

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission 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 <http://www.tncourts.gov>). The Commission 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 word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) *and* electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

General Sessions Court Judge, Part I, Washington County, TN.

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

1989; BPR#013867.

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#013867. Licensed October, 1989, 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).

Partner in the firm of Sherrod, Stanley, Lincoln and Goldstein from October 1989 until election as General Sessions Judge on September 1, 1998.

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.

I have been employed continuously since graduation from law school.

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 am presently the General Sessions Judge for Part I of Washington County, TN. My jurisdiction includes criminal, civil and juvenile cases. 65% of my caseload is criminal, 25% civil and 10% juvenile. Criminal caseload includes preliminary hearings on all felony matters, trials on all misdemeanors including DUI, assault, domestic violence, theft, reckless endangerment to name a few. Civil trials include any matter under \$25,000, orders of protection, collections, and landlord tenant matters. Juvenile includes delinquent offenses, dependency and neglect, unruly charges, and termination of parental rights. This is not an exhaustive list by any means.

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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

As an attorney from 1989 until my election as General Sessions Judge, I represented hundreds of clients in civil, criminal and juvenile matters. I stepped into a very busy practice right out of law school and tried over six jury trials by myself during the first year and a half. I have appeared before the Tennessee Court of Appeals in Knoxville, and the 6th Circuit Federal Court of Appeals in Cincinnati. I was lead counsel on several jury trials in both the civil and criminal courts of East Tennessee, Southwest Virginia, and the Federal Courts in Greeneville, TN. As General Sessions Judge my caseload currently exceeds over 10,000 cases per year, evidence of my strong work ethic. I was also Judge of the Probate Court for Washington County from my election in 1998 until that jurisdiction was transferred to Chancery Court around 2008. I am in court every day, 5 days a week. Court convenes at 9:00am and again at 1:30pm. Special settings take place on Fridays, and this day is also used as the Public Defenders' day to interview new clients, and the District Attorney's day to issue subpoenas and interview officers and victims. I am up to

date on the civil and criminal laws of Tennessee, and all new decisions that affect the criminal courts in particular. I attend several continuing education seminars every year. I also attend several hours of continuing education in addition to those required as judge to stay abreast of recent juvenile dependency and delinquency matters. I currently serve as vice-president of the Tennessee Council of Juvenile and Family Court Judges, which is a statutorily created position by the Tennessee Legislature. Governor Haslam has also personally selected me to serve on the Three Branches Institute which meets in Nashville to help facilitate a top to bottom review of the Dept. of Children's Services and its operations.

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

None.

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 was elected General Sessions Court Judge, Part I, for Washington County in 1998. Re-elected in 2006. I currently preside over 10,000+ cases per year. Most every noteworthy felony or misdemeanor case that occurred in Washington County that has appeared in the press or on television originated in General Sessions Court and was presided over by myself or Judge Nidiffer.

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

I have been appointed conservator over several individuals while a practicing attorney, and handled my great aunt's affairs for approximately 8 years as her proxy for health care decisions, and her power of attorney until her death.

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

As General Sessions Judge I am constantly looking for creative ways to address recurring

problems and situations in my court. I along with Judge Jim Nidiffer initiated and established in 2007, what has become an award-winning model for dealing with the unique problems courts face in working with individuals facing mental health problems. What started as a six month pilot program involving Frontier Mental Health, the District Attorney's office, Public Defender's office, NAMI, and the General Sessions Judges of Washington County became the "Washington County Mental Health Court". The court became a successful program to address the criminalization of individuals with mental health issues in our county, and was even awarded a \$190,000 Federal Stimulus Grant for operations. Participants are screened for diversion in the program, and if accepted, meet weekly with the General Sessions Court, undergo therapy, comply with physician's orders, and attend group sessions. Upon successful completion, participants may have their charges dismissed, and their record expunged. The entire process is based upon an entire year of diversion and participation. I contribute my time to this program without compensation, and find it one of my most rewarding pro bono duties as judge. We meet every Tuesday at 8:00am before our regular docket. I have also helped form the pediculosis task force which has become a model across the State to help prevent truancy in our public schools for children who have been excluded for head lice. Prior to implementation of this task force there were children in the county missing 20 and even 30+ days of school for head lice. I also helped implement the Washington/Unicoi County drug and alcohol court for the treatment of addiction from drugs and alcohol. Our diversionary program followed the Mental Health Court Model of diversion. The program was awarded a \$500,000 Federal Grant among several competing courts across the United States, and continued for approximately five years until all funding sources were exhausted by the State and Federal Government. All my time invested in these programs at the judicial level was without compensation in an effort to reduce recidivism in the court system.

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

I have not applied before.

EDUCATION

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

Randolph-Macon College, Ashland, VA. B.A., Political Science, 1984. Member Omicron Delta

Kappa Society, National Leadership Honor Society. Memphis State University, Memphis, TN.
Cecil C. Humphreys School of Law, Juris Doctor, 1989.

PERSONAL INFORMATION

15. State your age and date of birth.

51 years old, born December 30, 1961.

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

I have lived in Tennessee all of my life except for 2 years after college when I worked for Congressman James H. Quillen on the House Rules Committee in Washington, D.C.

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

I have lived in Washington County continuously since 1990.

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

Washington.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

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. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No.

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

No.

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

No.

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

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

The Rotary Club of Johnson City, TN. Boy Scouts of America, Executive Board of Directors 2009-2012. Deacon, First Christian Church, 2008-present.

27. Have you ever belonged to any organization, association, club or society which 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.

I was a member of a men's social club called the Hurstleigh club in Johnson City, TN. It met quarterly for dinner and hosted a Christmas ball for its members, spouses and guests. I resigned thirteen years ago when I became judge.

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

Appointed by Gov. Haslam to the Three Branches Institute for High Reliability in Children's Services. Member, Tennessee General Sessions Judges Conference. Member, Tennessee Council of Juvenile and Family Court Judges, currently serving as vice-president. Member, National Council of Juvenile and Family Court Judges.

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

Recipient of the Frank G. Clement Community Service Award, 2009, given by the Tennessee Association of Mental Health Organizations. National Association of Mental Illness Heroes in the Fight Award, 2007.

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

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have presented in several CLE seminars. Washington County Mental Health Court 101, Feb. 2007. 1st Judicial District Judges Forum, May, 2010. Civil Collections Panel, Sept., 2011. Comprehensive Judicial Committee to Address the Local Bar, Nov., 2011. Judicial Panel Washington County Bar, Dec., 2012.

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.

General Sessions Judge, Part I, Washington County, TN. Elected 1998. Re-elected 2006.

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

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Samples of my work are attached as "Exhibit 1" and "Exhibit 2". I authored and typed them myself as I do not have secretarial assistance as General Sessions Judge.

ESSAYS/PERSONAL STATEMENTS

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

The citizens of Washington County have entrusted me with the power to adjudicate over their lives from birth to death every matter from juvenile, criminal, civil, and until recently, probate. I am a dedicated public servant. Serving as Criminal Court Judge gives me the unique opportunity to bring to the Criminal Court bench the lessons learned from my fourteen years as judge. I have the temperament and the experience to see every case in an unbiased way, without bias coming from a recent background serving in the role of prosecutor or defense attorney. My re-election in 2006 with the largest margin of votes among any judicial candidate for any office in Washington County is testament to this fact, and to the public's belief in my capabilities as judge.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I have been instrumental in the creation of a multi-county drug and alcohol court, and an award winning Mental Health Court during my tenure as judge. Both are a diversionary type courts which depend heavily upon the judge being involved in the administration, treatment, and sanctioning of participants. Both courts are voluntary, and without compensation on my part, and are above and beyond my official duties. I feel that reducing the caseload of our judicial system and reducing recidivism among citizens demands action by the judiciary. I fully intend to carry this work ethic into my role as Criminal Court judge if appointed.

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 to become First Judicial District Criminal Court Judge, serving Washington, Carter, Unicoi, and Johnson Counties. This court has jurisdiction over felony and misdemeanor criminal cases. I come from a very expeditious court handling over 10,000+ cases a year. I can make a decision and move on. I do believe that justice delayed is justice denied and intend to move all cases through the criminal court system in an unbiased way mindful of all parties both defendant and victim.

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

I am an Eagle Scout and have been involved with the Boy Scouts since I was a teenager. I currently serve on the Board of Advisors to Sequoyah Council, BSA. I have coached and actually judged several competitions in the Mock Trial Program in East Tennessee. I am a deacon in my church at First Christian Church in Johnson City. I have also been involved in Rotary International. I feel that my participation in our Mental Health Court involves community service to individuals with mental illness, as this is above and beyond my elected duties as judge. Currently my caseload has prevented my participation in Rotary International for the last two years, but I hope to begin again if appointed Criminal Court Judge in this worthwhile humanitarian effort. If appointed, I also intend to participate in the Mental Health Court, even though the current criminal judges do not.

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

I have the experience and the temperament to be a great Criminal Court Judge. I come from a lifetime of service to others beginning in my teenage years as evidenced by my attaining the rank of Eagle Scout. My lifelong commitment to public service is evident by the fact that I was elected judge at the early age of thirty-six, and have dedicated my life to serving the public in this capacity. I have earned the public's trust and do not take this responsibility lightly. I feel

my life and my role as judge instills integrity and respect for the entire legal process. I also demand respect be accorded to all who seek justice in the courtroom regardless of circumstance.

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

Yes. Almost every week a decision is made by me in which I must uphold the rule of law even if I disagree with its substance or outcome. Please refer to "Exhibit 1", the first writing sample I submitted in response to question 34. This is an order after a preliminary hearing in my court. In that case I had to dismiss charges against a defendant due to an illegal search by officers of his home which ultimately uncovered 303 grams of marijuana, digital scales, and pills from what appeared to be an ongoing illegal narcotics selling operation. In essence, the alleged drug dealer is back on the streets by upholding the Fourth Amendment which protects all persons against illegal searches and seizures. This case was just decided by me December 20, 2012.

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

A. John Kiener, retired Washington County General Sessions Judge, phone [REDACTED]

B. Mitch Cox, President of Mitch Cox Development, phone [REDACTED]

C. Tony Seaton, attorney, phone [REDACTED]

D. Robert T. "Rab" Summers, President of Summers Taylor, Inc., phone [REDACTED]

E. Art Powers, former publisher, The Johnson City Press, phone [REDACTED]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the First Judicial District Criminal Court of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: January 9th, 2013.



Signature

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



TENNESSEE JUDICIAL NOMINATING COMMISSION

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 which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission.

Robert Lincoln

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

Robert Lincoln

Signature

1/9/2013

Date

013867

BPR #

In the General Sessions Court of Washington County, Tennessee

State of Tennessee

v.

Cheyenne C. Lowery

Case #0089065

OPINION OF THE COURT AND ORDER OF DISMISSAL

FACTS

This Court was called upon to conduct a probable cause hearing on December 20, 2012 in this case. At the probable cause hearing, officers Gryder and Garrison of the Johnson City Police Department testified that they were assisting officers from Unicoi county investigate a stolen mini bike that may be located at the home of Cheyenne Lowery, 1410 Colony Park Dr., Apt.#4, in Johnson City, Washington County, TN. Their purpose at this address was talk to Mr. Lowery about information they had received from Unicoi County that Lowery may be in possession of the stolen mini bike. Both officers testified that it was known to them that Lowery was on probation for a previous drug conviction, and that he was also suspected of being involved in narcotics activities. None of the officers responding to this address had a warrant to search Lowery's apartment, nor did they have a warrant for his arrest.

A total of six officers were present on the scene in the attempt to recover the stolen mini bike. Four members of the vice investigation unit for drugs and narcotics assisted Sheriff Hensley and Captain Arnold who had come over from Unicoi County to speak with Lowery. The four vice officers present were Gryder, Garrison, Perry and Hollis. Officers Gryder and Garrison went to the front door of the apartment, while officers Perry and Hollis went around to the back door. The Unicoi officers remained in reserve near the front door.

Upon arrival at the front door, officer Garrison testified he could peer through a window covered by blinds and through two blinds see a little boy and a man on the couch. According to Garrison, the man was "messing with something" before officers knocked. Gryder knocked and Garrison announced that they were the police and that they wanted to talk to Cheyenne Lowery. Lowery stood up and looked out through the blinds and saw the officers. Lowery then went back to the couch and put items in a drawer of a coffee table next to the couch. Garrison could not identify from his vantage point through the blinds just what those items were. Garrison then testified that he saw Lowery grab "what looked like a bag of dope" and run towards the rear of the house. He told Gryder that "it looks like he's trying to get rid of the dope". Immediately

upon hearing this Gryder opened the door and went inside the apartment, apparently bumping into Lowery's girlfriend, Stacy Matthews, who was about to open the door from the inside. Gryder then stopped and detained Lowery coming out of a back bedroom. Lowery was asked what he had in his pockets, to which he replied "marijuana". His pockets were emptied and several bags of what appeared to officers to be marijuana were confiscated. Consent to search the entire house was then obtained from Stacy Matthews who rented the apartment. Officers confiscated 303 grams of marijuana packaged for resale, two sets of digital scales, seven and one-half pills of Suboxone, three straws for snorting pills, a marijuana pipe, and \$714.00 in cash.

Lowery was taken into custody and charged with possession of Schedule VI for resale, simple possession of Schedule II controlled substance, and unlawful possession of drug paraphernalia.

ANALYSIS

The defendant asserts that this court should suppress the narcotics and drug paraphernalia recovered in the search of his apartment, and dismiss the warrant. The defendant argues that there was no exigency because officers did not have a reasonable belief in the existence of exigent circumstances and that any such exigency was created by officers themselves. The State contends that Lowery's movements inside the apartment created an exigent circumstance which justified the warrantless entry.

Both the Fourth Amendment of the United States Constitution and Article I, section 7 of the Tennessee Constitution guard all citizens against unreasonable search and seizure. The purpose of these prohibitions is to "safeguard the privacy and security of individuals against arbitrary invasions of government officials" State v. Randolph, 74 S.W.3d 330 (Tenn. 2002). Furthermore, a bedrock principle of Fourth Amendment law is that warrantless searches and seizures inside a residence are presumed to be unreasonable. Payton v. New York, 445 U.S. 573, 586 (1980).

The right set of exigent circumstances, however, provides an exception to the requirement of a warrant to search or enter a residence. Exigent circumstances arise where "the needs of law enforcement [are] so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." State v. Meeks, 262 S.W.3d 710, 723 (Tenn. 2008). Given the importance of the warrant requirement in safeguarding against unreasonable searches and seizures, a circumstance will be sufficiently exigent only where the State has shown that the search is imperative. Id. Situations that have been found to be sufficiently exigent to render a warrantless search of a domicile as reasonable include: (1) hot-pursuit, (2) to thwart escape, (3) to prevent the imminent destruction of evidence, (4) in response to an immediate risk of serious harm to others, and (5) to render emergency aid to an injured person or to protect a person from imminent injury. Id.

For the State to justify a warrantless search in this case, circumstances must give rise to “an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant.” *Id.* The State bears the burden of showing an exception to the requirement of a warrant. This Court must evaluate the exigency of the circumstances based upon the totality of the circumstances known to the State at the time of the search. This knowledge must be based upon specific and articulable facts and the reasonable inferences to be drawn from them. *Id.* at 723-724. The circumstances are exigent only when the search is imperative. *Id.* at 723.

Whether or not exigent circumstances were actually present in this case is a close question. Both officers saw Lowery look out the window at them after they knocked and announced their presence. The totality of the circumstances known to the officers at the time of entry into the apartment does not support a conclusion that exigent circumstances compelled the warrantless search. At the time of the entry, officers did not know for certain what was in the bag in Lowery’s possession. Nor did the State present any proof at the hearing that Lowery was currently involved in narcotics sales. Officers did not know for certain whether any narcotics were present in the apartment, although they did know Lowery was on probation for a previous drug conviction. At best, peering through two louvers of a drawn shade it “looked” like marijuana in a bag to officer Garrison. Furthermore, Garrison testified that other items next to the bag were placed inside a drawer of the coffee table which he could not identify from the same vantage point, casting doubt upon his ability to clearly see what was in the bag. Although they may have suspected drugs at the residence, mere speculation is inadequate to show exigency. *Meeks*, 262 S.W.3d at 723.

The exclusionary rule bars evidence either directly or indirectly obtained from an unconstitutional search or seizure. *Wong Sun v. United States*, 371 U.S 471, 488 (1963). The State cannot say that consent to search the apartment was obtained independently of the warrantless entry therefore, the evidence seized from the residence must be suppressed.

ORDER

Based on the foregoing reasoning this court concludes that the warrantless entry was unlawful. Therefore any evidence seized or obtained from the unconstitutional search is barred. The charges are DISMISSED.



Robert Lincoln, General Sessions Court Judge

Exhibit 2

IN THE PROBATE COURT FOR UNICOI COUNTY
AT ERWIN, TENNESSEE

IN RE:

THE ESTATE OF ALLEN D. COOK

LISA DONNELLY GELFAND and]
SANDRA SCHWEITZER,]

Plaintiffs,]

vs.]

JO ANN COOK and RONALD S.]
COOK, Co-Executors,]

Defendants.]

Filed In The Office Of Unicoi
County Clerk at 10:00 O'Clock A M
The 21 day of Nov., 2003
Ruby H. McLaughlin, Clerk

CIVIL ACTION NO.
5986

OPINION AND ORDER

This Court has been called upon to render an opinion whether enforcement of the Contract Not to Revoke a previous will allegedly entered into by Decedent Allen Cook is procedurally improper due to no claim being filed against the estate.

On January 8, 1998 in the Probate Court for Unicoi County, Tennessee, the purported Last Will and Testament of Allen D. Cook, who died December 21, 1997, was admitted to probate. All beneficiaries of that will were given notice of probate dated January

8, 1998, and Notice to Creditors was published as required by statute. (See Exhibit 1, Defendants' Submission of Items for Review.) Plaintiffs Gelfand and Schweitzer, named beneficiaries in that will, received notice of administration of the Cook estate by letter dated January 8, 1998. (See Exhibit 2, Defendants' Submission of Items for Review.)

Joint or mutual wills are frequently made in pursuance of an agreement or compact not to revoke. However, such wills are revocable although there has been an agreement not to revoke. The matter of the contractual aspect not to revoke does not properly arise upon probate, but only when the agreement is sought to be established as a claim against the estate. Rogers v Russell, 733 S.W.2d 79, 84 (Tenn. Ct. App. 1986) The Court in Rogers sided with the majority rule that a revoked will, even if it is a joint will, should be denied probate even though its revocation was a breach of contract. Persons claiming that the decedent's execution of a subsequent will in violation of the Contract Not to Revoke must seek relief by filing a claim against the decedent's estate. Id. at 85. The action before this Court is for a breach of an alleged Contract Not to Revoke. Therefore, this action can only proceed as a claim

against the estate.

Pursuant to T.C.A. Section 30-2-307 all claims against the estate arising from a debt of the decedent shall be barred unless filed within the period prescribed in the notice published or posted in accordance with T.C.A. Section 30-2-306(c). At Mr. Cook's death in December, 1997, actions against the estate were barred if not filed within six months of publication. However, an exception existed in instances where a claimant did not have actual timely notice involving a due process issue.

Plaintiffs in their brief argue that notice to them of any debt or claim to be filed was insufficient. In support they cite T.C.A. Section 30-6-302, which was in effect during this period. T.C.A. Section 30-6-302 was amended in 1989 by Public Chapter 395 to require mailing of notice to creditors "of whom the personal representative has actual knowledge or who are reasonably ascertainable." Creditors include all persons who have demands against an estate arising out of contract. Collins v Ruffner, 206 S.W.2d 298 (Tenn. 1947). The Court finds that notice to Plaintiffs was sufficient and timely. (See Exhibits 1 and 2 Supra.)

Plaintiffs argue in their brief that

notice of their claim against the estate was had by way of filing as an exhibit to their Complaint a copy of the purported will which they seek to have enforced. However, upon review of the original filing in the Probate Court records, no copy of the alleged will was attached as pled in the Complaint. Furthermore, this Court in February of 1999 ordered the production of said will within thirty days. In March of 1999 Plaintiffs filed a statement indicating that the original will could not be found. This action occurred some fifteen months after Mr. Cook's death and outside the deadline for any claims to be filed against the estate pursuant to T.C.A. Section 30-2-307.

The process for asserting claims against the estate of a decedent in Probate Court is clearly defined in T.C.A. Section 36-2-307. When any claim is evidenced by a written instrument, such instrument or a photocopy of same shall be filed. A copy thereof certified by the Court Clerk shall also be filed, and every claim shall be verified by affidavit and submitted in triplicate. Therefore, pursuant to Rogers v Russell, it is the contract to dispose of property in accordance with the terms of the will that becomes irrevocable at the death of the

first testator. Any claims that decedent's execution of a subsequent will breached that Contract Not to Revoke should proceed by way of filing a claim against the decedent's estate. No proper claim having been filed in this Court against the estate of Allen D. Cook leaves Plaintiffs without remedy. The timeframe for filing any claims against the Cook estate has passed. The only submission to this Court has been the filing of affidavits and motion filed March 16, 1999 stating the original wills executed by Allen and Joy Cook in Louisiana are not available, without any demand being made against the estate. Therefore, this Court finds that enforcement of a Contract Not to Revoke is procedurally improper due to no claim being timely filed against the estate.

The Court will now consider whether the lack of an original will brings a presumption that one or both of the testators revoked their will. Absence of an original will in Tennessee raises a presumption that the will has been revoked by one or both of the testators. According to Pritchard on Administration of Estates, 4th Edition, Section 48, pages 68-70, for the establishment of a lost will it is necessary for the Plaintiff to show to the satisfaction of the Court: First, that the testator made and executed a

valid will ..., second, that the will has not been revoked.

When a will can not be found after the death of the testator there is a strong presumption that it was destroyed and revoked by the testator himself, and this presumption stands in the place of positive proof. One who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient to show the persons interested in establishing intestacy have an opportunity to destroy the will. One must go further and show by facts and circumstances that the will was actually lost or destroyed fraudulently against and not in accordance with the wishes and intent of the testator. Pritchard

The Plaintiffs in response to this Court's direction to produce an original will filed an affidavit. (See Exhibit 1, Supra.) No original will has ever been produced. No facts nor circumstances have been raised to prove that the will was destroyed against and not in accordance with the wishes and intentions of the testators. Therefore, as a matter of law, the presumption of revocation applies.

Lastly, this Court will consider whether any in terrorem clause applies. The Last

Will and Testament of Allen D. Cook, probated January 1998, included a clause providing that the filing of any suit by any beneficiaries other than the co-executor or executrix will result in revocation of benefits pursuant to the Last Will and Testament.

Plaintiffs Gelfand and Schweitzer have filed numerous lawsuits contesting the Last Will and Testament of Allen D. Cook. Plaintiffs, along with Ted Donnelly and Susan Crowe, have executed affidavits in support questioning the testamentary capacity of Allen D. Cook at the time of execution of his Last Will and Testament. As a general rule forfeiture provisions in a will are not void as against public policy. Tate v Camp, 245 S.W.2d 839, 842 (Tenn. 1922). However, where a will contest is pursued in good faith and upon probable cause, the forfeiture clause will not be enforced.

This Court finds that Plaintiffs acted with somewhat reasonable justification when they contested Mr. Cook's November 26, 1997 will. Furthermore, the effect of the joint will entered into March 17, 1992 by the parties prior to the November 26, 1997 will was a valid issue which needed to be addressed by the Court. Therefore, this Court finds the in terrorem clause does not apply.

Therefore, for the foregoing reasons this Court orders:

1. Plaintiffs' claim of irrevocability of the Louisiana will dated March 17, 1992 is denied, no proper claim having been filed in probate.

2. The Louisiana will of March 17, 1992 is hereby revoked by the absence of an original and the execution by Mr. Cook of the subsequent November 26, 1997 will.

3. The in terrorem clause does not apply to the facts presented before this Court at the present time.

ENTER pursuant to Rule 58.02.



ROBERT G. LINCOLN, Probate Judge