

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: John Wheeler Campbell, Sr.

Office Address: 201 Poplar Avenue, Suite 6-19, Memphis, Shelby County, Tennessee
(including county) 38103

Office Phone: 901-222-3335 Facsimile: 901-222-3220

Email
Address:

Home Address: [REDACTED] Shelby County, Tennessee 38139
(including county)

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

INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) 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 Microsoft Word 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 Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Criminal Court Judge, Division 6, 30th Judicial District

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

1984 #10750

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, 1984, #10750 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).

Assistant Public Defender, Shelby County Public Defender, July 1984 till October 1985.

Assistant District Attorney General, 30th Judicial District, November 1985 till November 15, 2012.

Criminal Court Judge, 30th Judicial District, Division 6 November 16, 2012 till present.

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

N/A

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 a criminal court judge with general criminal jurisdiction. I preside over jury trials, sign warrants and hear asset forfeiture matters. Division 6 currently has a case load of 1300 cases that include every type of criminal matter from misdemeanors to Murder First Degree. Each year we dispose of about 1200 cases of all types. The case load is about 99% criminal and 1% civil. As part of my duties I make factual findings, make legal rulings and write orders that become the basis of appeal and preside over jury trials.

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.

My legal career has almost exclusively occurred within the confines of the Shelby County Criminal Justice Center, 201 Poplar Avenue. I served as a judicial clerk while still in law school, which gave me insight into the thoughts of the judge as he considers matters before the court. I was appointed as an Assistant Public Defender, after I received my license, and practiced in the Major Violators Court, Division 8 in front of Judge Joseph McCarty. I learned a lot about the legal system during the time I was a public defender.

I was then appointed an Assistant District Attorney on November 1, 1985 and since that time was assigned to a number of duties within the office. I was assigned to the Major Violators Unit in 1993 and handled a number of complicated cases. I prepared the indictments and handled the matters until disposition. In 1995 I was made a Division Leader and assigned to Division 9 of Criminal Court and Judge Joseph Brown. After my assignment in Division 9, I was assigned to Division 10 in front of Judge James Beasley, Jr. and Division 1 in front of Judge Bernie Weinman. I was a division leader until I was promoted to a Special Assistant in

2001. As a Special Assistant I supervised the State side of the Gun Program begun under the federal Project Safe Neighborhoods initiative in conjunction with the United States Attorney. I was appointed a Special Assistant United States Attorney. I also was assigned the duty of handling nuisance cases that were filed against problem properties in Environmental Court in Shelby County. In addition to these duties I also maintained a trial load involving homicide cases. I have, over my career, tried over 100 jury trials including everything up to capital murder. I also handle all capital post-conviction cases for the office. This requires conducting evidentiary hearings on ineffective assistance of counsel and involves litigation concerning experts in areas of mental health, forensics and other specialties. A number of cases that I prosecuted resulted in rulings that are at the cutting edge of the law in those particular areas. I was the legislative liaison with the District Attorney Generals Conference, the Public Safety Coalition, and the General Assembly. This assignment had me in Nashville during the time the General Assembly was in session to testify about bills that the Conference was supporting. As part of this assignment I was appointed to a Summer Study on capital punishment that convened the Summer of 2010.

In January 2011 I was appointed the Deputy District Attorney General in Shelby County. This job was very demanding in that the Deputy is responsible for the day-to-day running of the office for the DA. This included personnel issues, legal questions, public outreach and as a liaison with the courts. Plea negotiations on serious cases are discussed with the Deputy and the Deputy must approve any reductions in offer. This requires the Deputy to mediate between the Assistant DA and the defense attorney in coming to a resolution. In 2012, as Deputy, I assisted Congressman Steve Cohen in efforts to create a Veterans Court in General Sessions Criminal Court. This effort led to the creation of Veterans Court in Division 7 of General Sessions Criminal Court with Judge Bill Anderson presiding.

November 1, 2012 I was appointed to a vacancy on the trial bench in Criminal Court Division 6. I was sworn in on November 16, 2012 and I have served in this capacity up to the present time. As a criminal court judge I have tried 75 jury trials and handled several thousand cases. I have also been appointed by the Chief Justice to be a member of the Judicial Ethics Committee for a four (4) year term from 2015 until 2019 then reappointed for a one (1) year term 2019 through 2020. In 2018 I was elected to a one (1) year term to serve as the Secretary of the Tennessee Judicial Conference. I was also appointed by Governor Haslam to serve on a task force examining criminal justice reform. I have also been appointed to serve as chairman of the Education Committee of the Tennessee Judicial Conference which is responsible for creating CLE programs for the judges during the yearly Judicial Conferences. I was also appointed to serve on the Bench/Bar Committee for the AOC and Tennessee Bar to select topics and speakers for the joint conference in June. I was appointed in 2019 by Governor Lee to his Criminal Justice Re-Investment Task Force to serve as the chairman of the Sentencing Reform sub-committee.

Starting in September 2019, I served as the Administrative Judge for the criminal courts of the 30th Judicial District. During that time, I was responsible for overseeing the procedures for keeping the courts functioning during the COVID pandemic. This included overseeing the upgrade of video capability in the courts and the jail to allow for video arraignments and hearing to be conducted. I also was able to facilitate the creation of video visitation ability for attorneys to visit clients in the jail. I also facilitated the implementation of

video hearing capability between the criminal courts in Shelby County and the Tennessee Department of Corrections to allow for virtual hearings to be conducted with incarcerated inmates. This was necessary due to the pandemic stopping the transfer of inmates to the local jails for court appearances.

In September of 2020 I was elected as Presiding Judge of the District by the circuit and criminal judges and the chancellors.

I mention all this to show that I have experience in many areas of criminal law, judicial ethics and the legislative process.

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

In 1992 I was assigned the James Earl Ray post-conviction case that was filed with much fanfare. During the ensuing 6 years I was involved in several scientific tests on the murder weapon and conducted several hearings that were covered by media from all over the world. This case resulted in several appeals culminating with the removal of the trial judge for bias. As a result of the case, I appeared in documentaries produced by CNN and PBS and The Discovery Channel. I was also interviewed by Hampton Sides when he wrote his book *Hellhound on His Trail* about James Earl Ray and the King assassination.

In 2005, Robert Hood was convicted of Murder in the First Degree and received the death penalty. While the case was on appeal, evidence was found in the property room that undermined the testimony of a critical state's witness. This was brought to my attention and I felt that this evidence, had it been known at the time of trial, would have resulted in a different prosecution decision and verdict. The trial prosecutors and I met with the public defender and told them what we had found and felt that the case should be reversed. Since the matter was on appeal I suggested that the public defender file a petition for Writ of Error *Coram Nobis* for this newly discovered evidence. This would give the trial court jurisdiction to hear the matter. We stipulated that the defendant should get a new trial and this was done. His death sentence was reversed and he entered a plea to Murder in the Second Degree.

State v. Flake, 88 S.W.3d 540 (Tenn. 2002)

Nunley v. State, 552 S.W.3d 800 (Tenn. 2018)

Coe v. State, 17 S.W.3d 193 (Tenn. 2000)

State v. Burns, 979 S.W.2d 276 (Tenn. 1998)

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 a Criminal Court Judge in the 30th Judicial District in Memphis. I was appointed to this position in 2012 and elected to a full 8 year term in August of 2014. As a criminal court judge I preside over jury trials and handle all matters that are assigned to Division VI of Criminal Court.

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.

N/A

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

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.

In 2007 I applied for a trial court vacancy in Criminal Court Division 6 in the 30th District and was selected as one of the persons submitted to the Governor but I was not appointed. In 2012 I applied for a trial court vacancy in Criminal Court Division 6 in the 30th District and was one of the names submitted to the Governor and was appointed as Judge.

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.

Christian Brothers College, September, 1976 – 1977. The History Department was too small and I wanted to have a larger college experience.

Memphis State University, 1997 – 1980 BA in History.

Memphis State University, Cecil C. Humphreys School of Law, 1980 –1983. JD

PERSONAL INFORMATION

15. State your age and date of birth.

63, [REDACTED] 1958

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

63 years

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

63 years

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

Shelby County

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

N/A

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 have not had any formal complaints filed against me by the Board of Professional Responsibility or the Board of Judicial Conduct.

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.

Workman v. Summers, et al. 3:01-0290 (Middle District of Tennessee), Phillip Workman, a death row inmate, filed a §1983 action against the parole board, the Attorney General, the Governor and me alleging that he was not given a fair clemency hearing in his death penalty case. This action was dismissed by Judge Campbell, no relation, October 2001. Workman appealed but I never heard another thing about the case. I checked with the Attorney General's Office in Nashville and they do not show this case is still active.

Gretchen Swift v. John Campbell et al., 159 S.W.3d 565 (Tenn.Ct.App. 2004), attorneys for Phillip Workman file an "open records" request demanding the District Attorney, 30th District turn over his files for inspection. At the time Workman's case was on appeal in the federal courts and he had filed for clemency. The court found that Workman's file was not subject to open records because his case was still pending and was therefore not a "closed" file. The

decision of the Chancery Court denying relief was affirmed by the appellate court.

Fletcher v. City of Memphis et. al., 86-2065-GA (Western District of Tennessee), former public defender client filed a §1983 action against the police department, the witnesses who testified against him at trial and me, his public defender. Case was dismissed in the trial court.

Fletcher v. City of Memphis, et. al., 86-2317-HA (Western District of Tennessee), filed March 3, 1986 by the same plaintiff as above, contained same allegations as above action and was dismissed by the trial court. Supreme Court denied cert. 11-30-1987.

Fletcher v. City of Memphis, et al., 88-6263 (Western District of Tennessee) filed March 22, 1988 by the same plaintiff as above. This complaint was for the same case that I had represented the plaintiff as a public defender in 1985. The case was dismissed in the trial court and I was never served with the complaint.

Fletcher v. Campbell, No. 105699-1 (Chancery Court Shelby County, Tennessee), Same plaintiff as above filed a state complaint in chancery court alleging that I did not represent him properly in his criminal case. This case was dismissed by the Chancellor on October 30, 1995.

Lamar Fletcher v. Shelby County Public Defender et al, No. 98-0694-1, (Chancery Court Shelby County, Tennessee), same plaintiff filed complaint that I had a conflict of interest when I was his public defender. This case was dismissed by the Chancellor April, 2002.

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.

Leo Bearman Jr. Chapter, American Inns of Court. 2009-2012 and 2012-2015, Emeritus, presently. I am also a member of the Diocesan Review Board of the Catholic Diocese of Memphis.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for

the position for which you are applying, state your reasons.

NO

ACHIEVEMENTS

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

Leo Bearman, Sr. Chapter, American Inns of Court, Master 2009-2012, 2012-2015 now a member emeritus.

Tennessee Trial Judges Association.

Memphis Bar Association, Bench/Bar Committee co-chairman 2017

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.

President's Award Tennessee District Attorneys Conference, 2011.

Certificate of Special Congressional Recognition for Service to the Community, May 29, 2012, by the United States Congress from Congressman Steve Cohen.

Certificate of Appreciation from the Director of the Memphis Police Department for leadership in the Project Safe Neighborhoods initiative.

Certificate of Appreciation for the United States Attorney for the Western District of Tennessee for service to the public as state liaison to the Operation Safe Neighborhood program.

AV rating from Martindale-Hubble

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

The Practical Prosecutor, publication of the National College of District Attorneys, 2002 issue, *Cross Examination of the Runaway Witness*

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.

Wiretap Law, Tennessee Judicial Conference,

Wiretap Law, Memphis Bar Association, Family Law Section Fall 2016.

Sentencing Considerations, Tennessee Judicial Conference Spring 2017.
Domestic Violence Resources, Tennessee Judicial Conference Fall 2017.
Judges Toolkit, Forms, Tennessee Judicial Conference Fall 2018.
Domestic Violence and Firearms, Tennessee Judicial Conference Fall 2018.

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

August 2014 Criminal Court Judge Division 6 Shelby County. I was elected to a full 8 year term

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.

Attached are two orders that I have drafted. This is my own work.

ESSAYS/PERSONAL STATEMENTS

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

I have spent my entire legal career, some 39 years, in the criminal justice system. Over that time I have accumulated much experience in both the law and the practical side of criminal trial practice. I feel that this experience will be of great benefit on the Court of Criminal Appeals and I would like to use that experience to address the legal issues that are presented to the Court. I think the legal arguments address would be very interesting and I would like to have a hand in shaping the case law in 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)*

Since a prosecutor and a judge cannot practice law, I have not engaged in pro-bono service. However, I was involved in the creation of a Veteran's Court in Shelby County to assist veterans who have fallen on hard times to get assistance in lieu of a criminal conviction. This Court began on July 15, 2012. I have been involved for many years in community outreach, educating groups about the legal process. For over 20 years, I have taught lawyers and judges CLE on

topics such as trial practice and ethics. In 2016 I volunteered to serve as judge in an experiment on community prosecution in the Frayser area of Memphis. This program has a community linkage component that seeks to have citizens more engaged in the criminal justice system. I regularly speak to the Tennessee Association of Criminal Defense Lawyers, Memphis Chapter, about legal issues and pandemic protocols.

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 am seeking an appointment to the Tennessee Court of Criminal Appeals, Western Section in Jackson, Tennessee. This Court hears criminal appeals from the Circuit and Criminal Courts across the State. There are four judges assigned to the Western Section but they can hear cases from other Grand Divisions of the State. I feel that my experience as a trial attorney as well as a trial judge will bring useful experience to the Court. My experience will help in assessing decisions made by trial judges and their impact on the legal issues being presented.

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)*

Throughout my career I have been involved in educating the bar and the public about the courts and the law. I would continue this involvement on the appellate bench. I feel strongly that judges have a responsibility to educate the public about the legal system and give them a clear picture about what happens in criminal court. This education includes how the public is an integral part of the process. When explaining the law to potential jurors I find that many have misconceptions of how the system works and assume that justice is rigged in some way or another. I try to clear up this misconception and educate the jury member about how things really are and not how they appear on television.

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

The 8 years I have spent as a judge has given me insight in how to manage a docket and manage time. I have made it a priority to make rulings promptly and not have cases under advisement for inordinate amounts of time. I was given advice by an experienced judge when I began my judicial career to not let things sit and I have followed that advice to this day. I feel that this experience will help on the Court of Criminal Appeals where getting opinions out and circulated quickly is a necessity. I also believe in working with other judges as a team. I am always willing to help out a judge when someone is out sick or is needing a case heard by interchange. I have tried a number of cases by interchange when a judge is engaged in another trial and he or she has a backup case that needs to be tried. I would continue this same philosophy on the appellate

bench.

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)*

Of course. In this regard the office of judge and prosecutor overlaps to a great degree. The District Attorney cannot pick and choose what laws will be enforced and what will not. His job, as that of the judge, is to enforce the laws that have been enacted by the General Assembly as a representative of the people of Tennessee. If there are problems we have a responsibility to make them known to the General Assembly and seek changes. However, if the General Assembly, in its collective wisdom, feels that a law is proper we must enforce it unless it violates the Tennessee or federal Constitution. Judges take an oath to follow the laws of the State of Tennessee and that oath does not have an opt-out provision.

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. Gregory Wingo, Vice President First Capital Bank, [REDACTED] Germantown, TN 38137, [REDACTED]
B. Terry Harris, Federal Express, [REDACTED] Memphis, TN 38125 [REDACTED]
D. Stephen Jones, Assistant District Attorney General, [REDACTED] Memphis, TN 38103, [REDACTED]
C. Jamie Woodson, Education Policy Consultant, [REDACTED]
E. Mr. Art Quinn, Attorney at Law, [REDACTED] Memphis, TN 38103, [REDACTED]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Criminal Appeals, Western Section of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: Oct. 1, 2021.


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.

John W. Campbell
Type or Print Name

John W. Campbell
Signature

10/6/21
Date

#10750
BPR #

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

WRITING SAMPLES

**IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
THIRTIETH JUDICIAL CIRCUIT AT MEMPHIS
DIVISION VI**

STATE OF TENNESSEE,

VS.

No. 17-04163

NEHEMIAH RIMMER,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS INDICTMENT

Before the Court is a Motion filed by the defendant asking the Court to set aside an Order of the Juvenile Court transferring the defendant to criminal court and to dismiss the pending indictment for Rape of a Child. The defendant is charged with Rape of a Child involving his sister when she was 12 years old and the defendant was 13 years old. The alleged incident occurred in 2000 and the charges were not brought until 2015. At the time the charges were brought the defendant had already turned 18 and was already charged in criminal court with other indictments. Since these allegations stem from a time when the defendant was a juvenile the charges were brought in Juvenile Court and the defendant had a transfer hearing pursuant to T.C.A. §37-1-134. After the matter was heard the juvenile court judge found that transfer was proper and the defendant's case was transferred to criminal court for prosecution.

It is important to note that criminal court has jurisdiction over a juvenile even if there is no valid transfer order. The Statute governing juvenile transfers, T.C.A. §37-1-134, does not

control the jurisdiction of the criminal court but instead creates additional procedures for juveniles. In essence, Juvenile Court and Criminal Court have concurrent jurisdiction over juveniles of a certain age for certain crimes. The Tennessee Supreme Court in *Sawyers v. State*, 814 S.W.2d 725 (Tenn. 1991) held:

By contrast, the criminal court in this case clearly had authority to try Sawyers, had the proper transfer procedure been followed. Hence, the absence of a transfer order cannot be said to affect the court's subject matter jurisdiction, which, in a real sense, is concurrent with that of the juvenile court as to certain offenses committed by children falling within a specified age span. *See Model Penal Code § 4.10* and Revised Comment (1985) (relationship of two courts with respect to persons whose age makes them eligible for trial as adults described as "a system of concurrent jurisdiction"). The only requirement, as noted above, is that such proceedings against a juvenile must originate in juvenile court. T.C.A. § 37-1-103.

Thus, it is inaccurate to describe the problem in this case as one of subject matter jurisdiction. Other courts, faced with similar fact situations, have analyzed the age of a juvenile defendant not as an element of subject matter jurisdiction, but as a fact entitling him or her to certain procedural rights. *See, e.g., Commonwealth v. Sims*, 379 Pa.Super. 252, 549 A.2d 1280 (1980), and cases cited therein. We find their reasoning to be consistent with Tennessee authority and wholly persuasive, at least as applied to those juveniles eligible by statute for transfer to criminal or circuit court.¹

At the time that the alleged crime occurred, the law allowed for persons under 16 years of age to be transferred to criminal court if they were accused of certain offenses.

The statute stated:

§ 37-1-134. Transfers to criminal courts

(a) After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of

¹ *Sawyers v. State*, 814 S.W.2d at page 729.

competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

(1) The child was sixteen (16) years or more of age at the time of the alleged conduct, or the child was less than sixteen (16) years of age if such child was charged with the offense of first degree murder, second degree murder, rape, aggravated rape, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping or an attempt to commit any such offenses. The district attorney general may not seek, nor may any child transferred under the provisions of this section receive, a sentence of death for the offense for which the child was transferred;

When the defendant was transferred to criminal court in 2017 T.C.A §37-1-134 had been amended and stated:

(a) After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

(1) The child was sixteen (16) years or more of age at the time of the alleged conduct, or the child was less than sixteen (16) years of age if such child was charged with the offense of first degree murder, second degree murder, rape, aggravated rape, **rape of a child**, aggravated rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping, especially aggravated kidnapping, commission of an act of terrorism, or an attempt to commit any such offenses. The district attorney general may not seek, nor may any child transferred under this section receive, a sentence of death for the offense for which the child was transferred; (Emphasis added)

The General Assembly amended the statute in 2005 to include Rape of a Child as a transferrable offense for a child under 16 years of age.

In 2018 T.C.A. §37-1-134 was amended again and now says:

a) After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

(1)(A) The child was:

(i) Less than fourteen (14) years of age at the time of the alleged conduct and charged with first degree murder or second degree murder or attempted first or second degree murder;

(ii) Fourteen (14) years of age or more but less than seventeen (17) years of age at the time of the alleged conduct and charged with the offense of first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, aggravated burglary, especially aggravated burglary, kidnapping, aggravated kidnapping, especially aggravated kidnapping, commission of an act of terrorism, carjacking, or an attempt to commit any such offenses;

(iii) Sixteen (16) years of age or more at the time of the alleged conduct and charged with the offense of robbery or attempt to commit robbery; or

(iv) Seventeen (17) years of age or more at the time of the alleged conduct;

The defendant argues that since the General Assembly has raised the minimum age for transfer to criminal court to 14 years old for the offense of Rape of a Child then this defendant should get the benefit of that change and have his transfer voided and his indictment dismissed.

Based on a review of the record of this cause and brief of counsel, this Court finds that the defendant's argument is not well taken. The fact that the General Assembly changed a procedural rule after the juvenile court had already taken action on the defendant would not give rise to voiding an otherwise final order from the juvenile court. Unlike the example given by the defense that this situation is analogous to when a

criminal statute is amended and the new statute creates a lesser punishment, the defendant is not entitled to the benefit of a change in procedure to set aside a transfer order.

However, the Court is concerned with another aspect of this case that was not raised by either party. At the time of the alleged event, the defendant was not subject to transfer because Rape of a Child was not an enumerated offense in T.C.A.

§37-1-134(a)(1). Rape of a Child was a criminal offense in the Tennessee Code Annotated at the time of the alleged offense occurred but was not made a transferrable offense until 2005.

The Court can find no case that directly addresses the issue presented here but has found cases that are analogous with the case at bar. In *Sawyers*, the Supreme Court found that criminal court jurisdiction "...is concurrent with that of the juvenile court as to certain offenses committed by children falling within a specified age span".² In *State v. Alley*, 594 S.W.2d 831(Tenn. 1980) the Tennessee Supreme Court considered whether a child turned 15 on the day of or day before his birthday. The significance of this date was that a child could not be transferred to criminal court for murder first degree unless that child was 15 years of age or older. The Court found that the child had not turned 15 and therefore the criminal court did not have jurisdiction to try him for the charge. The Court ruled:

It results that defendant was not "fifteen (15) or more years of age" at the time of the murder. The transfer was erroneous and improper and the circuit court did not have subject matter jurisdiction.³

This holding was reinforced by the Court in *Sawyer*, when the Court stated:

² *Sawyers v. State*, 849 S.W.2d at page 729.

³ *State v. Alley*, 594 S.W.2d at page 383.

In citing *Alley* for the proposition that an error in juvenile transfer proceedings automatically deprives the criminal court of subject matter jurisdiction, the petitioner overlooks a crucial distinction between the two cases. Alley had been convicted in criminal court for an offense that occurred the day before his fifteenth birthday. The applicable statute made juveniles eligible for transfer to criminal court for offenses committed at “fifteen (15) or more years of age.” The issue was whether Alley attained this age only upon his actual birthday, or, as the lower courts held by using common law rules of computation, on the day preceding his birthday. This Court looked to legislative intent and held that Alley did not become of age for purposes of the transfer statute until the day of his fifteenth birthday. The Court further held that because the offense occurred before that date, the criminal court had no jurisdiction to try Alley, and that his conviction was therefore invalid. Unlike this case, in *Alley* there was no allegation that the juvenile defendant had been deprived of a transfer hearing or provided with a deficient hearing. The dispositive point there was that no amount of proper procedure could bestow jurisdiction where none existed by statute. Because the criminal court that tried Alley clearly lacked any semblance of subject matter jurisdiction in that case, the resulting conviction could only be found to be void and set aside.⁴

So, based on *Alley*, and *Sawyers*, criminal court has concurrent jurisdiction with juvenile court for juveniles who have attained a certain age and are charged with certain offenses. If the juvenile has not attained a certain age and/or is not charged with certain offenses than jurisdiction rests exclusively with the juvenile court. The criminal court would not have subject matter jurisdiction to rule on the case.

The question before this Court is what law controls. Does the Court look to the transfer statute that existed at the time of the offense or at the time of transfer. In this case the Court must look to the law as it applies to the ex post facto application of a procedural change to the transfer statute.

⁴ *Sawyers v. State*, 814 S.W.2d at page 728

The Tennessee Supreme Court has ruled that the Tennessee Constitution's provision against ex post facto laws is not broader than that found in the United States Constitution. In *State v. Pruitt*, 510 S.W. 3d 398 (Tenn. 2016), the Court held:

There is simply nothing in the text of our constitution nor in our history that supports the *Miller* Court's holding that the meaning of "ex post facto" in Tennessee is more expansive than the definition provided by Justice Chase in 1798. Therefore, we conclude that the holding of *Miller* must be overruled to the extent that it expanded the meaning of the Tennessee ex post facto clause beyond the meaning of the federal ex post facto clause. See *In re Estate of McFarland*, 167 S.W.3d 299, 306 (Tenn. 2005) ("Generally, well-settled rules of law will be overturned only when there is obvious error or unreasonableness in the precedent"); see also *State v. McCormick*, 494 S.W.3d 673, 683–85 (Tenn. 2016) (discussing the role of stare decisis). In so doing, we hold that the ex post facto clause of the Tennessee Constitution has the same definition and scope as the federal clause.⁵

In *Pruitt*, the Court outlined the federal understanding of ex post facto as:

The most significant case to interpret the ex post facto clause of the federal constitution was *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). Justice Chase explained in *Calder* that the prohibition against ex post facto laws was intended to prevent such "acts of violence and injustice" as had been committed by the British Parliament. *Id.* at 389.¹⁴ Justice Chase then described four categories of laws that would be included in the constitutional prohibition against ex post facto laws:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

⁵ *State v. Pruitt*, 510 S.W. 3d at page 416.

Id. at 390. These four categories have been the mainstay of federal case law in this area ever since, although there have been expansions, contractions, and refinements in the following centuries.⁶

The Court also found that ex post facto prohibition did not just effect statutes but also could apply to procedural rules. The Court stated:

The first question, therefore, is whether the application of ERRA in this case was retroactive. “The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively.” *Johnson v. United States*, 529 U.S. 694, 701, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000). “A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’ ” *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (quoting *Weaver*, 450 U.S. at 31, 101 S.Ct. 960), *abrogated in part by California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n.3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). However, “intervening procedural changes” may be upheld “even if application of the new rule operated to a defendant’s disadvantage in the particular case.” *Landgraf v. USI Film Prod.*, 511 U.S. 244, 275 n.28, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Nonetheless, merely labeling a law “procedural” does not prevent review under the ex post facto clause, *see Collins*, 497 U.S. at 46, 110 S.Ct. 2715, because “it is the effect, not the form, of the law that determines whether it is *ex post facto*,” *Weaver*, 450 U.S. at 31, 101 S.Ct. 960. “The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.” *Cummings v. Missouri*, 71 U.S. 277, 4 Wall. 277, 325, 18 L.Ed. 356 (1866). As the *Collins* Court wrote, “[T]he prohibition which may not be evaded is the one defined by the *Calder* categories.” *Collins*, 497 U.S. at 46, 110 S.Ct. 2715

Applying the *Calder* categories to this case it is clear that the retroactive application of the 2017 version of T.C.A. §37-1-134(a)(1) to an offense that allegedly occurred in the year 2000 would violate category (2) and (3) of *Calder*. Category 2 would be violated because at the time of the offense the defendant was only subject to juvenile court jurisdiction and only liable for a delinquent act and not a class "A" felony

⁶ *State v. Pruitt*, 510 S.W. 3d at page 411.

carrying between 15 and 25 years in the state penitentiary. Category 3 is violated because the change in the law increases the punishment from possible detention until age 18 to incarceration at the Department of Correction for a term of incarceration between 15 and 25 years.

Therefore, based on the above, this Court finds that the retroactive application of T.C.A. §37-1-134(a)(1) from the year 2017 to an offense that allegedly occurred in the year 2000 violated both the federal and state constitutional provisions against ex post facto laws. Because it appears that at the time of the alleged offense this defendant would never have been transferred to criminal court pursuant to T.C.A. §37-1-134(a)(1), this Court lacks subject matter jurisdiction and the indictment for Rape of a Child must be dismissed.

IT IS THEREFORE ORDERED, ADJUDGE AND DECREED: that the defendant's indictment for Rape of a Child under indictment number 17-04163 is hereby **DISMISSED.**

ENTERED this _____ day of _____ 20_____.

JOHN W. CAMPBELL
Judge of Division VI

**IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE
DIVISION VI**

STATE OF TENNESSEE,
Petitioner

-vs-

NO. P-40835

**CERTAIN REAL PROPERTY
OWNED BY YOSVANI GONZALES
LOCATED AT 7900 WOODCHASE DRIVE
CORDOVA, TENNESSEE,**
Respondent

**ORDER GRANTING MOTION TO DISMISS
PETITION TO SEIZE PROPERTY**

This cause came to be heard upon the issuance of a Forfeiture Warrant on August 25, 2014 seeking the forfeiture of real property, to wit, a dwelling identified as 7900 Woodchase Drive, Cordova, Tennessee; a Complaint for Forfeiture *In Rem* and Notice of Lien *Lis Pendens*, filed by the State on December 18, 2014; an Answer to Complaint For Forfeiture *In Rem* filed by the children and wife of Yosvani Gonzales, Yanleni Gonzales, *et.al.*, on January 26, 2015 seeking dismissal of the forfeiture action; a Motion to Dismiss filed by Yosvani Gonzales on January 15, 2015; a Response by the State of Tennessee to the Motion to Dismiss filed on April 16, 2015; a stipulation of fact submitted by the State of Tennessee and Yosvani Gonzales on May 19, 2016; and upon the entire record of this cause.

GROUNDS ALLEGED BY YOSVANI GONZALES/YANELI GONZALES *ET. AL.*

Yosvani Gonzales and Yaneli Gonzales raise four grounds in their Motion that this action by the State should be dismissed. The first ground alleges that Suntrust Mortgage, Inc. (Suntrust), the holder of the mortgage on the property has not been joined as an "interest holder" under T.C.A. §39-11-702(2). The respondent argues that since Suntrust is not a criminal defendant in the underlying action, Suntrust must be joined in this action and that has not happened. The respondent argues that since Suntrust is not a criminal defendant, this Court lacks jurisdiction to consider a claim by Suntrust. The second ground raised by respondent is that the property at issue is not subject to forfeiture per T.C.A. §39-11-704(a)(1) in that the property was acquired prior to the alleged criminal activity. The third ground raised by the respondent is that he has not been convicted of the underlying criminal charge pursuant to T.C.A. §§ 39-11-704(b) and 39-11-703(b). The fourth ground raised by respondent is that the State sought the forfeiture of the property through a separate forfeiture complaint and not through a count in his indictment pursuant to T.C.A. §39-11-708(d). An additional ground alleged by Yaneli Gonzales is that there was a misrepresentation by the police in the original complaint that there was not a substantial mortgage on the property.

The State responded to these allegations by asserting that:

1. Suntrust was not a participant to the criminal activity and the State was not seeking forfeiture of the assets of Suntrust. The State asserted that any interest acquired from a forfeiture would be prioritized behind the interest of Suntrust so joining Suntrust into the litigation was unnecessary.

2. Even though the respondent acquired the property prior to the criminal activity alleged in the complaint, the State alleges that proceeds from the criminal activity have been used to pay the mortgage of the property and therefore, the property is subject to forfeiture.

3. The respondent has been convicted of the underlying criminal charges alleged in the complaint and petition. The respondent has conceded this point.

4. The State asserts that T.C.A. §39-11-708 allows the State to proceed in a separate civil forfeiture action against the subject property under part (a) or it can proceed under part (d) as a count in an indictment.

FINDINGS OF THE COURT

Before the Court is a Petition on the part of the State to obtain an order granting the forfeiture of certain real property located in the 30th Judicial District to wit, 7900 Woodchase Drive, Cordova, Tennessee. The State alleges that the owner of said property, Yosvani Gonzales, was engaged in criminal activity allowing the forfeiture of the property under T.C.A. §39-11-701 *et seq.*

The Court enters into this inquiry with the understanding that forfeiture of property due to alleged criminal activity is not favored. The Tennessee Supreme Court recently stated in *State v. Sprunger*, 458 S.W.3d 482 (Tenn. 2015).

In Tennessee, while forfeiture is permissible, it is not favored: “The public policy of this state as expressed in the state constitution opposes forfeitures for convictions of crimes unless specifically provided for.” *Hays v. Montague*, 860 S.W.2d 403, 408 (Tenn.Ct.App.1993) (citing *Whisnant v. Byrd*, 525 S.W.2d 152, 153 (Tenn.1975), *overruled on other grounds by Logan v. Winstead*, 23 S.W.3d 297 (Tenn.2000); *Fields v. Met. Life Ins. Co.*, 249 S.W. 798, 798 (Tenn.1923)). “Forfeitures are not favored by the law.” *Redd*, 895 S.W.2d at 335; *see also Wells*, 198 S.W.2d at 643

("Forfeitures are not favored."). Consequently, "statutes authorizing forfeitures are to be strictly construed." *Watson*, 361 S.W.3d at 555 (citing *Redd*, 895 S.W.2d at 335); *see also Wells*, 198 S.W.2d at 643 ("Forfeiture statutes are to be strictly construed.")¹

Property subject to forfeiture is found in T.C.A. §39-11-703 which states:

§ 39-11-703. Criminal proceeds subject to forfeiture

(a) Any property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title, and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.

(b) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a violation of the following laws shall be subject to judicial forfeiture:

(1) A conviction for a violation of § 39-17-417(i) or (j) or the commission of three (3) or more acts occurring on three (3) or more separate days within a sixty-day period, and each act results in a felony conviction under chapter 17, part 4 of this title; or

(2) The commission of three (3) or more acts occurring on three (3) or more separate days within a sixty-day period, and each act results in a conviction for promoting prostitution under chapter 13, part 5 of this title.

(c) The following items are subject to judicial forfeiture as provided in this part:

(1) Conveyances, including aircraft, motor vehicles, and other vessels when used or intended to be used in connection with a violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;

(2) Books, records, telecommunication equipment, or computers when used or intended to be used in connection with a violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;

(3) Money or weapons when used or intended to be used in connection with a violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;

(4) Real property when used or intended to be used in connection with a violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;

(5) Everything of value furnished, or intended to be furnished, in exchange for an act in violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or

¹ *State v. Sprunger*, 485 S.W.3d at page 494

after July 1, 2011, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate the violation;

(6) Any property, real or personal, directly or indirectly acquired by or received in violation of such violation or as an inducement to violate such statutes, or any property traceable to the proceeds from the violation; and

(7) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a violation of §§ 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011.

(d) In any in rem forfeiture action in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution, or other like fungible property:

(1) It shall not be necessary for the state to identify the specific property involved in the offense that is the basis for the forfeiture action; and

(2) It shall not be a defense that the property involved in such an action has been removed and replaced by identical property.

Based on T.C.A. §39-11-703, the property at issue is subject to forfeiture if the State meets its burden. The Court notes that there are restrictions on what property can be forfeited.

T.C.A. §39-11-704(a)(1) states:

(a) No interest in any property described in § 39-11-703(a) shall be subject to forfeiture when one (1) of the following conditions is established:

(1) If the owner or interest holder acquired the property before the conduct alleged to give rise to its forfeiture;

In this case, per the stipulation entered into evidence by both the State and the respondent, the Court finds that the subject property was purchased in 2006. The criminal investigation of the respondent began in 2012 and the charges brought against the respondent involved the years 2012- 2014. The Court finds that the property in question was purchased prior to the alleged criminal activity. The State argues that the respondent had no visible means of legitimate income during the years 2012-2014 and therefore, the mortgage and upkeep of the property was being

paid for with criminal proceeds. Though this seems logical, does this use of illegal funds create an exception to the restriction found in T.C.A. §39-11-704(a)(1) that would allow forfeiture of previously purchased real property when illegal proceeds are used to pay a mortgage years after purchase? The Court in *Sprunger* made it very clear that the Court should examine these case with strict scrutiny of the language and requirements of the law. The Court stated:

The State's "exercise of police powers" in effecting the forfeiture of citizens' property "requires black letter compliance to procedural rules intended to safeguard the due process rights of citizens." *Redd*, 895 S.W.2d at 335. "Statutory authority empowering the State to seize and forfeit private property inherently carries with it an obligation to insure that the power is not abused." *Id.* "[T]he burden is on the State to satisfy due process." *Toyota Motor Credit Corp.*, 2003 WL 22519810, at *6 (citing *Redd*, 895 S.W.2d at 335; *Greene v. Lindsey*, 456 U.S. 444, 449, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982)).²

The Court further stated:

As noted above: "Statutes authorizing forfeitures are to be strictly construed." *Redd*, 895 S.W.2d at 335; *see also Garrett*, 717 S.W.2d at 291; *Wells*, 198 S.W.2d at 643. This directive applies to both the substantive and the procedural provisions of the forfeiture statutes.²⁷ Strict construction of the procedural as well as the substantive provisions aligns with the Tennessee Constitution's disfavor for forfeiture and serves "to safeguard the due process rights of citizens." *Redd*, 895 S.W.2d at 335. " 'Forfeitures ... should be enforced only when [they are] within both [the] letter and spirit of the law.' " *Wells*, 198 S.W.2d at 643 (quoting *United States v. One 1936 Model Ford V-8*, 307 U.S. 219, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939)).³

This Court finds that the argument of the State to interpret the plain language of T.C.A. §39-11-704(a)(1) to allow the forfeiture of property that had been purchased prior to the alleged criminal activity would violate the strict construction requirement as held in *Sprunger*. This finding is reinforced when the enabling legislation is examined. The General Assembly stated

² *State v. Sprunger*, 485 S.W.3d at page 499.

what the intent of this legislation was when it allowed for the forfeiture of real property. The legislative intent specified in Public Chapter 979 is:

SECTION 1. Legislative Intent.

(a). The General Assembly hereby finds and declares that an effective means of deterring criminal acts committed for financial gain is through the forfeiture of profits and proceeds acquired and accumulated as a result of such criminal activities.

(b). It is the intent of the General assembly to provide the necessary tools to law enforcement agencies and district attorneys general to punish and deter the criminal activities of professional criminals and organized crime through the unitary enforcement of effective forfeiture and penal laws. It is the intent of the General Assembly, consistent with due process of law, that all property acquired and accumulated as a result of criminal offenses be forfeited to the State of Tennessee and that the proceeds be used to fund further law enforcement efforts in this State.

(c). It is further the intent of the General Assembly to protect bona fide interest holders and innocent owners of property under this Chapter. It is the intent of the General Assembly to provide for the forfeiture of illegal profits without unduly interfering with commercially protected interests.

Here the General Assembly is targeting property that has been "acquired and accumulated as a result of such criminal activities". Property purchased prior to the alleged criminal activity would not fall under property that is "acquired and accumulated" by criminal activity. Based on the plain meaning of the Statute and the stipulated facts, this Court finds that the property in question is not subject to forfeiture.

Furthermore, T.C.A. §39-11-708(e) speaks to the burden on the State to show that the timing of the acquisition of real property is at the time of or after the criminal activity began.

Section (e) states:

(e) If the forfeiture count includes property described in § 39-11-703(a), a rebuttable presumption exists that the property of any person is subject to forfeiture, if the state establishes all of the following:

(1) The conduct giving rise to forfeiture occurred;

3 *State v. Sprunger*, 485 S.W.3d at page 500.

- (2) The person acquired the property during the period of the conduct giving rise to forfeiture or within a reasonable time after that period; and
- (3) There is no likely source for the property other than the conduct giving rise to forfeiture.


Again, the plain wording of the statute indicates that the real property had to be acquired during the time of the criminal activity or within a reasonable period of time after that period. Since the stipulation states that the property was purchased 6 years before the activity alleged in the indictment, this Court finds that it is not subject to forfeiture. The respondent's Motion to Dismiss is granted as to this issue.

The Court also finds that Suntrust should have been joined in this litigation due to the substantial financial interest it has in the property as mortgage holder. Though the State argues that it is not seeking forfeiture of Suntrust's financial stake and would be subservient to Suntrust's position, the Court finds that this is not so. If the property was forfeited to the State and the State undertook a sale of the property, would the proceeds of the sale cover the financial stake of Suntrust? If the property is sold for less than the mortgage price, Suntrust would suffer a financial loss. As an innocent party, this is unacceptable and would violate the intent of the statute to make sure that it would not "unduly interfere with commercially protected interests". Therefore, the Court holds that the failure to join Suntrust Bank as a party to the forfeiture action violates the statute and the petition must be dismissed.

Based on the above, the Court finds respondent's Motion to Dismiss is well taken and is hereby **Granted**.

IT IS SO ORDERED.

Entered this the 2nd day of June 2016.



JOHN W. CAMPBELL
Judge of Division VI
Criminal Court of Tennessee
30th Judicial District