The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 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 flash drive or CD 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.

Circuit Court Judge, Part IV, 19th Judicial District

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

1992, TN BPR #015352

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

Tennessee, BPR #015352, October 19, 1992, currently 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).

Taylor & Groover Attorneys, Knoxville, TN (November 1990-June 1993). I worked as a law clerk at Taylor & Groover during my second and third years of law school and was hired as an associate attorney following graduation from law school. I worked there while studying for the bar exam and following same. I was licensed in October, 1992 and worked until June, 1993 when I moved to Clarksville, TN.

Batson Nolan PLC f/k/a Daniel, Harvill, Batson & Nolan (July 1993-October 2015). In July, 1993, I moved to Clarksville, TN, and immediately began to practice law at what was then Daniel, Harvill, Batson & Nolan, in the capacity of associate attorney. I became a Partner/Member in the firm in January, 1997. The firm name changed several times and operated as Batson Nolan PLC. I withdrew from the firm when I was appointed to the bench in October, 2015, as I wound down my practice.

Austin Peay State University, Adjunct Professor (**1995-1998**). I was asked to develop curriculum for, and teach a course on Women in the Law, an upper level course in both political

science and women's studies. This was an evening course I taught after work.

Other: My first year of law school in 1989-1990, I worked at a clothing store (now defunct and the name of which I cannot recall) in what was then East Town Mall. I also worked the summer of 1986 for the City of Clarksville Parks and Recreation summer program as a gym attendant.

I was a runner for Broemel, Reeves & Baltimore from August or September, 1988 until I left for law school in August, 1989. I took this job to gain exposure to the law.

I worked at Belmont College in the Placement Office from 1985-1987 while attending college there. My duties were primarily secretarial/administrative. During that same time, I worked seasonally at Starwood Amphitheater as an usher, and also at My Friend's Place, a women's boutique in Green Hills. The summer of 1988, I worked in Hilton Head, SC with the opening of an affiliate of My Friend's Place, operating under the name Excursions.

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. I have been employed continuously since completion of my legal education.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I do not currently practice law. If this question is intended to include my current position as Circuit Court Judge, see my response to #10 below.

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 began the practice of law handling primarily civil litigation insurance defense work in East Tennessee with Taylor & Groover. I handled subrogation and collections cases in general sessions court. In Circuit Court, I handled insurance defense matters, primarily automobile

accidents, premises liability and workers' compensation. Most of my work as a new attorney was as co-counsel with one of the partners, or working on assignments for them. I also assisted with research projects and wrote appellate briefs.

After moving to Clarksville, TN in 1993, my practice shifted to include probate, estate planning and transactional work. I also handled court appointed juvenile cases in general sessions court, as well as collections, detainer warrants and general civil matters in general sessions court. Between 1993 and 2015 when I left Batson Nolan to take the bench, through long hours of work and community service, I had developed a very large client base in diverse practice areas. I had a significant probate practice including motion work, hearings before the Probate Master on claims and accountings and bench trials. I handled several large will contests and undue influence cases to trial and settlements, as well as contested conservatorships. I have written appellate briefs, but did not argue an appeal before the Tennessee Appellate Courts. I practiced in both Circuit and Chancery Courts in Montgomery and Robertson Counties, but primarily Chancery.

After Judge Ross Hicks was appointed to the trial bench in 2002, I sought out the representation of the Clarksville-Montgomery County School System and after public interviews, I was selected from an applicant pool of four or five other attorneys to serve as board attorney. I served in that role until I was appointed to the trial bench in October, 2015. My role as counsel involved a variety of work including representation of the board in tenure teacher dismissal hearings, matters with the Office of Civil Rights and other regulatory bodies. I attended school board work sessions and formal meetings to advise both the board and the school administration on all types of matters from implementation of state and federal legislation through policies, teacher and staff disciplinary matters, student disciplinary matters, negotiation of contracts and representation in contract disputes and real estate matters. I had assistance from other partners and associates in the firm to handle the volume of that work, but attended all board meetings and was primary legal counsel.

My practice also included bank work that involved uniform commercial code issues, contract negotiations and interpretation and development of policies and procedures, employment matters and analysis and application of state and federal laws and regulations. As both an associate and partner in the firm, I represented the local hospital which was then a quasi-governmental entity. That representation included health care regulatory issues, contracts, leases and employment law as well as board representation. I assisted other partners at the firm in those matters, but had direct contact with the client. That representation ended when a for-profit entity purchased the hospital's assets.

A significant part of my practice at Batson Nolan included complex estate planning, commercial real estate transactions and mergers and acquisitions. That work required long hours of document review and attention to details regarding due diligence and representations and warranties. I worked independently in those areas, occasionally having the assistance of an associate attorney and/or paralegal. I managed the real estate department overseeing attorneys and paralegals in both residential and commercial real estate transactions, and often served as title agent.

During my tenure at Batson Nolan, I also served as Managing Member at various times, while maintaining a full case load. At all times during private practice, my goal was to be responsive

and timely in communications and work product and to provide quality legal services.

As clearly set out above, I did not have criminal law experience when I took the bench in 2015. However, the greatest need of this district was the criminal law caseload and I committed to doing my part to hear those cases and manage the docket to catch up and keep up with the needs of the district. As I had done routinely in my practice, I knew I was capable of shifting focus and learning a new area of law. I have successfully done that for the last five years. It has also been advantageous that I had independence from having represented either side in the criminal process. I continue to have an open mind to all the legal issues, spend significant time preparing for court by researching the areas of law in question, and treating all with fairness and impartiality.

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

I handled a number of very complex transactional matters while I was in private practice; however, due to attorney client privilege am not at liberty to discuss same.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I currently serve as Circuit Court Judge, Part IV, 19th Judicial District which encompasses Montgomery and Robertson Counties. I was appointed to this position in October, 2015, and immediately faced a contested election in the primary which I won in March, 2016. I had no opposition in the general election. The 19th Judicial District currently has one Chancellor and five Circuit Court Judges. Part IV, the position I now hold, was created by the legislature in 2015 due to the volume of cases in the district. Among the circuit judges, two are designated to preside over all criminal matters in both counties in the district. When the new position was created, it had been originally designated to hear civil cases, primarily family law. However, between the time I applied and the date of the public hearings before the Trial Court Vacancy Commission, circumstances changed regarding the Part III Judge in the district and the position became designated as a criminal position. By the time I was sworn in, there was a significant backlog of criminal cases. The remaining two circuit judges had been handling that docket in addition to their normal case load until I was appointed. All of the prior Part III cases were transferred to Part IV and I started with a full docket and backlog of cases to manage.

As set forth in #8 above, my legal experience prior to taking the bench was all civil law. My goal was to become proficient in criminal law as quickly as possible while tackling the volume of work. The Part III Judge then retired and while that position was vacant, in addition to taking on the criminal docket, I continued to handle a portion of the Part III family law case load on

the two office administrative days I had available each month. When the Part III vacancy was filled by the election in September, 2016, most of those cases were transferred back to Part III.

All judges in the 19th Judicial District rotate to serve in both counties each month; accordingly, I have the privilege of serving a more urban area along with a more rural area. With the volume of the criminal docket, that rotation requires strong organization, management and preparation. My reputation of efficiency and hard work can be documented in the Trial Judge Case Statistics published by the Administrative Office of the Courts. In fiscal year 2015-2016, I disposed of 943 cases in the nine months I was on the bench. In 2016-2017, I disposed of 1,483 cases; in 2017-2018, I disposed of 1,783 cases; and in 2018-2019, I disposed of 1,802 cases. I also have a solid record on appeal.

Obviously COVD-19 has created challenges for everyone in the judicial branch. As presiding judge of the 19th Judicial District, I worked with my colleagues, mayors, sheriffs, clerks, general sessions and municipal judges, and courthouse security in two counties to develop the first plan for limited reopening approved by the Supreme Court. I have used existing technology to conduct video hearings from the jail, have spent additional time and effort to create and coordinate staggered dockets to limit the amount of people in the courtroom and courthouse, and with the assistance of the Montgomery County IT Department, have set up a system to live stream voir dire to additional jurors who could not be seated into the courtroom due to small courtrooms and distancing requirements. At the time of the filing of this application, I have presided over three jury trials, including a four-day first degree homicide trial. From March through the end of September, 2020, I have disposed of 332 cases.

As a trial judge, I have presided over numerous lengthy multi-defendant jury trials as well as many bench trials and post-conviction proceedings. The following cases have been noteworthy:

State v. Alphonso Richardson, Matthew Reynolds, Derek Vicchitto and Cynthia Skipper was one of the first cases over which I presided as trial judge. Defendants were charged with beating the victim to death as she hung by her arms from the ceiling of the living room of their shared home. Proof was entered that the victim served as the "house slave" and had a contractual relationship with her "owner" to consent to beatings. During the course of the trial, defendants continued to raise an issue of consent. In the jury instructions, I drafted an instruction to the jury that even though the alleged victim was the member of an organization whose members granted consent to punishment, the organization is not immune to the laws of the State of Tennessee. The Court of Criminal Appeals found no error in the instruction. The Tennessee Pattern Jury Instruction Criminal Committee added a footnote to the Effective Consent Jury Charge referencing this case for guidance.

State v. Michael Marchiello. My first day on the job as a trial judge, I was greeted with a large banker's box containing parts of this file. Mr. Marchiello had been tried and found guilty by a jury in March, 1997 of first degree premediated murder of his estranged wife, as well as other charges. There was a post-conviction proceeding that had been pending for years for various reasons including but not limited to changing attorneys, changing judges, and illnesses of involved parties. When I took over the file, there had been a partial evidentiary hearing in February, 2014 with no conclusion. My goal was to bring the post-conviction proceeding to a conclusion which required intensive review of the entire file as well as multiple hearings. I was able to bring the file to a conclusion with a written opinion July 15, 2019, prepared with the

assistance of Jason Steinle from the Capital Resource Offices.

Prior to my experience as a trial judge, I served as a **Hearing Officer for the Board of Professional Responsibility, 2002-2008**. In that capacity, I served as chair of several hearings, presiding over the pre-hearing matters and hearings, including several lengthy hearings. I managed the hearings, ruled on motions with collaboration from co-panelists and wrote the opinions which were submitted to co-panelists for input.

I also served as a hearing officer for the Dickson County, Tennessee School Board in the matter of **Dickson County School System v. David Shepherd, February 23, 2011**. I presided over the hearing, and rendered a written opinion. The substance of the case was dismissal of the teacher on the basis of incompetence. The process protected the due process rights of the teacher and the education of the public school students. I found that the school system did present evidence to support the termination of the teacher. My ruling was not appealed.

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

I serve on the Investment Advisory Committee of First Presbyterian Church. We oversee the investment of church memorial funds and trust funds.

I served as Trustee of the Daniel Mark Nolan Irrevocable Life Insurance trust for the benefit of my children. That trust was terminated August, 2020.

I served as Co-custodian on UTMA (Uniform Transfers to Minors) bank accounts and brokerage accounts for my children. They are now over age 21 and own the accounts themselves.

I served as Executor of the Estate of Katie Irene Burress. Mrs. Burress had requested me to serve in that capacity to have an independent Executor other than her children. The estate was closed and distributions made to the beneficiaries in September, 2015.

In May, 2001, I was appointed by Chancellor Laurence McMillan to serve as Administrator CTA of the Estate of Mahagony Outlaw. I was responsible for completing the estate of a minor child, including pursuing collection of assets from a prior fiduciary and her attorney, and disbursement of the net estate to the heir.

When I was in private practice, I served as Trustee and Substitute Trustee on numerous deeds of trust and foreclosure matters.

In the 1990s, I was periodically appointed as Guardian ad Litem in juvenile matters in Montgomery County General Sessions Court.

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

There were no attorneys in my family and I had no real mentors in the 1980s when I was considering law school. I took the initiative to work in a law firm so I could observe and learn from others. Since then, I have been fortunate to have had friends and mentors in the legal

profession and within the judiciary. I acknowledge how much those people have helped to guide me and open doors for me. I have tried to pay that forward to those coming along behind me. I have coached college mock trial teams and served as a mentor to Tennessee Promise Students and Austin Peay State University students, and I have gained as much as I have given. I am committed to continue to mentor others and to serve the judiciary by seeking opportunities to lead and serve when asked. In January, 2020, I was appointed by the Tennessee Supreme Court to serve on the Judicial Ethics Committee.

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 to the Trial Court Vacancy Committee June 9, 2015 for the 19th Judicial District Circuit Court, Part IV position, and was selected on July 14, 2015 as one of three applicants for consideration by Governor Haslam. I was appointed to the position on October 21, 2015.

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.

I attended **Belmont College** (now Belmont University) from August, 1985 through May, 1989, graduating with a Bachelor of Arts, cum laude with a major in English and a minor in Secondary Education. I was the recipient of a Departmental Scholarship; Dean's List; Blue Key National Honor Society, President; Sigma Tau Delta English Honor Society; Alpha Chi Honor Society.

I attended **University of Tennessee College of Law** from August, 1989 through May, 1992, graduating with a Doctor of Jurisprudence. I was the recipient of the George C. Taylor Memorial Scholarship; member of Phi Alpha Delta legal fraternity; Student Bar Association; Advisor for University of Tennessee (undergraduate) mock trial team.

I attended the **National Judicial College** General Jurisdiction Course, completion October 25, 2018.

PERSONAL INFORMATION

15. State your age and date of birth.

53 years of age; date of birth [redacted] 1967

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

I have lived continuously in the State of Tennessee since I started college in August, 1985.

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

I have lived continuously in Montgomery County, Tennessee since July 3, 1993.

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

Montgomery 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.

Not applicable

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

No

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

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I was a named defendant in the matter of *Joey Eldridge and Leople Eldridge v. Estate of Sadie Eldridge and Jill Ayers*, Montgomery County Circuit Court, Docket No. MC-CC-CV-CT-12-

3189. That case was dismissed as set out in #25.

July 24, 2015, Timothy York filed a complaint against me with the Board of Professional Responsibility, File No. 42348-6-KB. I filed a detailed response and the complaint was dismissed.

Sometime in the early 2000s, a complaint was filed against me with the Board of Professional Responsibility by Michelle Hester. I had taken over a guardianship matter for her son from an attorney who had left the practice of law. I filed a detailed response and the complaint was dismissed.

While serving as a trial judge, I have received notices from the Tennessee Board of Judicial Conduct that complaints filed by defendants in criminal court were dismissed by an investigative panel upon recommendation of Disciplinary Counsel. I was not requested to respond to those complaints; therefore, no details are included herein.

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.

Jill Bartee Nolan v. Daniel Mark Nolan, Stewart County, Tennessee Chancery Court, Docket #08-13-141, filed May 23, 2008, final decree entered August 22, 2008, a divorce action based upon irreconcilable differences.

Joey Eldridge, Executrix Leopal Eldridge v. Estate of Sadie Eldridge and Jill Ayers (f/k/a Nolan) et al, Montgomery County, Tennessee Chancery Court Docket # MC-CC-CV-CT-12-3189. Motion for Summary Judgment granted October 26, 2015. Beneficiaries of an estate alleged I breached a fiduciary duty to them when I represented a former Executrix of the estate. I had withdrawn as counsel in 2007.

Mardoche Olivier v. Judge Jill Bartee Ayers and Daniel A. Stephenson, Montgomery County, Tennessee Circuit Court, Docket # 2017-CV-2012, dismissed October 12, 2017. A defendant

who represented himself at a jury trial filed suit against myself and the prosecuting assistant district attorney.

Mardoche Olivier v. Judge Jill Bartee Ayers, United States District Court, Middle District Tennessee, Docket No. 3:16-3286, dismissed by Order entered January 17, 2017. A pro se litigant filed suit against me for the denial of a petition for writ of habeas corpus.

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.

First Presbyterian Church, Clarksville, Tennessee. I serve on various committees and served as Elder 2016-2019.

Sunrise Rotary Club, Clarksville, Tennessee, Paul Harris Fellow

Leadership Middle Tennessee, Executive Committee and Board of Directors, 2011-present. I served as Board Chair July 1, 2018 through June 30, 2020.

Montgomery County Republican Women

Clarksville Area Chamber of Commerce and Robertson County Chamber of Commerce

I served as Director of Legends Bank and Legends Financial Holdings, Inc., Vice-Chair of the Board of Legends Bank, Chair of Human Resources Committee, and Chair of Compliance Committee. I resigned from both boards upon my appointment to the bench in October, 2015.

Life Member of Junior Auxiliary

Member of the Network, an organization formed for women's networking opportunities in Clarksville, TN

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.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

The Network, referenced in #26 above, is a women's organization with the following mission: "To gather Clarksville's women of influence in order to foster empowering relationships among this group. By recognizing the accomplishments of these vital leaders, we hope to increase the community's awareness of both their leadership abilities and their unlimited potential to benefit

Clarksville." There are no specific membership restrictions based on gender: however, there are currently only women in this organization. Because membership is not restricted, I have continued my involvement in this group after being appointed Circuit Court Judge, and would plan to continue if appointed to the Appellate bench. However, if the group ever instituted membership restrictions, I would resign.

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 Trial Judges Association member October, 2015-present. I currently serve on the Executive Committee.

Tennessee Judicial Conference – served as Executive Committee, Secretary 2018-2019, and currently serve on the Executive Committee as Middle Grand Division Representative. I am also a member of the Tennessee Criminal Pattern Jury Instructions Committee and Compensation and Retirement Committee.

Montgomery County Bar Association since 1993. I served as treasurer sometime in the early 1990s.

Tennessee Bar Association since 1992.

Council of School Attorneys of the Tennessee School Board Association and National School Board Association 2002-2015.

Tennessee Board of Professional Responsibility Hearing Committee Member 2002-2008.

Tennessee Land Title Association 2014-2015.

At one time, I was a member of the Nashville Estate Planning Council; I do not remember the specific years.

I have been a member of the American Bar Association, but am not currently a member.

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.

Recipient of the Athena Award in Clarksville, TN 2009

Rated AV Preeminent by Martindale-Hubbell

American Mock Trial Association Recognition for Contribution of Case Problems, 1999

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

I have not published any legal articles or books. I have written numerous articles on estate planning, real estate issues, and women's legal issues for local newspapers, magazines and for the Batson Nolan PLC website. I do not have the details of these articles.

I co-authored three mock trial problems used by the American Mock Trial Association Collegiate level: Thompkins v. Erie Railroad, 1994-1995; Chris P. Daniel v. Chuggie's Sports Bar & Terry Minetos, 1996-1997; and Stacey Griswold v. United Guages of America, 1998-1999.

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 not taught law school or law related courses in the past five years. As noted above, I was an adjunct professor at Austin Peay State University 1995-1998.

I have presented numerous CLE programs more than five years ago primarily on estate planning and probate issues, all of which were for credit.

In the last five years, the judges of the 19th Judicial District have provided CLE for credit for attorneys in both counties in our jurisdiction on at least three occasions. The most recently scheduled event had to be postponed due to COVID-19.

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.

19th Judicial District Circuit Court Judge, Part IV, appointed October 25, 2015, elected August 4, 2016.

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.

The attached writing samples are 100% my personal work.

ESSAYS/PERSONAL STATEMENTS

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

Before applying for this position, I talked to former and current judges on both the Court of Criminal Appeals and the Court of Appeals to confirm that I understood the job and did want to seek the position. I am organized and enjoy reading, research and writing. Those skills have served me well in private practice and as a trial judge, and will carry over to the Appellate bench. When I took over the criminal court docket in the 19th Judicial District, I overcame my lack of criminal law experience and successfully transitioned to the bench using those skills along with long hours and preparation. I enjoy analyzing the law and applying the facts of each case to the law. I am committed to public service and want to use my experience and skills to contribute to the Court of Criminal Appeals and to serve the State of Tennessee.

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)***

In 2015, I served as Clarksville service area campaign chair for the Legal Aid Society, and am a sustaining donor to the campaign. While in private practice, I signed up with the local Legal Aid office to take pro bono referrals and provided those services on a regular basis. I also provided pro bono assistance to several military families in the community who had suffered losses, and represented organizations that served individuals with limited financial resources. I was honored to receive a "Beyond Measure Award" by the Salvation Army in May, 2008 for pro bono legal assistance.

While I have been a trial judge, I have assisted in coordinating and provided services to three Expungement Clinics in Montgomery County in conjunction with the NAACP, Faith and Justice Alliance and other community partners.

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

I seek the appointment to the Court of Criminal Appeals, Middle Grand Division. There are twelve judges on the court, four from each grand division of the state. The Court of Criminal Appeals hears trial court appeals in felony and misdemeanor cases as well as post-conviction petitions. The members meet monthly in panels of three in Jackson, Knoxville and Nashville and other locations as necessary. I would bring to the court a diverse legal background and knowledge along with experience of a trial judge presiding over criminal cases. I am prepared to immediately contribute to the Court if selected. My strong work ethic, professionalism and leadership skills would also benefit the Court. Additionally, I would continue to serve my community as allowed under the Code of Judicial Conduct and seek speaking and educational opportunities to raise awareness and promote public confidence in the independence, integrity and impartiality of the judiciary.

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)***

As seen by my involvement in the organizations set out in #26 above, I enjoy serving my community and my state. In addition to those organizations described above, I have served as a Tennessee Promise Mentor, Mentor for APSU Emerging Leaders program, and enjoy public speaking on leadership. If appointed to this position, I would continue to serve my church and my community as allowed under the Code of Judicial Conduct and as time allows.

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

I learned early in life that I may not always be the smartest person in the room or the best athlete on the court, but that I could improve any deficiencies with effort and perseverance. While my parents provided me with the foundation and opportunities to reach my potential, I have always had a drive to push myself to my highest and best use. Life experiences such as showing cattle; stripping tobacco after a long day of school, after-school practices and homework; playing sports; and being strongly encouraged to play the piano at church on Wednesday nights, taught me that growth is often uncomfortable and talents are not to be squandered.

As an attorney and member of a law firm, I sought opportunities to grow my practice by learning new areas of law and serving clients after traditional work hours. When appointed to the trial bench, I successfully managed four major tasks: addressing a backlog of cases, learning and preparing for an area of law in which I lacked experience, running and winning a contested election, and winding down a law practice. I will bring that attitude and effort to the Court of Criminal Appeals if appointed to serve. I have earned the reputation of being knowledgeable, efficient, timely, fair and ethical as well as leading and working cooperatively with others. I have the skills required to analyze and decide cases applying the law as written, and to serve as a good colleague on the Court of Criminal Appeals.

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)***

As a trial judge, I have taken an oath to uphold the law. I have met that obligation as a trial judge and will continue to uphold that obligation if appointed to the Court of Criminal Appeals. I am committed to analyzing and deciding cases based upon the law as written and legal precedent. As a trial judge, there have been times that I did not like the outcome of a motion to suppress or a sentence imposed; however, my personal opinion is irrelevant and I have followed the law. As we instruct jurors, we are to have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence on our decisions.

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. **Billy P. Atkins**, Retired CEO Legends Bank, Clarksville, TN 37043;
B. **Carol M. Joiner**, General Counsel, Clarksville Montgomery County School System, Clarksville, TN 37040; (office); (mobile);
C. **Representative William Lamberth,** P.O. Box 812, Portland, TN 37148; Cordell Hull Bldg., Nashville, TN 37243; (office);
D. **Jack B. Turner,** Principal of Jack B. Turner & Associates, Clarksville, TN 37040;
E. **Brigadier General Kurtis J. Winstead,** Nashville, TN 37212;

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 of Criminal Appeals, Middle District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended 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: October 5, 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.

Jill Bartee Ayers

Type or Print Name

Signature

10-5-2020

Date

015352

BPR #

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

TN Dept of Commerce and Insurance, Title

Insurance Producer License No. 889518, inactive

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
IN THE STATE OF TENNESSEE
AT CLARKSVILLE

STATE OF TENNESSEE	)	
	)	
VS.	)	DOCKET #2018-CR-117
	)	
CHRISTOPHER P. CONWAY	)	
	)	

11/13 14:01

ORDER

This cause came to be heard on the 21st day of October, 2019, upon the Motion of Defendant Christopher P. Conway to suppress the statements made by the defendant to law enforcement on or about November 14, 2017. Based upon the statements of counsel, testimony of Sgt. Timothy Finley and of TBI Special Agent Melanie Garner, review of the videotaped interviews and the transcripts of same, all of which were admitted into evidence, the Court finds as follows:

FINDINGS OF FACT

1. On November 14, 2017, Emily Conway called 911 to report that Adeline Conway, one of her almost nine (9) month twin daughters was not breathing. Adeline was transported to Tennova Hospital where she was pronounced dead. Sgt. Timothy Finley, who was at that time a homicide detective, was assigned the call. He went to Tennova Hospital emergency room and spoke with Emily Conway and Christopher Conway, parents of Adeline.

2. Sgt. Finley asked Christopher Conway, an army medic in his early twenties (20s) to come to the Clarksville Police Department Special Operations Unit (SOU) on Vista Lane to help figure out what happened. Defendant agreed and voluntarily went to the SOU office, having received a ride from a friend to the location.

3. Defendant voluntarily went into an interview room with Sgt. Finley. He expressed no reservation about entering the interview room. He was not handcuffed or restrained in any way and the door was not locked. Defendant was not under arrest and was free to leave. He was asked not to walk out of the room on his own due to other law enforcement matters going on in the nearby rooms and secure area, but to knock on the door if he wanted to leave the room for any reason and someone would come assist him. All conversations with the defendant were videotaped.

4. DVD 4 was entered as Exhibit 1 and captured the initial interview. This portion of defendant's interview will be hereinafter referred to as the "Finley Interview." Sgt. Finley reviewed the Sudden Unexplained Infant Death Investigation (SUIDI) form with the defendant. Defendant was forthcoming with all the requested information.

5. Approximately one (1) hour into the interview, Sgt. Finley asked defendant for permission for law enforcement to go into the home he shared with Emily Conway to take photographs and collect evidence. Defendant consented and was advised he could withdraw consent at any time. Emily Conway had also consented to the search.

6. After completion of the SUIDI form, Sgt. Finley left the room for a while. When he returned, he reviewed with the defendant the *Miranda* warning, reading it to the defendant. He told the defendant that if he wanted to continue talking to him, defendant

should sign the *Miranda* warning. Defendant initialed the warning at the beginning and the end and signed the warning November 14, 2017 at 11:49 (the form does not indicate a.m. or p.m., but the record supports that this was 11:49 a.m.). Sgt. Finley also signed the warning after the defendant signed. The warning was entered as Exhibit 4.

7. Defendant was never specifically told he could leave the Special Operations Unit. He was told what to do if he wanted to leave the room. He was offered restroom breaks and food and water. He never asked to leave other than one time to go to the restroom. He never asked for an attorney or requested the interview stop. During the Finley interview, defendant was questioned separately by Sgt. Finley, Detective Chris Nolder, and Detective Michael Ulrey. Defendant did ask several times how much longer the interview would take and whether he could be with his wife. He was told his wife was being interviewed so he could not be with her at that time.

8. Defendant was also asked for permission to check the contents of his phone and he consented without any question and provided the passcode for the phone.

9. There were periods of time when defendant was left alone in the room. Toward the end of the Finley interview, defendant indicated that he would be willing to take a polygraph exam that day. The Finley initial interview lasted approximately four and one half (4.5) hours. Defendant was left alone in the room for approximately one (1) hour as shown on the video from 4:22:16 until 5:24:21 hours.

10. At 5:24:21 on the recording, Sgt. Finley asked the defendant for consent to swab his cheeks for D.N.A. purposes and defendant agreed. He was advised the detective were

trying to get the polygraph set up that day. The recording of the Finley interview ended at 5:53:16.

11. Following the Finley interview, defendant continued to stay in the interview room. DVD 5, admitted as Exhibit 2, was reviewed and transcribed. During the period of time captured on this video, Detective Nolder offered to get defendant food and drink and brought same back to the defendant. Most of this period of time, defendant was alone and can be seen in the video sleeping and fidgeting in his chair. There were only two (2) chairs and a table in the room. The recording lasted 5:24:39 and ended with defendant leaving the room with law enforcement personnel. Defendant never asked to leave.

12. DVD 7, entered as Exhibit 7 begins with Tennessee Bureau of Investigation Special Agent Melanie Garner introducing herself to the defendant. This interview will be referred to hereinafter as the "Garner interview." Defendant had voluntarily walked with law enforcement personnel to a different room for the polygraph examination. Agent Garner described the defendant as pleasant, not appearing tired or upset at first or under any influence or duress when she met with him.

13. Agent Garner reviewed with the defendant the Consent to Polygraph Examination form by reading it and explaining it to him. She told the defendant he could stop the examination at any time. Defendant signed the consent form indicating he had read and understood the consent. The form was dated November 14, 2017 at 8:18 p.m. It was entered as Exhibit 6 to the hearing.

14. Agent Garner next reviewed with the defendant the Tennessee Bureau of Investigation Warnings as to Constitutional Rights. She read the warnings to him as well

as the waiver. Defendant signed the waiver agreeing to make a statement and answer questions without a lawyer being present. The form was dated November 14, 2017 at 8:19 p.m. It was entered as Exhibit 5 to the hearing.

15. Before administering the polygraph examination, Agent Garner asked defendant about any prior treatment for psychological issues; he denied any such treatment. She asked him about current medications and he stated he took a muscle relaxer for his back only at night, and not every day, and not the night before Adeline's death. He stated his overall health was good and he had about seven (7) hours of sleep the prior night. He denied any physical or mental condition that would make it difficult for him to take a polygraph. He appeared calm and coherent.

16. During the polygraph examination with Agent Garner, defendant never asked for an attorney, never asked for the interview to stop, and never asked to leave the interview room.

17. Agent Garner explained the process of the polygraph exam in detail to the defendant and then began the exam just over one (1) hour after the Garner interview began (1:03:34).

18. Upon completion of the polygraph exam, approximately thirty (30) minutes after it had started, Agent Garner advised defendant that he had not passed the polygraph examination. She continued to interview and question defendant for approximately 2.5 hours. During the interview, Agent Garner advised the defendant his wife Emily had passed her polygraph examination. She also questioned him many times about how his

pubic hair had gotten into to Adeline's diaper and vagina. During her testimony at the hearing, Agent Garner admitted she now knew the hair was dog hair and not pubic hair.

19. During Agent Garner's interview with defendant, she made three (3) references to his failure of the polygraph examination. She testified at the hearing that defendant appeared to be wrestling with something and wanted to talk more about it. Defendant continued to use phrases such as he "did not remember getting out of bed," "did not remember doing anything," "obviously it happened. I don't remember it.", "it had to be me. I can't remember", and "I would not have done it." He also talked about feeling like he was floating above the room. Toward the end of the interview with Agent Garner, he admitted that he could see his daughter lying there with the cord around her neck crossed in front with her pajamas on, but that he did not remember doing it. Defendant ultimately admitted that he wrapped the humidifier cord around his daughter's neck and killed her. He continued to state that he did not remember it the morning he got up and did not go into his daughters' room that morning.

20. Approximately four (4) hours into the Garner interview, Agent Garner stepped out briefly and Special Agent Joey Boyd, also with the Tennessee Bureau of Investigation came back into the room with her. Defendant admitted to Agent Boyd he was sorry for killing Adeline and ruining his family's lives. Agent Boyd continued to question defendant about whether he had sexually assaulted Adeline. Defendant continued to provide similar responses that he did not remember doing anything.

21. At one point, defendant stated he was just "trying to make stuff up." Both Agents told him they did not want him to make anything up, but to tell the truth. Ultimately,

defendant told the Agents he saw himself walking into his daughters' room with an erection and demonstrated to them how he held her up and rubbed the tip of his penis into her vagina and then turned her around and put it in her butt and then got her dressed again. After that, he remembered twisting the cord around her neck.

22. The Garner interview ended after five hours, eight minutes and fifty-one seconds (5:08:51). Defendant was then placed under arrest, handcuffed, and removed from the room.

23. Defendant remained at the Special Operations Unit approximately over sixteen (16) hours from the time of his arrival until his arrest following his confession.

LAW

The basis of the defendant's Motion to Suppress is that defendant's statements were made in violation of his rights against self-incrimination as guaranteed by Tennessee and United States Constitutions. Specifically, defendant argues that he was in custody, was not provided proper *Miranda* warning and that he did not knowingly and intelligently waive his *Miranda* rights before responding to questions posed by law enforcement. Defense further argues that the delay of over seventeen (17) hours in bringing defendant before a judicial authority for a probable cause determination affects the voluntariness of the confession in violation the Fourth Amendment.

CUSTODIAL ISSUES

Under the Fifth Amendment of the Constitution of the United States, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Such principle is echoed in Article 1 §9 of the Constitution of the State of

Tennessee, granting an accused "shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. The Fifth Amendment privilege that protects against self-incrimination applies to individuals "in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona,* 384 U.S. 436, 467 (1966). Examining what these settings may look like, the *Miranda* Court described such as "unfamiliar" and "police dominated atmosphere" that entails some degree of psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 456-57; 467.

The *Miranda* Court concluded that "adequate protective devices" need to be in place to "dispel the compulsion inherent in custodial surroundings." *Id.* at 458. Without protective measures, the concern was that any statement given by an individual in a police-dominated setting could not be the "product of his free choice." *Id.* To thwart against the "inherent compulsion" in a custodial interrogation, the *Miranda* Court held that an individual "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed to him prior to any questioning if he so desires." *Id.* at 479. Finally, an individual must be provided an "[o]pportunity to exercise these rights . . . throughout the interrogation." *Id.*

It follows that once *Miranda* warnings are given and the individual has had an opportunity to invoke these rights, an individual may "voluntarily, knowingly, and

intelligently" waive these rights. *Id.* An individual may initially waive his *Miranda* rights but subsequently choose to invoke his right to remain silent or clearly state he would like an attorney, in which case the interrogation must be terminated. *Id.* at 473-74.

The relevant inquiry, to determine whether a person is in custody and entitled to the warnings required by *Miranda* as set out in *State v. Anderson*, 937 S.W.2d 851 (Tenn. 1996), is "whether under the totality of the circumstances a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *Id.* At 855. The *Anderson* court set out a list of factors to consider in making this analysis:

> …the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

In the instant case, defendant voluntarily went to the Special Operations Unit of the Clarksville Police Department. He was not taken there by law enforcement; a friend brought him. He agreed to stay for the polygraph examination. He was advised during the Finley interview and during the Garner interview of his right to stop the interview at any time. There were no restraints placed on him at any time. He was not guarded by police officers. There was no display of weapons by any officers and no use of language

indicating his compliance might be compelled. He was made aware over the course of the interviews, especially the Garner interview, with law enforcement's suspicions of guilt as they obtained more evidence and as defendant continued to provide information. While the duration of the total time he spent as SOU was lengthy, he voluntarily remained there and continued to participate in the interviews.

Defendant initially met with Sgt. Finley and cooperated to fill out the SUIDI form. Following completion of the form, Sgt. Finley reviewed *Miranda* warnings with defendant, and defendant signed the document acknowledging the warnings in response to Sgt. Finley's statement that he should sign the warnings if he wanted to talk to him further. Defendant continued to talk to Sgt. Finley for the duration of the Finley interview. During the Finley interview, defendant consented to a search of his home, consented to a search of his phone and provided the passcode, and agreed to provide swabs for D.N.A. testing. At no time did defendant ask to stop the interview, ask to leave the interview room, or ask for an attorney. Defendant further voluntarily agreed to take a polygraph examination.

Under the totality of the circumstances, the *Anderson* factors weigh against the conclusion that defendant was in custody during the Finley interview. However, even if it were to be determined that defendant was in custody during the Finley interview, he was given *Miranda* warnings and agreed to speak with Sgt. Finley after being advised of same.

While defendant waited several hours for the polygraph exam to be set up, he was provided food and drink and slept much of the time he waited in the interview room.

There is no evidence of any intent by the defendant to leave the interview room. He asked to leave to use the restroom and asked about when he could see his wife, but never demonstrated over the entire course of events that he wanted to leave the interview room or the Special Operations Unit. He was aware that his wife was also there.

When the polygraph examination was set up by Agent Melanie Garner, defendant was again provided *Miranda* warnings and signed a written waiver. Agent Garner also reviewed with him the Consent to Polygraph Examination document and he signed same. The polygraph examination was completed approximately 1.5 hours after the Garner interview began. The interview continued 3.5 hours thereafter until it concluded with the defendant's confession and arrest.

Based on totality of the circumstances, the Court finds that the defendant was not in custody during the polygraph examination and post-polygraph interview by Agents Garner and Boyd. Defendant voluntarily consented to the polygraph examination, signed a written consent to undergo the examination, and reviewed and signed a second *Miranda* warning before talking with Agent Garner. He was advised he did not pass the polygraph examination and the apparatus was taken off of him by Agent Garner at 1:31:52 on the video. Defendant continued to voluntarily talk with Agent Garner and approximately twenty (20) minutes later, he stated, "Obviously it happened. I don't remember it." (video 1:52:00; transcript p.98). Agent Garner did not repeatedly use the failure of the polygraph examination to push defendant toward a confession. The videotape and transcript are clear that defendant continued to talk and provide additional information within close proximity to the defendant's consent to the polygraph and waiver of *Miranda* rights.

KNOWING AND VOLUNTARY WAIVER

Absent an individual's invocation of *Miranda* rights, a statement given "during a custodial interrogation" is considered inadmissible unless it is established that the individual "knowingly and voluntarily waived [his] rights' when making the statement." *Berghuis v. Thompkins,* 560 U.S. 370 at 383 (2010) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). A valid *Miranda* waiver has is a two-prong inquiry: first, a waiver must be "voluntary in the sense that it was the product of a free deliberate choice rather than intimidation, coercion, or deception," and second, a waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *State v. Climer*, 400 S.W.3d 537 (Tenn. 2013). In the case at hand, on two (2) separate occasions, once during the Finley interview, and once during the Garner interview, defendant was read his *Miranda* rights. In the Finley interview, he was told if he understood his rights and wanted to continue to talk to Sgt. Finley to sign his name on the *Miranda* form. He verbally waived his rights. In the Garner interview, he was again read these rights and told to sign the waiver if he wanted to proceed. Defendant expressly waived his *Miranda* rights.

The Court must next look to the voluntariness of the defendant's statements. The essential inquiry as to the voluntariness of the statement looks to whether an "[individual's] will was overborne so as to render the confession a product of coercion." *Dickerson v. United States*, 530 U.S. 428, 433-35 (2000); *see also State v. Smith,* 933 S.W.2d 450, 455 (Tenn. 1996). The Tennessee Supreme Court has adopted a non-

exhaustive list of circumstances relevant to determining the voluntariness of a defendant's statement, which includes:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured[,] intoxicated[,] or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep or medical attention; whether the accused was physically abused and whether the suspect was threatened with abuse.

State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996) (quoting *People v. Copriano,* 429 N.W.2d 781, 790 (Mich. 1988). *See also State v. Carter,* 16 S.W.3d 762, 769 (Tenn. 2000). Other factors to consider include the individual's "reading and writing skills, his demeanor and responsiveness to questions; . . . and the manner, detail, and language in which the *Miranda* rights were explained." *State v. Echols,* 382 S.W.3d 266, 280-81 (Tenn. 2012). "Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran*, 475 U.S. at 421.

In applying the above factors to the defendant's statement in this case, there is no evidence that defendant's will was overborne as to render the confession a product of coercion. Defendant was twenty-two (22) years old, married with children, and serving in the United States Army. He had a high school diploma, an associate's degree and was taking additional classes at the time of Adeline's death. Before the polygraph examination, he was questioned extensively by Agent Garner about his physical and

mental health, any medications, and how much sleep he had. Defendant indicated he had no issues that would interfere with his ability to take the exam.

While there was a long waiting period between his initial interview with Sgt. Finley and the interview with Agent Garner, defendant had been provided food and water and had slept. The length of the post-polygraph interview did extend several hours. However, during that time, defendant continued to provide additional facts and information and admissions. There were no threats of violence or promises made to the defendant. While he had no prior experience with law enforcement or the criminal justice system prior to this event, based on the application of the factors to the totality of the circumstances, the Court finds the waiver to have been made voluntarily. This Court finds the defendant was capable of, and voluntarily waived, his *Miranda* rights.

DELAY

Defendant also argues that the length of time defendant stayed at the SOU amounted to an unnecessary delay in bringing defendant before a judicial authority for a probable cause determination in violation of the Fourth Amendment. Applying a Fourth Amendment analysis as set forth in *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996), if a detention is illegal, the court should consider four (4) factors to determine if the confession was the fruit of the poisonous tree: (1) the presence or absence of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct. As set forth above, the Court finds the defendant voluntarily remained at SOU and was not arrested until after his confession. There was no illegal detention of the defendant.

However, even if it were determined that an illegal detention took place, in applying the above factors to the case at hand, defendant was given Miranda warnings at two (2) separate times, once at the commencement of the Finley interview, and again at the commencement of the Garner interview. Defendant voluntarily went to SOU and voluntarily stayed to take the polygraph examination. He began "remembering" or at least admitting he must have done something to Adeline very soon after the completion of the polygraph examination, and after the *Miranda* warnings were given by Agent Garner and waived by defendant. There were no intervening factors and the record does not show any official misconduct. As Agent Garner testified, defendant seemed like he wanted to tell her more, and in fact, he did continue to provide more information as the interview progressed, and officers obtained more information from the investigation as the interview progressed. The Court finds no Fourth Amendment violation occurred.

DEFENDANT'S SUPPLEMENTAL PLEADING

On November 6, 2019, Defendant filed a Supplemental Pleading to his Motion to Suppress to address the recently released Tennessee Supreme Court ruling in *State v. McCaleb*, 582 S.W.3d 179 (Tenn. 2019). Defendant argues in the Supplemental Pleading that the *McCaleb* decision is relevant to the matter at hand regarding the intertwining of defendant's polygraph examination and his post-polygraph admissions, and that his confession should be suppressed under *McCaleb*.

The Court finds the *McCaleb* case distinguishable from the case at hand. In McCaleb's post-polygraph interview, law enforcement "repeatedly asserted" that the polygraph indicated defendant's denials were false. To the contrary, in the Conway

interview, after Agent Garner advised the defendant he did not pass the polygraph, she referenced the polygraph examination briefly two (2) times and one of those was to mention that Emily Conway did pass her polygraph (Transcript p. 103) and in that context, since Emily passed, emotional distress would not cause one to fail a polygraph examination (Transcript p. 142). Defendant brought up the polygraph examination and his willingness to take it because he thought he would pass (Transcript pp. 125-126). Instead of referencing the polygraph examination, Agent Garner used words such as "I don't believe you," instead of "the polygraph proves your lying" as used in *McCaleb*. In his post-polygraph interview, defendant continued to add pieces of information to his story despite his assertions that he did not remember doing anything to Adeline that night.

McCaleb did not overturn the long-standing rule that polygraph test results are not admissible, but voluntary statements made in conjunction with a polygraph exam might be admissible. *State v. Damron*, 151 S.W.3d 510, at 517 (Tenn. 2004). In *McCaleb*, the Tennessee Supreme Court recognized two (2) caveats to *Damron*. First, a defendant has a constitutional right to inform the jury about circumstances surrounding his admissions. A jury may hear evidence of the circumstances under which a confession was procured. The second *Damron* caveat focuses on the admissibility of a criminal defendant's post-polygraph statements if they are voluntary in the constitutional sense and also consistent with other applicable constitutional and evidentiary rules.

In this matter, defendant has executed a written waiver of his right to a trial by a jury and requested a bench trial. Thus, the evidentiary issues raised in *McCaleb* are not

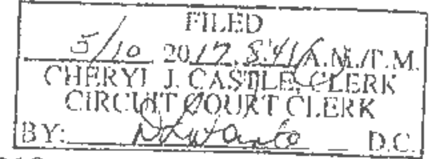
applicable in the context of the information a jury may or may not hear at trial. Defendant argues in his Supplemental Pleading that he should not incur evidentiary penalties for his decision to waive his right to a jury trial. Even if this matter were to be tried by a jury, under *McCaleb*, defendant would be able to present to the trier of fact the circumstances surrounding his confession. The video and transcript of the Garner interview could be easily be redacted if necessary in this case due to the lack of references to the polygraph examination. Further, the Court could provide a limiting instruction to the jury regarding the polygraph examination if defendant desired to bring it up as circumstances surrounding his confession. This Court has found that defendant's statements were voluntary and not coerced. Defense has not raised any additional information to support a theory that his admissions are not consistent with other constitutional and evidentiary rules.

It is therefore ORDERED that the Motion to Suppress the statements made by the defendant to law enforcement on or about November 14, 2019 is DENIED.

Entered this 8th day of November, 2019.

JILL BARTEE AYERS
CIRCUIT COURT JUDGE

IN THE
CIRCUIT COURT
19TH JUDICIAL DISTRICT
MONTGOMERY COUNTY, TENNESSEE
CRIMINAL DIVISION IV



STATE OF TENNESSEE)
)
VS.) DOCKET #41201018
)
RICHARD KELLEY)

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

This matter came before the Court on May 1, 2017, for a hearing on the Petitioner's petition for post-conviction relief. Having reviewed the record and the post-conviction petition, and having conducted an evidentiary hearing, the Court finds that the petitioner has failed to establish that he received ineffective representation. Accordingly, the Court denies the petition.

I. PROCEDURAL HISTORY

Following a November, 2013 jury trial, the petitioner was convicted of three (3) counts of aggravated sexual battery, four (4) counts of rape of a child, and one count of assault. The trial court sentenced the petitioner to serve an effective sentence of thirty (30) years to serve in the Tennessee Department of Corrections.

A Motion for New Trial was filed on March 19, 2014 and subsequently denied. The Court of Criminal Appeals affirmed the petitioner's convictions and sentences on direct appeal. *State v. Richard Thomas Kelley*, No. M2014–00740–CCA–R3–CD (Tenn.

Crim. App. April 16, 2015) ("Kelley appellate opinion"). The Tennessee Supreme Court denied the petitioner's application for permission to appeal June 11, 2015.

On December 16, 2015, Mr. Kelley filed a timely pro se petition for post-conviction relief; thus jurisdiction is properly before this Court. The Court appointed Nathan Hunt as counsel for petitioner. On August 22, 2015, petitioner filed a motion for a new attorney. The Court granted that motion on September 6, 2016, and appointed Allan Thompson as counsel (who did not file an additional amended petition), and an evidentiary hearing was held May 1, 2017.

II. ISSUES PRESENTED FOR REVIEW

The petitioner raises numerous grounds for relief in his petition. At the evidentiary hearing, the petitioner presented evidence supporting his claim that his trial counsel, Greg Smith rendered ineffective assistance of counsel. Specifically, the petitioner argued:

a. That his attorney failed to interview witnesses that were relevant to the defense.
b. That his attorney failed to ensure that he was heard by a fair and impartial jury.
c. That his attorney failed to inform him of the grounds he intended to include in his Motion for New Trial and subsequently precluded from him the possibility of arguing actual innocence.
d. That his attorney failed to obtain discoverable evidence and present it to the petitioner so that subsequently he was not fully informed of the State's case against him.

e. That his attorney failed to obtain an order from the Court mandating that the petitioner undergo a psychiatric evaluation to determine his state of mind during the commission of the offenses and his overall mental health.

III. EVIDENCE PRESENTED AT TRIAL

The Tennessee Court of Criminal Appeals summarized the evidence presented at the petitioner's trial:

> The defendant was charged with eight counts of rape of a child and five counts of aggravated sexual battery for acts committed against his granddaughter, who was twelve years old at the time of the offenses. Prior to trial, the State dismissed the first count of the indictment charging aggravated sexual battery, and the trial court renumbered the remaining counts for the consideration of the jury. At trial, the State presented the testimony of the victim and the victim's mother during its case-in-chief.
>
> The victim's mother testified she and her family moved back into her childhood home around 2009 because her mother had cancer, and her father, the defendant, needed help providing the necessary around-the-clock care. The victim's mother testified that both she and the victim's grandparents contributed financially to the household, splitting the rent and utilities. The house had three bedrooms: one was occupied by the defendant and the victim's grandmother, one was occupied by the victim's mother and stepfather, and one was occupied by the victim and her younger sister.
>
> The victim's mother testified that the victim was born on October 25, 1999, and she was around nine years old when they moved into the house. The victim had a good relationship with her grandmother who helped take care of the children after her convalescence. The victim had a limited relationship with the defendant because she had not spent much time with him.
>
> When the victim's family moved in with her grandparents, the defendant worked at a heating and cooling company, but eventually he started his own tire business, which he first operated out of his home and later out of a shop in a building he rented. The defendant had three employees in the shop. The victim's mother testified that the shop was a one-car bay and that there was a room to the side which was used as storage and where a radio was kept. The shop was in the back of the building and would not have been visible from the road. There was also limited visibility looking into the shop because it was dark and used as storage. The inside of the shop was "like a maze" to navigate through, and employees would sometimes go behind the counter to sleep. The victim's mother acknowledged that the bay door was generally open, and she believed there was no air conditioning.

In 2012, the victim would occasionally go to the defendant's shop with her grandmother. In May or June, the victim's mother noticed that the victim was speaking with the defendant more and spending more time with him. The victim also went on "road calls" with him after the defendant told the victim that her mother used to go on "road calls" when she was young.

On June 8, 2012, the family went on a camping trip to celebrate the birthday of the victim's grandmother. The victim was sharing a tent with her sister and initially did not want to come out of the tent. After her mother spoke to her, she came and sat immediately beside the defendant. The victim's mother was looking at her phone but glanced up to see the defendant put his arm around the victim's shoulder. A few minutes later, she observed him rubbing his arm "all up and down her leg." The victim's mother asked the victim to go back into the tent. She later spoke to the victim about what she had observed and contacted the police as a result of the conversation. The victim last had contact with the defendant on June 10, 2012. The victim's mother testified that the victim's behavior had changed since the abuse and that she was getting into trouble at school and seemed angry.

The victim's mother acknowledged that she had experienced problems with boyfriends in the past. She recalled taking out an order of protection against the victim's father, William Wright, in 2002 because she alleged that the victim's father had choked her while the victim was present. She testified that she had requested to have the order of protection dismissed. The victim's mother also acknowledged lodging a complaint with the Department of Children's Services ("DCS") in 2007 that the victim's father was watching pornography with the victim and giving her alcohol. She denied that this complaint was dismissed and testified custody was taken from the father. She did not recall telling DCS that the victim's father had attacked her with a knife while she was holding the victim and denied that the judge determined she was not a credible witness.

The victim's mother agreed that there was an incident at the victim's daycare in which the victim and a little boy had placed their hands down each other's pants. She testified that she later learned the little boy was being abused and that she removed the victim from the daycare. She was not aware if the boy was forced to leave. The victim's mother acknowledged that the victim's grandmother once complained to DCS about the victim's mother, but she testified that the complaint was made because the victim's grandmother was "mentally not stable." She did not recall posting a picture of herself and the defendant with the words, "beautiful people" in March 2013 on social media, although she acknowledged having posted some family photos and stated that she did not deny posting the photo. The victim's mother acknowledged that her husband did not get along with her parents.

The victim testified that she was fourteen years old at the time of trial. She confirmed her mother's testimony that her family lived with her maternal grandparents and that the defendant owned a tire shop. The victim drew a diagram of the tire shop, which showed a single bay for vehicles and a separate storage area. The victim testified that the first incident of abuse that she could remember with the defendant was in 2012, when she was twelve years old and school was almost out. She and the defendant were

cleaning the pool when he began to stare at her breasts and tell her that boys would want to touch her now that she was getting older. The defendant then said, "[I]f I show you mine will you show me yours[?]" They went into the house, he asked her to come to his room, and he tried to pull her close and kiss her.

The victim then testified to several incidents that took place at the tire shop. She testified that her grandfather forced her to perform fellatio behind a van in the shop. One of his employees was at the shop that day but did not see what happened. A second time, they were both sitting on a couch at the shop, and the defendant touched her breasts and kissed her. The prosecutor asked whether the touching occurred on her skin or over her clothing, and the victim responded, "He went under my shirt. So my skin." The prosecutor then asked her if she was wearing a bra and if the defendant touched under her bra, and the victim stated, "On top of my bra."

In a third incident, the defendant took her to the storage area, pulled down her shorts and underwear, and put his finger inside her "part." The victim also testified that there was a bench outside the shop and that one time, as she sat on this bench, the defendant came up and began to rub her groin over the clothing.

The victim testified that she went on two road calls with the defendant. During one of the road calls, the defendant was fixing the tire of a tractor, which was located in the middle of a field. He touched her breasts while he was seated on the tractor. Then he forced her to perform fellatio while he sat on a tractor tire with his hands beside him. The victim testified that he also forced her to perform fellatio once in a corner of their home garage where tools were kept next to some outlets.

The victim also testified regarding several incidents that occurred in her home. She testified that the defendant once told her sister to go outside and that he kissed her in the home on the couch after her sister left. She also testified that she once went into the kitchen when the defendant was there and that he pulled her over and touched her breast over her bra. On a separate occasion, "Benny" was watching football, and the victim went to watch American Idol with the defendant in his room. The defendant was rubbing her leg "and then kind of slowly went up to my private area and ... was rubbing around there." Her sister entered the room, and he stopped. The victim testified that she did not have a relationship with the defendant prior to the abuse. After the defendant began to abuse her, he bought her and her sister bicycles, and he bought her headphones. When her mother asked her if anyone was touching her, she said no at first because the defendant had told her that both she and he would go to jail and she believed him.

On cross-examination, the victim testified that she recalled the incident with the boy at her daycare and that she recalled the incident with her father showing her pornography. She did not recall going to counseling in relation to anything other than the defendant's crimes. She agreed that her school records showed disciplinary action for hitting a student and for making an obscene gesture on the bus in 2010. She also acknowledged several disciplinary actions which occurred after the defendant began to abuse her and about which the defense questioned her thoroughly.

The defense attempted to impeach the victim with her testimony at the preliminary hearing in July 2012. The victim acknowledged that at the preliminary hearing, she had

described the digital penetration as occurring in a "hallway." At trial, she explained that when she said "hallway," she was referring to a cleared pathway through the cluttered storage room, which while "not really a hallway, ... was kinda like made as a hallway." She clarified that the room was crowded with things like tires and sheetrock and concluded, "It's a storage room and then there's like a little path but, no, there's no actual hallway." She acknowledged that the transcript of the preliminary hearing reflected that she did not identify other places in the shop where abuse had occurred. She also acknowledged having said that the pool incident occurred after school let out and not before. She testified that she was at the shop only three or four times. She agreed that at the preliminary hearing, she had testified that the defendant's hands were on her head while he was sitting on the tire but at trial she had said they were at his side. On redirect examination, she explained that she did not recall exactly where the defendant's hands were on that day but she recalled the rape itself. She elaborated that the space she was referring to as a "hallway" at the hearing was actually a narrow path in a room crowded with supplies. She explained, "It's just a big long space that was empty and we could walk through it, and then there was stuff piled up against the walls, so that's why I call it a hallway."

At the close of the State's proof, the defendant moved for a judgment of acquittal. The parties agreed that there was not sufficient proof to continue with all the counts in the indictment. The trial court dismissed four counts charging rape of a child, and the State elected which offenses to assign to the remaining four counts of rape of a child and four counts of aggravated sexual battery.

The defendant presented several character witnesses on his behalf. Mary Nulty had known the defendant and his wife for a number of years because the defendant and his wife went daily to the diner where she worked, and she considered him a friend. Sarah Nulty saw the defendant and victim together once and did not notice anything out of the ordinary. Bruce Parker had been a customer of the defendant's for twenty years, and he was at the defendant's shop two or three times a week in the summer of 2012. He rarely saw the victim there, and he testified the defendant had an employee who was almost always at the shop. Anthony Kelley, the defendant's brother and neighbor, testified he did not see the defendant and victim together often and that the victim's sister was usually with them. He testified that he was not home frequently and only saw the defendant around the house once or twice a month.

Mary Fellows testified that the defendant is her cousin and that she was managing the property on which his shop was located. She testified that she kept carpets, sheetrock, cabinets, doors, and other supplies in the storage room but that the defendant did not store anything, particularly tires, there. Ms. Fellows was at the shop once or twice a day during the summer of 2012, and she only saw the victim once, with her stepfather. Although Ms. Fellows attempted to discredit the victim's testimony by testifying that the storage area was open with no hallways or doors, on cross-examination, she acknowledged that to get around the storeroom, "I just made a walkway ..."

The defendant also recalled the victim's mother as a witness. Although the victim had testified she did not recall receiving counseling prior to the defendant's abuse, the

victim's mother testified the victim, who was born in 1999, did receive counseling in 2002. The victim's mother acknowledged that the victim had hit another child and made an obscene gesture but testified that both of these incidents were in response to actions from another child. She acknowledged the disciplinary incidents which occurred after the abuse.

The defendant testified on his own behalf that he did not touch the victim's breasts or groin area and did not rape her or force her to perform fellatio. He testified that he did not know why the victim would say that he did these things. On cross-examination, he acknowledged that she had visited his shop and garage but stated she was always with her grandmother or stepfather. He testified he did give her headphones but that the bicycles were presents from an employee. The defendant acknowledged that she was a "good kid." The defendant denied ever having been alone with the children and testified that the victim had never gone on a "road call" with him.

In rebuttal, the State presented the testimony of Benjamin King. Mr. King had known the defendant since Mr. King was five years old, and he worked at the tire shop for a period and also stayed in the home with the victim, defendant, and their family from December 2011 until the following summer. He stated that he saw the victim and defendant together at the shop and that he saw them leave for a "road call" together. Mr. King testified that the victim was at the shop a couple of times a week and that she was always with an adult. The garage area had access to the storage area, which had three stacks of drywall so that "[i]t could be considered a hallway." On cross-examination, he acknowledged that he had not paid rent when he stayed with the family and that he was currently working as a cook in the victim's mother's store. He testified that he had found it difficult to keep a job and that his job as a cook was one of the longest term jobs he had held. The victim's mother was a district manager and not his immediate supervisor.

The jury found the defendant guilty of four counts of rape of a child, three counts of aggravated sexual battery, and one count of assault, a lesser-included offense of aggravated sexual battery. The defendant was convicted in Count 1 of rape of a child based on the testimony of fellatio by the van; the defendant was convicted in Count 2 of aggravated sexual battery based on the testimony that he touched the victim's breasts on the couch at the shop; the defendant was convicted in Count 3 of rape of a child based on the testimony of digital penetration in the storeroom; the defendant was convicted in Count 4 of aggravated sexual battery based on the testimony that he touched the victim's groin on the bench outside the shop; the defendant was convicted in Count 5 of rape of a child based on the testimony of fellatio by the tractor during the "road call"; the defendant was convicted in Count 6 of aggravated sexual battery based on the testimony that he touched the victim's groin in his bedroom while watching TV; the defendant was convicted in Count 8 of assault based on the testimony that he touched the victim's breasts and kissed her in the kitchen; the defendant was convicted in Count 10 of rape of a child based on the testimony of fellatio in the home garage.

Kelley C.C.A. opinion, slip op at 1-4.

IV. POST-CONVICTION HEARING TESTIMONY

At the post-conviction hearing, the petitioner's evidence consisted solely of his own testimony. The state's proof consisted of the testimony of attorney Greg Smith, petitioner's trial and appellate attorney. A transcript of the trial was also introduced. The Court accredits Mr. Smith's testimony and finds the petitioner not credible. The Court will summarize both witnesses' testimony to facilitate appellate review.

RICHARD KELLEY

Mr. Kelley began his testimony by recounting the issues he raised in his petition for relief. He first stated that he had drawn a map of the shop interior and brought it to his attorney on the first day of trial. He claimed that Mr. Smith gave the map to the Assistant District Attorney, Kimberly Lund, and that the map was then used in trial against him by the victim. He indicated the drawing the victim made in court was not good enough for her to have done it on her own and that the jury was swayed by the drawing.

He then testified that Mr. Smith failed to call witnesses to testify at trial and said Mr. Smith told him he would only call one witness. Petitioner stated that Mr. Smith did not talk with the petitioner's wife or his mother, and their testimony would have been helpful. His wife could have testified that he was never alone with kids; and that she was with him and their granddaughter, the victim at all times. His wife is manic depressive, but has her condition under control.

Mr. Kelley also testified that he did not get a discovery packet at the beginning of his case. He did state that it was brought to a hearing and only got a packet from

Department of Children's Services regarding his granddaughter, but no discovery pertaining to him.

Mr. Kelley testified that he did not have a jury of his peers. He was at the table with Mr. Smith during voir dire but claimed that Mr. Smith did not allow him to approve or disapprove of any of the jurors. The jury foreperson was an employee of the juvenile court and he thought she was not fair. He did not voice his concern or any objection to that juror at the time of voir dire. He also testified that he could not hear during voir dire but that he did not ask for headphones to assist him with hearing until the trial started. Headphones were provided to him upon request.

Mr. Kelley complained that Mr. Smith did not object to leading questions on direct testimony. He claims that his granddaughter was led in what to say while she was on the witness stand. He also complained that Ms. Lund, attorney for the State also asked leading questions to his employee Benjamin King who was called by the state. He indicated that Ms. Lund coerced Mr. King into testifying that it was possible that petitioner and his granddaughter were alone at one time.

Mr. Kelley testified that he should have had a psychological evaluation. He thought he would get one. He was very distraught during the proceedings and would not accept an offer for a plea bargain because he was not guilty. He testified that he would have taken the offer if he had known the trial outcome.

Finally, Mr. Kelley testified that there was a media report releasing a prior conviction of his reported in the local newspaper the morning the jury deliberations began. He believes the jury was swayed by this information but he had no specific proof

that any juror had seen the report. He felt that he would not have been found guilty without the newspaper article.

On cross examination, Mr. Kelley acknowledged that the appellate opinion in this case and the transcript indicated that his granddaughter drew the sketch of the building in her testimony. He also admitted that Mr. Smith had been successful in keeping his prior conviction from being presented to the jury. He acknowledged that Mr. Smith called several witnesses to testify on his behalf and that he asked Ben King to testify for Mr. Kelley and Mr. King declined and was a witness for the state. Finally, Mr. Kelley testified that he had never been treated for any mental health issues.

GREG SMITH

Mr. Greg Smith testified that he had been practicing law since 1988 and had been appointed to represent the petitioner. He testified that he received all discovery provided by the state and turned it all over to the petitioner with exception of the forensic interview of the minor victim which could not be released by the state. He had reviewed a video of the interview and reported to his client about same. His recollection was that he had reviewed all discovery with Mr. Kelley and had a series of letters in his file breaking down the discovery. He further recalled that he obtained the DCS file on the victim as a supplement to discovery based on conversations with his client about trial tactics and how he wanted to present information on the victim. Information from the DCS file was used at trial.

With regard to witnesses at trial, Mr. Smith testified that Mr. Kelley gave him a long list of potential witnesses, most of whom were character witnesses. He had obtained

the services of a private investigator for trial preparation and either he or the investigator talked to all of the witnesses listed by Mr. Kelley. Some were called at trial. Mr. Kelley's employee Benjamin King, was not called as a witness at trial because his testimony was not favorable to the petitioner, and he also had some criminal baggage. Mr. Smith did talk to Mr. Kelley's wife. She attended a hearing and had indicated to Mr. Smith that she would punish anyone who called her as a witness and that she would not come in on her own to testify. Mr. Kelley's mother also came to court regularly and Mr. Smith talked with her. She was elderly and had no specific information about the case; she did seem genuinely concerned about when her son was coming home.

Regarding Mr. Kelley's criminal history, Mr. Smith said he spent 40-50 hours working on information provided by Mr. Kelley that he had been pardoned in the prior case. He was never able to find that a pardon had been granted, but he was successful in keeping the criminal history out at trial.

Mr. Smith testified about the diagrams or drawings presented at trial. There were two (2) maps. He had prepared one from meeting with the landlord of the building Mr. Kelley rented for his business. He went to the location and drew a large map that was used in trial and admitted through witness Mary Fellows. His recollection was that the minor victim drew the other map during the trial. She was provided a blank page and drew the map. He did not give Ms. Lund or the child the map he prepared prior to trial.

Mr. Smith also testified about the state's questioning of the minor child at trial. He did object at one time to a leading question, but was sensitive to the age of the child and the case law on the handling of child witnesses.

Mr. Smith did not request a psychological evaluation of Mr. Kelley prior to trial. There was no evidence that he was incompetent. He was guarded and scared and thought the child might not testify, but he participated in preparation for trial and at trial and did not appear at any time to be insane or incompetent. Mr. Kelley sent him many "legal epistles" and actively participated throughout the case.

After the close of the state's proof, Mr. Smith moved for judgment of acquittal and was successful in getting four (4) of the rape charges and one (1) aggravated sexual battery charge dismissed. An additional charge was dropped to a lesser misdemeanor assault.

Mr. Smith testified that he also handled the appeal of Mr. Kelley's case. He did seek Mr. Kelley's input, but believed that sufficiency of evidence was the only potential issue for appeal. He also testified that his understanding of case law is that at the appellate level, the attorney makes the final decision on issues to appeal. He recalled that he sent Mr. Kelley what he called a "photograph letter" based on the record at trial asking Mr. Kelley what issues he wanted him to look at. They discussed sentencing as an issue for appeal and Mr. Smith felt that the sentencing was on the low end and he was concerned if they appealed the sentencing, it could likely be increased.

Finally, regarding the jury selection, Mr. Smith testified that he talked with the defendant about each of the potential jurors. He knew the juror who ultimately served as foreperson was a juvenile court employee, and he knew her to be fair and impartial in his dealings with her. He felt she would be a good juror, and given the opportunity, he would select her again on a jury.

EXHIBITS

At the close of the testimony, Mr. Kelley asked if the child's drawing could be located and marked as a late filed exhibit to this hearing. A copy of the map was located in the court file and was marked as late filed Exhibit #2 to this hearing. (The original exhibit of the map was still with the record at the Court of Criminal Appeals.) The trial transcript and sentencing transcripts were marked as Exhibit #1.

V. STANDARDS OF REVIEW

A. POST-CONVICTION PROCEEDINGS

A petitioner is entitled to post-conviction relief if the petitioner can establish that "the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. §40-30-103 (2014). The petitioner bears the burden of proving factual allegations in the petition by clear and convincing evidence. Id. §40-30-106(f)(2014); Dellinger v. State, 279 S.W.3d 282, 296 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction is waived. Tenn. Code Ann. §40-30-110(f). A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the

ground could have been presented unless: (1) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right: or (2) the failure to present the ground was the result of state action in violation of the federal or state constitution. Id. § 40-35-106(g)(1)-(2). Previously determined claims are also precluded from post-conviction review. See id. §40-36-106(f). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Id. §40-30-106(h). A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence. Id.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show that (1) counsel's performance was deficient and (2) the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-72 (1993); Davidson v. State, 453 S.W.3d 386, 393 (Tenn. 2014). A showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after

satisfying both prongs of the Strickland test. See Davidson, 453 S.W.3d at 393. Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697. "Indeed a court need not address . . . both [Strickland components] if the [petitioner] makes an insufficient showing of one component." Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing Strickland, 466 U.S. at 695).

The performance prong requires a petitioner raising a claim of ineffective assistance of counsel to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975), the Tennessee Supreme Court held that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases.

The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional efforts, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. "The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland." Brimmer v. State, 29 S.W. 3d 497, 508-09 (Tenn. Crim. App. 1998).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the

proceedings. Adkins v. State, 911 S.W. 2d 334, 347 (Tenn. Crim. App. 1994). Deference to tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. Cooper v. State, 847 S.W. 2d 521, 528 (Tenn. Crim. App. 1992).

VI. PETITIONER'S CLAIMS FOR RELIEF

At the evidentiary hearing, petitioner raised several claims that he received ineffective assistance of counsel at trial. With regard to his claim that Mr. Smith failed to interview witnesses relevant to the defense, this claim is without merit. Mr. Smith testified that he or the private investigator interviewed all witnesses Mr. Kelley requested that he talk with. He called several witnesses at trial. Mr. Smith elected not to call Mr. Kelley's wife, mother or Benjamin King as they would not have been favorable witnesses for Mr. Kelley.

With regard to Mr. Kelley's claim that his attorney failed to ensure that he was heard by a fair and impartial jury, there was no indication that he did not have a fair and impartial jury. Included in Mr. Kelley's concerns about the jury were that the foreperson was an employee of Montgomery County circuit court clerk juvenile office; his lack of involvement in selection of jurors during voir dire, and inability to hear; and a newspaper article including information about his prior conviction being released on the day the jury began deliberations. Mr. Smith testified that Mr. Kelley participated in voir dire. Mr. Kelley testified that he never informed Mr. Smith or the Court that he had hearing difficulties and did not request a headset to assist with his hearing. Mr. Kelley presented

no information that any juror was aware of the newspaper article. Mr. Smith had been able to keep the prior conviction out at the trial so the jury was not aware of same. The is no merit to the claim that Mr. Kelley did not have a fair and impartial jury.

Mr. Kelley's petition also alleges that his attorney failed to inform him of the grounds he intended to include in his Motion for New Trial and subsequently precluded from him the possibility of arguing actual innocence. At the evidentiary hearing, Mr. Kelley did not present testimony on this issue. Mr. Smith, however, testified that he communicated with Mr. Kelley and got his input on the issues for appeal. Mr. Smith, however, made the final recommendations and decisions.

Mr. Kelley also argues that he had ineffective assistance of counsel in that his attorney failed to obtain discoverable evidence and present it to the petitioner so that subsequently he was not fully informed of the State's case against him. To the contrary, the evidence at the hearing was that Mr. Smith obtained discovery and sent it to petitioner with correspondence breaking down the discovery. The forensic interview could not be copied for petitioner, but Mr. Smith watched same and reported on it to the petitioner. Further, in developing the defense in the case, Mr. Smith obtained supplemental discovery of the victim's information with the Department of Children's Services and such information was used at trial.

With regard to Mr. Kelley's claim that his attorney failed to obtain an order from the Court mandating that the petitioner undergo a psychiatric evaluation, and thus rendered ineffective assistance of counsel, again the court finds no merit to this claim. Mr. Kelley testified that he had never suffered psychological issues. Mr. Smith testified

that Mr. Kelley actively participated throughout his representation through the trial and was at all times competent, often sending counsel lengthy legal documents.

At the evidentiary hearing, Mr. Kelley also complained that Mr. Smith did not object to leading questions by the prosecution. However, the record indicates that Mr. Smith did in fact raise at least one objection to the state leading the minor victim on direct examination. Further Mr. Smith testified that he was intentionally cautious in his objections because of the age of the victim.

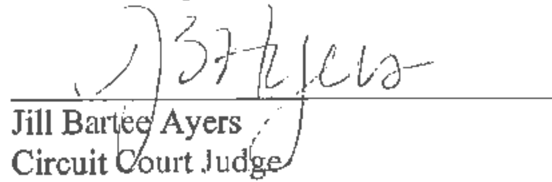
Finally, the Court finds nothing in the record to substantiate Mr. Kelley's claim that Mr. Smith gave the map he drew to the victim and that the same map was given to the state's attorney and then used at trial. The record indicates that the state's attorney gave a blank paper to the victim and she drew the map/drawing of the shop building on her own during trial. Exhibit #2 to this hearing appears consistent with the transcript as having been drawn by the child at trial. Mr. Smith's testimony was that he did not turn over a drawing to the state and he recalled the child drawing the map at trial.

The Court concludes that none of Mr. Kelley's claims for post-conviction relief were supported by the evidence at the post-conviction hearing. The Court does not find petitioner's testimony credible. The petitioner has failed to establish that he received the ineffective assistance of counsel in this case.

VII. CONCLUSION

For the reasons stated above, the petition for post-conviction relief is DENIED.

IT IS SO ORDERED this the 10th day of May, 2017.



Jill Bartee Ayers
Circuit Court Judge

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

IN THE STATE OF TENNESSEE

AT CLARKSVILLE

2016 JAN 25 AM 8:55

CHRISTY M, VELEZ (NOW HORAN),)
)
PLAINTIFF,)
) File No: MC CC CV DV 10-1754
VS)
) Division IV
DANIEL J. VELEZ,)
)
DEFENDANT)

ORDER

This cause came to be heard on the 8th and 11th days of January, 2016, upon the Petition in Opposition to Relocation filed by Daniel J. Velez.

The parties, Daniel J. Velez (Father) and Christy M. Velez, now Horan (Mother) were divorced Mary 4, 2011, and have been involved in litigation almost constantly since that date. Mother appealed the prior rulings of the Court to the Tennessee Court of Appeals, and in both instances, the equal shared parenting time of the Mother and Father has been affirmed. Each of the parties has filed a Petition for Criminal Contempt against the other. Additionally, Mother provided Father written notice of her intention to relocate to Georgia as a result of her current husband's military orders. Father filed a Petition in Opposition to the Relocation.

The Tennessee Relocation Statute provides in 36-6-108(c), if the parents are actually spending substantially equal intervals of time with the children, the court shall

determine whether or not to permit relocation of the child based upon the best interests of the child considering all relevant factors including those set forth in TCA 36-6-106(a)(1) – (15). After considering all the evidence and proof over a two-day hearing, the Court finds that the parents are actually spending substantially equal intervals of time with the children, and therefore the bests interests factors are applied as follows:

(1) **The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child**: The proof was clear that the children have strong loving relationships with each of the parents and both parents have exercised their equal parenting time such that neither parent performs a majority of the parenting responsibilities.

(2) **Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order:** While these parents clearly cannot, and will not make an effort to get along, no proof was presented that either party has or would in the future fail to comply with a new visitation arrangement. Each of them performs his/her parenting responsibilities during his/her parenting time. However, as set forth in (11) below, neither parent facilitates or encourages the relationship with the other parent.

(3) **Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings:** This factor is not applicable in this matter.

(4) **The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care:** The evidence is clear that both parents provide the children with necessary food, clothing, medical care, and are involved in the children's education, and that there is no difference in behavior, appearance and school work from week to week. Unfortunately, the evidence was clear that each of the parents has a tendency to manipulate medical information, medication and school information in what appeared to be an effort to antagonize and frustrate the other parent; however, there was no evidence that the children lacked care from either parent.

(5) **The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities:** The evidence presented supported the consistent history of these parties that each of the parent exercises equal parenting time and as such, they are equal caregivers and neither is the primary caregiver.

(6) **The love, affection, and emotional ties existing between each parent and the child:** The evidence presented at trial was consistent with prior court rulings that the children have strong ties with both parents, and also enjoy a positive relationship with both step-parents.

(7) **The emotional needs and developmental level of the child: Each of the parents as a separate family unit appears to be stable based on the evidence:** The children's emotional needs appear to be met and each child appears to be at an appropriate developmental level. Unfortunately, each of the parents appears to be unstable with regard to the constant manipulation and antagonism of the other parent which has also involved the children in these ongoing legal matters from time to time.

(8) **The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child:** Each of the parents appears to be in good physical health although the Father is partially medically disabled. There was also proof presented that the Mother is in treatment for anxiety and takes medications for same. The proof did not support a finding that either parent was not mentally or physically able to care for the children.

(9) **The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities:** Despite the behavior of the parents, the proof from witnesses involved with the children at school is that they are doing well for the most part with the exception of some recent trouble the son has had with discipline issues at school. Both children are good students and are involved in normal extra-curricular activities, despite the parents' arguments regarding the out of school activities and lack of participation by each of the parents in the activities they did not approve of, or that the other parent was primarily involved in. The Step-Mother has a child that resides with her and Father on weeks when the children are with the Father. There was no proof of any concerns with their step-brother nor any detrimental impact of moving away from him.

(10) **The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment:** The Velez children appear to have more stability now that these parents are divorced than they did while living in an environment of constant dissension between the parents while they were married. Most of their family on both the Mother's and Father's side reside in Clarksville where the children have been their entire lives. Each of the children has attended Clarksville Academy for their entire academic career to date.

(11) **Evidence of physical or emotional abuse to the child, to the other parent or to any other person:** While the Court finds no evidence of physical abuse of the children by either parent, there was evidence that the behavior of the Father toward the Mother had a negative impact upon the children. Further, this Court was very disturbed by the fact that Father and Step-Mother routinely cross examined the children immediately upon the exchange after they returned from a week with Mother, and without the knowledge of the children, recorded those conversations. It was evident from the recordings that Step-Mother and Father were baiting the children with questions designed to solicit negative responses about their Mother to use against Mother, although some of the discussions about Mother's behavior were also disturbing. The court also notes that Father testified multiple times that Ethan should not be believed because he would state what he thought the person he was talking to wanted to hear.

It was also evident from the recording submitted by Father that Father overacted to information gained in the cross examinations to harass the Mother. Specifically, Ethan recounted an event when he and his sister were fighting in the car while Mother was driving them home from church and she lost her temper with them and made a statement to the effect that their fighting could cause her to run off the bridge and kill all of them. When this was relayed to Father and Step-Mother, they called the police and reported that Mother was suicidal, resulting in an investigation from Department of Children's Services that was concluded with no findings. In the audio recording presented as evidence by Father, Ethan clearly told his Father that Mother did not make a threat to harm them and that she did not mean it the way Father was indicating; yet Father called the police without making any effort to communicate with Mother about the incident.

The Court further finds that Father took out 2 criminal warrants against Mother for harassment, both of which were nollied by the District Attorney's office. The basis for the harassment charges were presented in total by Father as evidence and consisted of non-threatening emails and text messages from Mother, all related to parenting issues of the children such as medication, appointments, activities. While the communications could certainly be perceived as annoying, they did not appear to be harassing to the level of filing criminal charges.

There was also evidence presented that on one occasion Ethan sent text messages to his Mother warning her that Father was going to have her arrested. Regardless of whether or not it was true that Father was going to have her arrested at that time, it was clear that the children, or at least Ethan were exposed to discussions between Father and Step-Mother about having Mother arrested and that this caused concern and anxiety for Ethan.

Father also called Mother's husband's military chain of command to report that Step-Father was getting "cocky" in the exchanges and that Mother and Step-Father had tried to make changes to the children's DEER's account. The Court finds that this was not a reasonable response, but an effort to interfere with Step-Father's job.

Proof was also presented that at one exchange in July 2014, Mother lost her temper over a pair of shorts and some medicine at a Sunday exchange and cursed Father and Father's mother in front of the children, and also said derogatory statements about Father in front of the Children. Further proof was provided that Mother made derogatory statements about Father in front of Kaili

at school functions, and that while she encouraged or at least approved of the children calling her husband "Daddy", she instructed the children not to call Father's wife "Mommy."

(12) **The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child:** There was no proof that either step-parent or any other person exposed to the children while with their respective parents was of any concern.

(13) **The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children:** The Court heard from the parties' son, Ethan, who is a very mature 12 year old. While Ethan appeared to be very smart and mature, he also appeared to be very well coached on his testimony. The Father testified that Ethan should not be believed under oath because he was a "pleaser" and would say what he thought someone wanted to hear, regardless of the truth. Step-Mother agreed. However, both Father and Step-Mother agreed that Ethan was likely to be truthful to a neutral party. Ethan volunteered detailed information that this Judge did not believe a typical 12 year old boy would have noticed or would have discussed without coaching. Examples include details about how step-mother dressed at a football banquet, and very specific details on how he would propose a visitation schedule with Father that would deny Father the right to visit with the children in Clarksville. However, Ethan did state to the Court, a neutral party, that he desired to move to Georgia with his Mother and Step-Father and that he had a friend in Savannah that he had gone to school with in Clarksville. The Court also met with Kaili, the 9 year old daughter of the parties, but did not ask her preference about the move because she did not appear to be mature enough in the Court's opinion to understand. However, Kyle did blurt out after being asked by Mother's attorney if there was anything she wanted to tell the Court that she did want to move with her Mother.

(14) **Each parent's employment schedule, and the court may make accommodations consistent with those schedules:** Neither parent is currently employed as Father is on medical disability and Mother has elected not to work outside the home.

(15) Any other factors deemed relevant by the court.

With regard to the Mother's proposed relocation, the proof supported that the relocation has a reasonable purpose as Step-Father has come down on orders to move to Savannah, Georgia. There was no proof of a vindictive or malicious motive, nor any threat or harm to the children. Applying the best interest analysis, each parent has much room for improvement in his/her ability to co-parent with the other. The Court does find that Ethan expressed a believable preference to move, and that preference coupled with the fact that the Court finds the Father's actions toward the Mother and his cross examinations of his son to be more harmful and disruptive to the children than the Mother's behavior toward the Father, although she clearly has room for improvement as well. The Petition in Opposition to the Relocation is therefore denied and the Mother shall be authorized to relocate to Savannah, Georgia with the children.

Thus, the next step is to evaluate each of the parties proposed parenting plans. Father filed alternative Parenting Plans, one with him as primary residential parent and one with Mother as primary residential parent. Mother filed one proposed parenting plan on the morning of the trial with her as primary residential parent. The Court finds that the Mother's proposed parenting plan is not reasonable as it would prohibit Father from ever spending parenting time with the children in Clarksville, TN. Father's proposed parenting plan as set forth in Exhibit 33 with Mother as primary residential parent is approved with the following modifications:

(1) The Father will enjoy parenting time with the children during spring break from 10:00 a.m. the Saturday after school is released for spring break and concluding at 8:00 p.m. the Saturday prior to school reconvening after spring break every year.
(2) Under Paragraph J. "Other", language shall be added requiring the parents to split the cost of extra-curricular activities pro rata.
(3) Father's gross monthly income shall be increased to accurately reflect his BAH for book stipend and the amount of tuition covered by the GI bill to be pro rated over a 12 month period.
(4) Because Mother has elected not to work outside of the home, her income shall be imputed at $21.00 per hour, the average of what she could make if working according to her testimony, at 40 hours per week.
(5) Child support shall be recalculated based on the above in accordance with the child support worksheet.
(6) Mother shall claim the children for federal income tax purposes.
(7) As set forth in the approved parenting plan, all decision making shall be joint. With technology, this can be accomplished. Mother shall not make any effort to lock Father out of any medical or educational information or decision making regarding education, non-emergency health care, religious issues or extracurricular activities of the children.

Each party shall be responsible for his/her own attorney fees and court costs incurred in this matter.

This Order adjudicates all issues in this matter and is a final judgment. All motions not addressed by this Order are denied or expressly waived.

It is so ORDERED this 25 day of January, 2016.

JUDGE JILL BARTEE AYERS