

The Governor's Council for Judicial Appointments
State of Tennessee
Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 41 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 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

1) Self-employed trial lawyer in full-time private solo practice as the Law Office of D. Marty Lasley.
2) Judge of the Soddy-Daisy City Court on August 2, 2012. Our Court has concurrent General Sessions Criminal Court jurisdiction and is a part-time position. I was elected to fill an unexpired term that ended on August 31, 2014, in a race of ten candidates. On August 7, 2014, I was unopposed and won a full eight-year term that expires on August 31, 2022.

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

I was licensed to practice law in Tennessee in October 1987. My TNBPR# is 12696.

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.

I am licensed to practice law in the State of Tennessee and was admitted by the Tennessee Supreme Court on October 28, 1987. My license is currently active and has been continuously so since first admitted. My TNBPR# is 12696. I am also currently admitted by Pro Hac Vice Motions to practice on two out-of-state cases: 1) a civil case in the Circuit Court of Jefferson County, Alabama with a jury trial is set to start on April 13, 2015; and 2) handling a Motion for New Trial and Appeal in a Superior Court of Catoosa County, Georgia criminal matter.

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).

2012-present	<i>Soddy-Daisy City Court Judge.</i> (Concurrent General Sessions Criminal Court jurisdiction and a part-time position).
2009-present	<i>Private Practice.</i> Civil and Criminal matters in all Courts.
2007-2009	<i>Hamilton County Judicial Commissioner.</i> Appointed by the Hamilton County Board of Commissioners for two one-year terms as a Magistrate. Set bonds for those arrested for crimes and signed arrest and search warrants. The position was full-time. From November 1, 2007 until December 31, 2008 I had two full-time jobs.
2003-2008	<i>Member of the law firm Nelson, McMahan & Noblett and Special Counsel to the City of Chattanooga.</i> Represented the City of Chattanooga in state and federal litigation and personnel matters, prosecuted cases in City Court, reviewed and drafted contracts and advised various City Boards and agencies. Private practice areas included civil and criminal matters in all state and federal courts such as: Employment Law, Criminal Law, Contracts, Personal Injury (Torts), Property Law, Wills and Estates, Business Law, Domestic Law and Juvenile Law.
1996-2002	<i>Administrative Assistant to Claude Ramsey, Hamilton County Mayor (Executive).</i> Provided counsel and research on complex political, legal, legislative and administrative issues; advised on revisions to County Employee Handbook and personnel matters; spoke before thousands and dozens; met with paupers and multimillionaires; provided media contact; solved problems by working with government officials and private sector leaders. Often worked closely with County Attorney, lawyers and office staff. Appointed liaison for the County on the Hamilton County Nursing Home matters, including personnel issues, from 1997-2000. Oversaw and/or negotiated and drafted the dozens and dozens of easements for the construction of the Tennessee Riverwalk.
1988-1995	<i>The Law Office of D. Marty Lasley.</i> At age 26, began successful solo law practice in Soddy-Daisy with emphasis upon criminal and civil litigation in state and federal courts: federal drug cases, federal grand jury investigations, bank robbery, telemarketing scams, murder, DUI, embezzlement, employment discrimination, medical malpractice, wrongful death, torts, real estate, contracts and domestic cases.
May 1987- Oct. 1988	<i>Associate, Brown, Dobson, Burnette & Kesler.</i> Garden-variety associate: employment law litigation and civil, business and commercial litigation.
1984-87	I helped put myself through law school (my wife was working full-time, so she is mostly responsible for putting me through law school) by clerking for law

	firms and solo practices and doing research and writing memos or briefs for extended times (about 20 hours per week) during the school year.
Summer 86	Summer clerkship with Gullett Sanford Robinson & Martin in Nashville.
Summer 85	Summer clerkship with the Chicago Title Company in Nashville.
1978-84	Prior to law school, while in grad school I worked as a waiter at various restaurants in the Chicago area, and while in college and high school I did a wide variety of jobs largely including farm work such as bailing hay, cutting cabbage and picking various vegetables.
1982	Worked as a waiter in a French restaurant from May-August at the World's Fair in Knoxville.
1980	While a student at Carson-Newman College, I was selected as an intern for 1 st District Congressman James H. Quillen from September through December 1980, and received a semester of credit for the experience.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

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

I am a trial lawyer engaged in the general practice of law in all municipal, county, state and federal courts. I estimate that criminal law matters make up about 60% of my law practice. Domestic, juvenile, child support, civil litigation and personal injury matters make up about 35% of my practice. Corporate work/business law, probating estates, filing conservatorships and preparing legal documents such as wills, deeds, power of attorney, contracts and leases generally make up the rest of my practice.

Approximately 95% of my time is spent on litigation matters involving the knowledge of various Rules of Procedure and the Rules of Evidence.

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.

1. The Early Years, 1987-1988.

2. My first post-law school graduation job was as an associate with a great Chattanooga law firm, Brown, Dobson, Burnette & Kesler. I graduated on a Saturday and my first day was Monday two days later. I loved it. I still see Scott Brown on a regular basis. Working with him added Bankruptcy to my repertoire and Harry Burnette taught me employment law and that to win you needed to know the law inside out because federal court has no mercy.

3. About a year plus into my stint there, I grew too impatient to get into the courtroom (how naïve it sounds now), and left to hang my own shingle. Simultaneously the dumbest and best thing I ever did for my career. (We parted very amicably and feel free to contact any of them). I had begun to get on the various court-appointed lists, but when I left there I had only 4 or 5 files—all pro bono cases from my work with the Christian Legal Society/Inner Cities Ministries Pro Bono Project!

4. The Solo Years, 1990-1995.

5. I grew up in Soddy-Daisy, and lived in Soddy-Daisy, so I opened my first office in Soddy-Daisy. I did anything and everything that walked in the door. I discovered that Soddy-Daisy was an excellent base to pick up Rhea County, Bledsoe County, Sequatchie County, Marion County and Meigs County cases. (Many people in those small counties thought all the lawyers were in cahoots with each other and came looking for an outsider). This is where I learned that those lofty ideas I had of our justice system are not shared by anyone *who perceives the system to be rigged or partial*. I took to heart what I learned about judging--the concept of perceived fairness/unfairness is the reality.

Meanwhile, I was trying every kind of case imaginable—from a “bad poodle haircut case” to a felony murder case, to Title VII cases in federal court and criminal cases in federal court (some were the first multi-defendant meth cases in the state). During this period, I handled every major state criminal charge except a death penalty case.

During this time I also handled a number of TVA Merit System Protection Board cases.

6. The Public Service Years, 1996-2002.

7. During my early years, I was also heavily involved in local Republican politics. I ran unsuccessfully as the Republican candidate for Public Defender in 1990, at the requests of Party Chairmen Hal North and Zach Wamp. In 1992, I was selected as the Hamilton County Republican Precinct Chairman in charge of getting every precinct organized. As a result of some legal and political successes and a friend who worked with Claude Ramsey I was interviewed to be the Executive Administrative Assistant to the newly elected Hamilton County Mayor, Claude Ramsey after he won election in August 1994.
8. As the Executive Administrative Assistant to Claude Ramsey, I advised on, and dealt with, a wide-range of legal topics like major contracts, district boundaries, employment law and our nursing home crisis. I also worked with many excellent administrators, staff and elected officials in all branches of Hamilton County government and local municipal governments.
9. Three of my proudest moments while working for Hamilton County were: 1) Keeping the U.S. Justice Department from taking over the Hamilton County Nursing Home via a Consent Decree. I was given the task of simultaneously overseeing the immediate improvement of the quality of care at the Nursing Home (which was not then a part of County Government) and to fend off the United States attorneys in order to avoid a showdown in federal court. I immediately immersed myself into every aspect of Nursing Home law (including Medicare and Medicaid law). I was privileged to play a role in the legal dimension of turning the institution around so that the Nursing Home could be shown to be a high quality facility that made it a desirable purchase for a reputable company.
10. My second proud moment was the successful acquisition of all the miles of easements necessary to construct the Tennessee Riverwalk, which is enjoyed by our citizens to this day.
11. The third proud moment for me was successfully making the legal argument for and filing for the return of over \$100,000.00 of County monies unlawfully collected by the Tennessee Department of Revenue.

12. The Assistant Chattanooga City Attorney Years, 2002-2008.

13. During this period, I tried Governmental Tort Liability Act cases in state courts, defending the City from 1983 Civil Rights Act cases in federal court. I also continued to handle federal criminal matters. I was also an associate for the law firm of Nelson, McMahan & Noblett and handled my own clients and their legal matters. Randy Nelson was the Chattanooga City Attorney and we handled city work and our own cases.
14. In both my time as the Administrative Assistant to the Hamilton County Mayor and as an Assistant Chattanooga City Attorney, often requests were made for advisory opinions

concerning the legality and/or constitutionality of certain governmental actions and I would write official memos/opinions for the County or City to follow. On several occasions, I sat as designee of the County Mayor or City Attorney during County Board meetings, City Board Meetings and City Council meetings to address legal concerns under consideration. During that time I was also frequently called upon to give oral and/or written legal guidance to various departments of local government in the course of their business.

15. The Hamilton County Magistrate Years, 2007-2009.

16. From November 1, 2007 until about November 4, 2009, I served as a Hamilton County Judicial Commissioner. I was appointed twice by the Hamilton County Board of Commissioners to one-year terms as a Magistrate.

17. My duties included setting bonds for those arrested for crimes and hearing sufficient proof from law enforcement officers for the purpose of signing arrest and search warrants. A Magistrate is considered a Judicial Officer by the Tennessee Supreme Court and is guided by the Tennessee Judicial Code of Ethics.

18. It was during this time that I became intimately familiar with the Tennessee Release From Custody and Bail Reform Act of 1978 and the grounds for approving a search warrant. Setting bonds, and signing arrest warrants and search warrants was a nightly job.

19. The Private Practice Years, 2009-present.

20. I presently handle wrongful death cases, personal injury cases, criminal matters in state and federal court, domestic matters, juvenile court cases, child support cases, property law matters, wills & estates, immigration issues and various civil litigation.

21. The diversity is incredible. For example, in 2013 I worked for a six figure settlement in an auto accident case for my client and later that year represented him in a federal plea on a firearm case. I also won a libel Summary Judgment Motion for a defendant in Marion County, Alabama and won a 1983/wrongful death Summary Judgment Motion for a Defendant in Eastern District Court, Southern Division. Later in 2014, I settled a wrongful death case.

22. I presently have a DUI case scheduled for a jury trial on Tuesday March 3 in Hamilton County Criminal Court and a libel/slander jury trial set to be tried (and it will be) in Birmingham, Alabama. I'm in court on some matter (or matters) almost every day.

23. The Soddy-Daisy Judge Years, 2012-present.

24. Since my election to the position of Judge on August 2, 2012, I've handled over 4,000 criminal and traffic matters. This includes signing search warrants, signing criminal complaints, setting bonds, accepting and approving plea agreements, handling preliminary hearings and conducting several bench trials.

25. Because we only have court one day a week, on Tuesday evenings, and the last Tuesday of every month is designated for traffic matters, I often go down to the Hamilton County Jail during the week to make sure we abide by the 10 Day Rule.
26. Further, I routinely go down to the police station at any hour of the day or night to sign search warrants, arrest warrants, sign no contact orders on domestic assault cases or set bonds.
27. The previous Soddy-Daisy Judge was appointed to a Hamilton County General Sessions Court Judge position so for many months various special judges sat for our dockets, and then for a few months the City Commission appointed a single special judge to hear all cases until a new Judge was elected. The caseload really backed up during this entire period. My first order of business was to get the court caught up, and we did. My first mentor, Scott Brown used to say, "A good lawyer is not known by how many cases he can open, but by how many he can close." That has always been my motto as a lawyer, and I found it works well as for Judge, too. I keep track of how many cases we open and how many we are closing.
28. Part of the job of a Sessions Judge is to conduct preliminary hearings when a defendant wants one. I have also heard two preliminary hearings on murder cases, several concerning aggravated assault and several concerning the manufacturing of meth.

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

Wow. I wish someone had told me to keep a list of all the trials I have back when I first started practicing law. I "guestimate" I've had well over 3,000 clients and have long ago shredded the files from my first decade of practice, so the timeframe on some matters may be a little off.

The following cases are representative of ones that I handled at the trial and/or appellate level in state or federal court and did 100% of the work, except when noted. Unless noted otherwise, I also tried the underlying case on appeals that I cite.

1. *American Nat. Bank & Trust Co. v. Auman*, Court of Appeals of Tennessee, Eastern Section. November 13, 1987, 746 S.W.2d 464 1987 WL 44367. Chattanooga Attorney Scott Brown was the Trustee and he commenced action seeking declaration of rights of parties under testamentary trust. I was an associate on this matter and all work by me was under Mr. Brown's supervision. This was my first appellate brief and oral argument experience.

2. A civil jury trial in the Eastern District of Tennessee, Southern Division where I was the second to Mr. Scott Brown. Chattanooga attorney Tom Ray represented the Plaintiff and we represented the Defendant/Counter-Plaintiff in a breach of contract case involving proprietary business software developed by our client. My role was extensive trial prep/research/discovery (and I learned that being a "trial lawyer" mostly involves vigorous trial prep and the courtroom activity is only the tip of the iceberg). I do not remember whether I did any courtroom examinations or cross-examinations, but I was at Defendant's table the entire time. We prevailed.

That was my first jury trial. I loved it.

3. From May 1987 until October 1988, I assisted Chattanooga attorneys Harry Burnette and Anita Hardeman in several trial preparations. They were handling many state and federal employment discrimination cases, and I assisted the two of them at several jury trials in state and federal court during this time. I do not recall sitting at the Plaintiff's table. We won them all. I learned from those two lawyers, that trial success, especially in federal court, depends on complete mastery of the law, and that research is one way to gain the advantage. Always know more about the law than opposing counsel. If I am appointed as the trial Judge, I would never be able to stand thinking I knew less about a point of law than any lawyer who comes into the courtroom. Keeping up with the law and knowing it deeply are lifelong aspirations.

4. Sometime around Christmas Eve 1987, I was summoned by one of the partners to go handle a landlord-tenant case in Sessions Court. They thought it would be humorous for me to be asking a Judge to kick a poor tenant out near Christmas Eve. That was my first solo experience in front of a Judge on a hearing of any kind. I was successful.

5. In late October 1989, I opened my own law office in Soddy-Daisy, Tennessee. I immediately put my name on every appointment list and was soon handling cases in every court in and around Hamilton County.

6. My first solo appellate case was *Davis v. State*, Court of Criminal Appeals of Tennessee, at Knoxville. December 01, 1989, 1989 WL 144910. Appealed from the denial of his petition for post-conviction relief in which he claimed ineffective assistance of counsel. I was appointed to handle the post-conviction hearing and the appeal.

7. I have shredded all of my old files, so I am going from memory, but hope to confirm the exact dates and docket numbers and supplement the record if/when I do. (The court clerk computer systems for state and federal courts do not go back this far). I began a flurry of jury trials in early 1990 and I believe my first one was in Judge DiRisio's court.

8. I represented a man charged with burglary of a house and being a Habitual Offender under the old Habitual Offender Act. I brought in an expert on cocaine addiction to explain to a jury how an addict can hide being high from friends and family and what some "signs" may be and that when high on cocaine one could not form the specific intent to burglarize a house. The jury verdict was favorable on some counts and guilty of lesser-included counts on others. The verdicts were so logically inconsistent that Judge DiRisio strongly suggested we go settle the matter. We did. My client avoided being found a Habitual Offender.

9. I believe my next two jury trials were in late 1989/early 1990 in federal court with Judge R. Allan Edgar.

10. One was a case of a husband/wife co-defendants who were the lowest pawns on the pecking order and were asked to transport a large "bail" of marijuana from point A to point B. I represented the husband. They were both found guilty, but Judge Edgar substantially departed from the guidelines on his own initiative (ask lawyers how often *that* happened), noted that his reasons might not be as sound legally as he always tried to be, but were justified based on the circumstances. He even noted that he hoped the U.S. Attorney would not appeal the sentence.

The U.S. Attorney did not. I learned that even the most brilliant Judge I've ever appeared before, who always got the law right, thought that the circumstances of my client's involvement warranted mercy, not harshness. I remind myself of that every court night as Soddy-Daisy Judge.

11. The next federal jury trial was in early/mid 1990 before Judge Edgar. This time I was appointed to represent a young married man from Atlanta who was called by an old buddy, whom the Feds had caught selling kilos of cocaine, and were using the old buddy to round up others. The old buddy really wasn't because he called my client up and my client agreed to find his old buddy a supplier of a few kilos of cocaine, my client did indeed find a supplier and then rode up from Atlanta with the supplier(s) (in a separate car with his wife—they were going to do some sight-seeing). It was a sting operation, of course. We unsuccessfully raised the defense of entrapment. My client was found guilty and sent away for about 20 years.

12. *Peck v. State*, Court of Criminal Appeals of Tennessee, at Nashville. October 24, 1990, 1990 WL 160292. Appeal as of right from a judgment of the trial court denying the appellant's application for post-conviction relief. I was appointed to handle the post-conviction hearing and the appeal.

13. *Malone v. State*, Court of Criminal Appeals of Tennessee, at Knoxville. October 24, 1990, 1990 WL 160294. Appeal from the dismissal by trial court of petition for post-conviction relief after appointment of counsel and a hearing. I was appointed to handle the post-conviction hearing and the appeal. (I am mentioning a number of post-conviction matters because I learned a lot about trying a criminal case by being appointed to do a post-mortem, so to speak, on another lawyer's case).

14. In early 1990, two young adult clients whose parents were killed in an auto accident caused by an eighteen-wheeler for a trucking company retained me to handle the double wrongful death case. I associated more experienced counsel--one of the smartest things I ever did. While that case did not go to trial, I learned how to work a wrongful death case. The settlement was structured and significant.

15. It was in late 1990, I believe, that I had my next jury trial in federal court before Judge Edgar. My client was Rodney Fred Delegal. He had already done federal time for bank robbery and when he was released from prison shortly thereafter he and three other men were charged with robbing a bank in Cleveland, Tennessee. He was found guilty. I'm fairly sure I handled the appeal to the Sixth Circuit and filed a Petition for Writ of Certiorari with the U.S. Supreme Court. The Petition was denied. I will get confirmation that I handled the appeal. The case is reported at 951 F.2d 351 (6th Cir. 1991).

16. Also in 1990, I handled the case of *Sandra Rooks v. Chattanooga Electric Power Board*, 738 F. Supp 1163 (E.D. Tenn. 1990). Ms. Rooks was a black, low-level manager with the Power Board who was always passed over for promotions. I brought in an expert who did a statistical analysis to demonstrate that the Defendant's proffered explanation for failure to promote was a pretext. The question then was whether under the current law, a statistical analysis alone could carry the day to prove discrimination.

17. Early in 1991, I handled a state court jury trial for James Farley before Hamilton County Criminal Court Judge Douglas Meyer. Mr. Farley was the Hamilton County Purchasing Director and he was accused of embezzling County money from the auction of surplus County vehicles. Bill Cox prosecuted for the state and John Cavett was counsel for the co-defendant. The trial was multiple days and my client was found guilty. I handled the appeal. The conviction was upheld.

18. *Scott v. State*, Court of Criminal Appeals of Tennessee, at Knoxville. June 18, 1991, 1991 WL 104200. Appeal from the trial court's denial of post-conviction relief alleging ineffective assistance of counsel. I was appointed to handle the post-conviction hearing and appeal.

19. Around mid-1992, I believe, I had a DUI jury trial in Hamilton County Criminal Court. My client was found not guilty.

20. *State v. Penney*, Court of Criminal Appeals of Tennessee, at Knoxville. January 11, 1993, 1993 WL 3480. My client was charged with arson in two indictments. She was ordered to submit to a psychiatric examination and we appealed.

21. I believe in about mid-1993, I had a federal jury trial in Chattanooga with Judge Hull from Knoxville presiding. My client was a black female, middle-aged and accused of having a large quantity of crack cocaine hidden out in a buried spot in her yard. We tried the case for several days and then the jury came back with a not guilty verdict. At that time, it was the only “not guilty” jury verdict in a Chattanooga federal drug trial in decades.

22. In 1994, I believe, I had two civil jury trials. One was a medical malpractice case alleging failure to diagnose breast cancer in a timely manner. The jury found for the Defendant. That experience did lead me to be able to settle another malpractice case for a substantial amount about a year later.

23. My second civil jury trial in 1994, was a case where I represented a tenant married couple whose rented house had been destroyed by an elderly lady who ploughed her car into the home. The elderly lady was dead at the scene, probably from a heart attack or stroke prior to the crash. We were suing for damages to the couple’s personal effects. The husband’s brother was suing for the damage to the house that was owned by the brother. On the evening before the trial, the brother settles with the insurance company and takes ALL of the insurance money. Neither he nor his lawyer informed me or my client and neither showed up for the trial. Since they had the main case, it was agreed that they were doing most of the trial prep and we were just a “tag along”—so to speak. I learned a valuable lesson that morning. Always prepare to put on the entire trial even if are not assigned to the whole trial. We tried it, and I employed the doctrine of *res ipsa loquitur*. The jury came back with a great verdict for us, but Judge Barker vacated and reversed on a Motion for a New Trial.

24. *State v. Walker*, Supreme Court of Tennessee, at Knoxville. January 30, 1995, 893 S.W.2d 429 (1995). Homicide case. I handled the jury trial and appeal. The jury found my client not guilty of first degree murder, but guilty of felony murder. The appeal issue was whether the statutory form of first-degree murder committed while in perpetration of a designated felony is a legitimate and constitutional legislative function. (I still believe that the same defenses a First

Degree Murder defendant is entitled to raise ought to be available to a Felony Murder defendant). The Supreme Court affirmed the conviction.

25. *Rackley v. Rackley*, Court of Appeals of Tennessee. May 31, 1995 Not Reported in S.W.2d. 1995 WL 324029. Divorce case. The trial court's judgment dissolved a marriage of over 23 years. Appeal over abuse of discretion in awarding alimony. I was hired to handle the appeal.

26. In late 1995, I took the position of Executive Administrative Assistant to the Hamilton County Executive Claude Ramsey. (That position is now called County Mayor).

I focused on my jury trial court experience from 1989-1995, but I'm skipping over a number of jury and nonjury trials in federal court on employment law matters such as Title VII discrimination litigation. Also, I had ten or more TVA Merit System Protection Board administrative law judge trials during this time as well as countless domestic, juvenile court and general sessions court civil trials.

27. As Executive Administrative Assistant in late 1995 through 2002, I was prohibited by my job requirements and conflict of interest issues, from taking on any new criminal matters. That prohibition carried over to my time as an Assistant City Attorney for the City of Chattanooga from 2002-2008. However, from 2002 through 2008, I was allowed to take state post-conviction matters and federal criminal matters, and I did.

28. *Bell v. State*, Court of Criminal Appeals of Tennessee, at Knoxville. February 28, 1996, 1996 WL 83011. Appeal as of right from a judgment of the trial court dismissing his suit for post-conviction relief after an evidentiary hearing. I was appointed for the post-conviction hearing and the appeal.

29. *State v. Sheline*, Court of Criminal Appeals of Tennessee, at Knoxville. June 14, 1996, 1996 WL 325913. Appeal as of right from a jury verdict conviction of rape. Issue was the application of the Tennessee Rape Shield law. Court reversed, ordered new trial. I was hired to handle the appeal. (I still think the Ct. of Appeals got it right). The State appealed.

30. *State v. Sheline*, Supreme Court of Tennessee, at Knoxville. October 20, 1997, 955 S.W.2d 42 (1997). Reversed the TN Criminal Court of Appeals holding that evidence of victim's sexual behavior with persons other than defendant was not admissible under rape shield rule exception. I was hired to handle the appeal. (A whole host of SCALES high school students, perhaps hundreds, were on hand to hear the oral arguments on this case, which I recall was specially held in Morristown).

31. *Bullard v. Scott*, Court of Appeals of Tennessee. July 13, 1999, 1999 WL 486818. This controversy focuses on a subdivision lot that is owned by numerous tenants in common. Hotly contested subdivision v. subdivision property dispute.

32. *Ledford v. State*, Court of Criminal Appeals of Tennessee, at Knoxville. March 24, 2005, 2005 WL 675204. The petitioner, Robert Ledford, appeals the trial court's denial of post-conviction relief. The issue was whether the petitioner was denied the effective assistance of

counsel. I was appointed for the post-conviction hearing and appeal.

33. *Moore v. City of Chattanooga*, Court of Appeals of Tennessee. November 18, 2005, 2005 WL 3081126. David W. Moore and Sandra Moore sued the City of Chattanooga (“the City”) after a truck owned by the City and driven by a City employee rear-ended Mr. Moore's car.

34. During my time as an Assistant City Attorney for the City of Chattanooga, I handled a good number of civil trials in Hamilton County Circuit Court involving the Tennessee Governmental Tort Liability Act, like the *Moore* case cited above. Those were nonjury trials. Most I tried alone, but on a few, I was co-counsel with a fellow City Attorney.

35. Also, during my time as an Assistant City Attorney for the City of Chattanooga, I was co-counsel with my fellow Assistant City Attorneys on a good number of federal court cases involving 42 U.S.C. Section 1983 claims (alleging the violation of civil rights by City of Chattanooga police officers).

36. *State, Dept. of Children's Services v. T.M.B.K.*, Court of Appeals of Tennessee, Eastern Section, at Knoxville. February 08, 2006, 2006 WL 304688. Evidence did not preponderate against finding that mother abandoned her children by willfully failing to support them.

37. *State, Dept. of Children's Services v. T.P.H.R.*, Court of Appeals of Tennessee. July 20, 2007, 2007 WL 2080939. The Juvenile Court terminated the parental rights of T.P.H.R. (“Mother”) to her three children, K.R.R., A.O.R., and C.T.R., (the “children”) who were ages 7, 5 and 4.

38. During my time as an Assistant City Attorney for the City of Chattanooga, I handled a large number Juvenile Court cases involving Dependency & Neglect cases, Delinquency trials and termination of parental rights proceedings.

39. *Free Fathers, Inc. v. State, Dept. of State, Charitable Solicitations Div.*, Court of Appeals of Tennessee. February 07, 2008, 2008 WL 360612. This appeal arose from an enforcement action against a not-for-profit charitable corporation to compel the corporation's compliance with the registration provisions of the charitable solicitation law.

40. *United States v. Sims*, No. 07-5561, United States Court of Appeals, Sixth Circuit, 2008 U.S. App. LEXIS 19307; (6th Cir.), September 10, 2008. I handled the jury trial and appeal. The Court held that there was sufficient evidence to convict defendant of aiding and abetting the distribution of five or more grams of crack cocaine in violation of 21 U.S.C.S. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C.S. § 2 where rational juror could have inferred that defendant saw his cohort dealing the drugs and intended to assist him as the driver.

41. *U.S. v. Fekete*, United States Court of Appeals, Sixth Circuit. August 05, 2008, 535 F.3d 471 2008. Carjacking case. I handled the trial and appeal. Court held that a finding of conditional intent under carjacking statute is not conditioned on proof beyond reasonable doubt of loaded firearm. (This case has been fairly heavily cited, which it should be, because it holds that the government doesn't have to prove one of the essential elements of the crime).

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.

1. *Soddy-Daisy City Court Judge*. Since my election to the position of Judge on August 2, 2012, I've handled over 4,000 criminal and traffic matters. This includes signing search warrants, signing criminal complaints, setting bonds, accepting and approving plea agreements, handling preliminary hearings and conducting several bench trials.

I have also heard two preliminary hearings on murder cases, several concerning aggravated assault and several concerning the manufacturing of meth.

2. *Hamilton County Magistrate*. From November 1, 2007 until about November 4, 2009, I served as a Hamilton County Judicial Commissioner. I was appointed twice by the Hamilton County Board of Commissioners to one-year terms as a Magistrate.

My duties included setting bonds for those arrested for crimes and hearing sufficient proof from law enforcement officers for the purpose of signing arrest and search warrants. A Magistrate is considered a Judicial Officer by the Tennessee Supreme Court and is guided by the Tennessee Judicial Code of Ethics.

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.

Over my legal career I have accepted court-appointed cases as a guardian ad litem for Involuntary Commitment Hearings, Juvenile Court cases and a few Conservatorships.

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

1. *Administrative Law Experience*. Over the years, I have appeared before various City of Chattanooga and Hamilton County Boards and have served as legal counsel to several boards as well. Additionally, I have handled federal administrative matters such as Social Security Disability, Black Lung, Veteran Affairs, and employment matters through the Merit System Protection Board. On the state level, I've been involved in cases involving the Secretary of State and the Tennessee Administrative Procedure Act, The Tennessee Claims Commission, the Tennessee Employment Security Division (unemployment claims) and the Tennessee Asset

Seizure and Forfeiture Act via the Tennessee Department of Safety.

2. *Various Courts.*

Local: Hamilton County General Sessions Court, Hamilton County Juvenile Court, State Circuit Court, State Criminal Court, Chancery Court, United States Federal Court, Eastern Division, United States Bankruptcy Court, Eastern Division

Municipal: City of Chattanooga, City of Soddy Daisy, City of East Ridge, City of Red Bank and City of Signal Mountain

Other: State and County courts in Bradley County, Meigs County, Marion County, Sequatchie County, Bledsoe County, Rhea County, Knox County, White County, Davidson County and various state and federal administrative agencies

Appellate Practice: Tennessee Court of Appeals, Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, United States Sixth Circuit Court of Appeals, and several *Petitions for Certiorari* filed with the U.S. Supreme Court

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 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 June 2013, I submitted an application for the position of Tennessee Court of Criminal Appeals Judge for the Eastern Division of Tennessee. A hearing/public meeting was held on or about June 27, 2013 and the Judicial Commission considered 15 applicants. My name was not submitted to the Governor as a nominee.

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.

1984-1987	Vanderbilt School of Law, Nashville, Tennessee, J.D. Selected for the International Moot Court Team, 1986. Awarded “Best Brief” in the International Moot Court Team competition.
1982-1984	Trinity Evangelical Divinity School, Deerfield, Illinois, graduate work on an M.A. in Church History. Left with all course work completed (thesis unfinished) to attend law school.
1979-1982	Carson-Newman College, Jefferson City, Tennessee, B.A., <i>cum laude</i> , degree

called "Individual Studies" and I majored in Political Science, History and Philosophy.

1977-1979 Soddy-Daisy High School

PERSONAL INFORMATION

15. State your age and date of birth.

My date of birth is August 6, 1961 and I am 53 years old.

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

Thirty-one years since moving to Nashville to start law school in 1984. I was born in Tennessee, but my family moved out of state and then returned in 1970. I have been a legal resident of Tennessee (though living in the Chicago area while in grad school 1982-84) since 1970.

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

28 years since moving back to Soddy-Daisy (in Hamilton County) after law school.

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

Hamilton County, Tennessee.

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

Not applicable.

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

No. Well, some speeding tickets, but fortunately not since being elected Judge.

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 state and provide relevant details regarding any formal complaints 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.

None. When I applied for the Criminal Court of Appeals position, I was told that I had been admonished on a matter back in the mid-1990s. I don't recollect that, nor believe I was disciplined. I've never ask for a hearing and always tried to solve any client complaints.

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.

I have never been a Plaintiff in a lawsuit, but I was once a Defendant. I was one of 25-30 named Defendants--mostly various Hamilton County and City of Chattanooga elected officials and various local county and municipal city attorneys--in a Hamilton County Chancery Court lawsuit filed by Basil Marceaux back in about 2003. The case was frivolous and dismissed by the trial court and upheld on appeal in 2006.

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.

SPARC, Sports, Arts & Recreation of Chattanooga, 2010-present
Stuart Heights Baptist Church, 2008-present
Sunday School Teacher, Stuart Heights Baptist Church, Soddy-Daisy Campus, 2011-present
Sunday School Teacher, Stuart Heights Baptist Church, Hixson Campus, 2008-2011
Red Bank Baptist Church, 1988-2007
Sunday School Teacher, Red Bank Baptist Church, 1988-2007
Middle Valley Soccer League Coach, 1999, 2000
Upward Basketball Coach: Soddy-Daisy Church of God, 2004, 2005
Upward Basketball Coach: Red Bank Baptist Church, 2006
First Things First, Board of Directors, 1997-2002
Front Porch Alliance, Board of Directors, Incorporator, 2000-2004
Tennessee Baptist Convention, Executive Board of Directors; Member of the Executive, Budget and Education Committees, 2000-2006
President, Soddy Daisy Chamber of Commerce, 1994
Board of Directors, Chattanooga/Hamilton County Bicentennial Library 1993-1998

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

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.

Over the years I have only been an occasional member of any local, state or national bar associations (and never held any positions/offices to the best of my recollection). I have chosen to use my time, talents and resources in other civic, community and charitable endeavors.

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, Soddy Daisy Chamber of Commerce, 1994

Chosen to write a pamphlet on Euthanasia written for the Southern Baptist Convention in 1994 and distributed widely to any churches or individuals in the Convention requesting it.

Red Bank Baptist Church, Chairman of the Deacons, 1998

Selected/Appointed as a Hamilton County Magistrate, 2007-2008, 2008-2009

Elected Soddy-Daisy Judge in August 2012, August 2014

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

1) A pamphlet on Euthanasia written for the Southern Baptist Convention in 1994 and distributed widely to any churches or individuals in the Convention requesting it.

2) Over the years, I've written 75-100 short articles/columns on the law for various newspapers. I've always thought it important to write about law-related matters for the general public.

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 was a Chattanooga Bar Association Law Seminar Instructor in 2007 and taught a seminar for CLE credit on "The Paperless Law Office."

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.

2014—Re-elected at the Judge of Soddy-Daisy City Court without opposition on August 7.

2012—The Soddy-Daisy City Court judgeship became vacant for the first time in over 25 years and an open election was held on August 2, 2012. I was one of ten candidates. I won.

2007-2009--Selected/Appointed as a Hamilton County Magistrate, 2007-2008, 2008-2009

1990--When the Hamilton County Public Defender position (a county-wide office) was first created in 1990, I ran for the position in the county general election of August of 1990. I lost.

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 that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

- 1) Petition For A Writ of Certiorari to the United States Supreme Court on behalf of Stephen Tracy Sheline, January 1998. Written entirely by the undersigned.
- 2) Euthanasia, 1994. Written entirely by the undersigned.
- 3) 6th Circuit Court of Appeals Brief for Anthony Panzica. The 6th Circuit reversed in my client's favor the WDTN Trial Judge who erroneously ruled that the statute of limitations had run on filing a 42 U.S.C. Section 1983 action alleging false imprisonment. Written entirely by the undersigned

ESSAYS/PERSONAL STATEMENTS

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

“When I stand before God at the end of my life, I would hope that I would not have a single bit of talent left, and could say, ‘I used everything you gave me.’” Erma Bombeck

I want to make a difference in people's lives.

I'm making a difference now as the Soddy-Daisy City Court Judge, but the replacement for Judge Stern will take over Drug Court from her. That's a place where individuals, families and whole communities can be changed. I want to be a part of it.

I've handled practically every type of case that may come before a court--argued both sides of most—and represented a diverse client base.

My background, experience and temperament, tested over the years and under fire, provide me with the foundation, resources and ability to make tough decisions and still be empathetic, compassionate, fair and rule in accordance with the law.

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)*

My pro bono service begins on day one of my law career. I was a member of the Pro Bono panel, Inner City Ministries, Christian Legal Society from 1987 through 1992.

Over the years, I've helped a number of groups form Tennessee charitable corporations, and always help people referred to me by my church members and staff as well as referrals for

pro bono work from many pastors in the Chattanooga area.

I've represented a widely diverse client base: White, Black, Hispanic, Asian, Middle Eastern; gay and straight, single and married; pastors, churches, the devout, the irreligious; the prosperous, the pauper, the elderly widow, the college student, the young punk, meth lab gangs, computer lab geeks and the like.

My client base represents a broad cross-section of society and gives me the experience necessary to interact with fairness, impartiality and empathy with anyone that comes before me in court.

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)*

The judgeship sought is the position of Hamilton County Criminal Court (Circuit) Judge. The court is a criminal trial court of record. There are three Circuit Criminal Courts in Hamilton County.

First, a new judge must prove himself/herself a competent, honorable and diligent to his/her colleagues, and get along with them in a professional and respectful manner before he/she may have any impact whatsoever.

Second, once the respect of colleagues is earned a new judge must prove himself/herself in the same manner with the broader legal community. The legal community must know that the new judge does his/her homework and is prepared and that the new judge is respectful and cordial with all who practice before the court.

Only at this point, will one judge among four be in a position to contribute any wisdom or insights gained over his/her career. See answer 39 for the next step.

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

As the elected Soddy-Daisy Judge and public official, I believe it is my duty to get out into the community and meet the various organizations leaders and volunteers that help make our community a great place to live.

I think that concept would apply to the larger community of the Eastern Division of Tennessee as well. My oldest son is a rising senior at UT Knoxville, my wife and I are graduates of Carson-Newman College in Jefferson City and my youngest son will be a freshman at East Tennessee State University. I already feel connected to the entire East Tennessee region, but the region deserves to feel connected to its elected officials.

Hamilton County deserves to know its judges and its judges should be very deliberate and methodical in getting to know the people. That is my plan and it may be largely accomplished through speaking engagements and attending community public functions.

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

The most important person in the courtroom is the litigant who will lose that day. The phrase “equal justice for all” only has real meaning if the losing party believes that he or she was treated with respect, that the Judge was open-minded, listened carefully and attentively to both sides, and that the ruling was fair and impartial. Therefore, four corollaries follow:

- 1) Every lawyer, litigant, party, plaintiff, defendant, police officer, witness, whether rich, poor, of high or low standing, regardless of race, creed or color must be treated with utmost respect and courtesy by the Judge.
- 2) A Judge must listen closely, and with an open mind, to all who come before the court because the consequences of his decisions may be immediate and life altering.
- 3) A Judge must never allow the judicial process to become rote and routine because it’s not rote and routine to most defendants.
- 4) A Judge must continuously search his heart and mind (and the record) for signs of hidden or unconscious bias or prejudices. Justice demands absolute impartiality, and a good Judge will always *know* whether he consistently rules fairly and impartially.

More generally, a Judge should know the law well, understand people and human nature, have wisdom and compassion and be unflappable. The icing on the cake is when a Judge has all of these qualities plus a good sense of humor.

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)*

In *Letters from a Birmingham Jail*, Dr. Martin Luther King, Jr. said, "One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws."

The moral and legal dilemma of choosing between obeying the law (or King) or obeying the moral code (or the gods) goes back as far as Antigone’s choice to defy King Creon when he forbids the burial of Polynices and was revisited in American history when abolitionist judges enforced the Fugitive Slave Act. I would have to recuse myself if faced with that dilemma.

However, I interpret the phrase “disagree with the substance of the law” to mean a law that one finds unreasonable, impractical, wrong-headed or worse. Not an unjust law or an unconstitutional law, just a bad one. I am committed to the Founders’ concept of the three branches of government as checks and balances upon each other. Assuming a particular law is constitutional, my oath of office obligates me to follow the law and not substitute my “wisdom”

for that of the legislative branch.

As a Judge, I regularly approve pleas with mandatory minimum fines or other legislative requirements that I think in a particular case are not useful or helpful, yet if the law does not give me the authority to tinker with it, I don't. Instead, as a constituent, I will try to persuade my State legislators to change it.

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. R. David Proctor, Judge, U.S. District Court, Northern District of Alabama, Hugo L. Black U. S. Courthouse, 1729 Fifth Avenue North, Birmingham, AL 35203, (205)-278-1700. Dave is my college roommate and close friend.

B. Barry Steelman, Judge, Hamilton County Criminal Court, Courts Building, 600 Market Street, Chattanooga, TN 37402, (423)-209-7574. Barry and I are good friends and he has known me my entire professional career.

C. Gary W. Starnes, Judge, Hamilton County General Sessions Court Judge, Courts Building, 600 Market Street, Chattanooga, TN 37402, (423)-209-7660. Gary and I are good friends and he has known me my entire professional career.

D. Rick Nunley, Vice-Mayor, City of Soddy-Daisy, 9835 Dayton Pike, Soddy-Daisy, TN 37379, (423)-332-5323. Rick and I are good friends and he has known me since I was about 10 years old.

E. Steve Slater, Farm Bureau Agent, 8305 B Dayton Pike, Soddy-Daisy, TN 37379, (423)-648-4422. Steve and I are good friends and he has known me since I was about 10 years old.

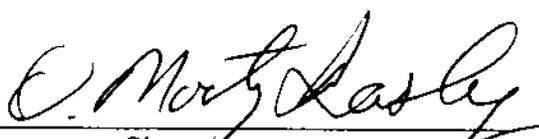
AFFIRMATION CONCERNING APPLICATION

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] Hamilton County Criminal Court 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 questionnaire with the Administrative Office of the Courts for distribution to the Council 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 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: Feb 27, 2015.


Signature

When completed, return this questionnaire to Debbie Hayes, 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.

D. Marty Casley
Type or Print Name
(Marty Donald Casley)

D. Marty Casley
Signature

Feb 27, 2015
Date

12696
BPR #

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



Euthanasia

By Donald Mart Lasley

RESCUE THE PERISHING, CARE FOR THE DYING

Every January Southern Baptists celebrate Sanctity of Human Life Sunday. The emphasis includes the issue of euthanasia. Euthanasia encompasses the topics of infanticide, suicide, mercy-killing and doctor-assisted suicide.

No more relevant moral issue for Southern Baptists exists than that which deals with death and dying. We all face the illness and death of loved ones. We all face the prospect of pain and suffering in our deaths.

The Bible specifically and generally addresses how we as Christians are to face our own deaths and how we are to comfort and care for the dying.

After reviewing Scripture and various arguments, we will reach two basic conclusions. One is that our Christian duty toward the dying may be summarized by quoting lyrics from a Fanny Crosby hymn, "Rescue

the perishing, care for the dying; Jesus is merciful, Jesus will save."¹

The second conclusion is that we have a Christian duty to be a witness for Christ during our own dying process, which precludes actively taking our own lives or directing others to cause our deaths.

In the first section we will survey the present trends and practices in our society regarding euthanasia. Then we will examine the moral issues and arguments in light of biblical principles. Finally, we will present a Southern Baptist response based on the biblical mandate.

I. THE CULTURAL DILEMMA

There is a way which seemeth right unto a man, but the end thereof are the ways of death (Prov. 14:12).

Over the last decade, the "right to die" or the "death with dignity" movement has gathered the momentum of a tidal wave and has slammed full force into the moorings of our legal system, moral values and public policy.

Euthanasia is a leading ethical, medical and legal topic in the United States and is an important moral issue of the 1990s.

It is time for all Southern Baptists to take a quick "damage assessment" and then get to work cleaning up the moral confusion created by the euthanasia movement. Consider the following:

Dr. Jack Kevorkian, "Doctor Death" as he is often called in the press, continued to make headlines on September 9, 1993, for assisting in the death of his eighteenth victim, a 73-year-old bone cancer patient. At the time, Kevorkian was facing criminal charges for his role in the death of a 30-year-old man who had been diagnosed with Lou Gehrig's disease. Dr. Kevorkian has been quoted on the issue of doctor-assisted suicide:

"It's unstoppable. It may not happen in my lifetime, but my opponents are going to lose."²

Derek Humphry, founder of the Hemlock Society, an organization to promote legislation supporting mercy killing, made the 1991 *New York Times* best-seller list with his book *Final Exit*. The book advocates suicide for the terminally ill and provides numerous methods for committing suicide.

In the *Journal of the American Medical Association* an anonymous gynecology intern reports that while making night rounds he met a 20-year-old woman named Debbie who was suffering from ovarian cancer. The intern reports giving her a lethal injection of morphine. No permission or consent was sought. To date, no action has been taken against the doctor.³

In the *New England Journal of Medicine* Dr. Timothy Quill relates how he instructed his long-time patient Diane, who suffered from acute leukemia, on taking enough barbiturates to kill herself. She did.⁴

In the early 1980s the well-known cases of "Baby Doe" (the Bloomington, Ind. Down's Syndrome baby with a *correctable* deformity who was allowed to die by starvation) and "Baby Jane Doe" (the baby allowed to die without treatment of her infections) made known what many in the pediatrics community already knew—it is a common practice to allow mentally or severely physically defective newborns to die in hospital neonatal care units.⁵

In the courts, family members, doctors and hospital administrators are increasingly petitioning for permission to withhold food and water from permanently unconscious patients.

In the state legislatures, laws permitting living wills have now passed in 44 states and are pending in five others.⁶

Several states, such as California with Initiative 161 (the California Death with Dignity Act), and Washington, with Initiative 119 (the Washington Aid in Dying Act) have put to a vote whether to approve doctor-assisted suicide and active euthanasia. Both failed. Efforts in other states are pending.

In 1990, Congress passed the Patient Self-Determination Act, making it mandatory for all federally assisted health-care providers to ask prospective patients about a living will.

*Derek Humphry,
founder of the Hemlock
Society, an organization
to promote legislation
supporting mercy
killing, made the 1991
New York Times best-
seller list with his book
Final Exit.*

Presently, the so-called health-care crisis is forcing health-care providers and insurance companies to reduce costs. One way to reduce costs is to limit care for the terminally ill and elderly. Further, the AIDS epidemic is fueling speculation that the number of terminally ill AIDS patients draining resources and money from the health-care system will force the country to adopt active euthanasia out of economic necessity.

In order for Southern Baptists to successfully confront the euthanasia movement and the eroding respect for the sanctity of human life, we must first examine the arguments for active euthanasia and compare those arguments to the principles taught in the Bible.

II. THE MORAL PROBLEM

What mattered it whether he struck the rock living or dead! feeling would soon be over. Hawkeye from *The Last of the Mohicans*.

Euthanasia comes from the Greek language and literally means "a good death." However, today the term "euthanasia" has been used in so many contexts that it is important to define it.

Southern Baptists are on record as opposing "active euthanasia." Active euthanasia is generally defined as an action by a person which causes the death of another person who is suffering from a terminal and imminently fatal condition.

Hawkeye committed active euthanasia in the passage quoted above from *The Last of the Mohicans*. An Indian wounded by Hawkeye is dangling high in an oak tree on the edge of a cliff, with rocks and the river below. It is obvious that the Indian will lose his grip and plunge to a rocky and gruesome death. Duncan pleads with Hawkeye to finish him off. Hawkeye fires the fatal shot just as the Indian is falling.

A typical medical example of active euthanasia is when a doctor gives a dying patient a lethal injection to relieve pain and suffering.

Notice two points about active euthanasia. First, the action is one that directly kills the patient. The cause of death is the intervening action, not the underlying disease or illness.

Southern Baptists oppose active euthanasia and doctor-assisted suicide because they are direct, intentional acts of killing.

Conversely, when an imminently dying patient refuses additional medical treatment which will not significantly extend life, or

when medical procedures or treatments keeping a patient alive are withdrawn and as a consequence of that action, the patient dies from his or her present medical ailments, the action is sometimes called "passive euthanasia."

The famous case of Karen Ann Quinlan is an example of passive euthanasia. The Quinlan family asked the court for permission to withdraw an artificial respiratory device from Karen. Everyone believed that Karen

Today the term "euthanasia" has been used in so many contexts that it is important to define it.

would die immediately, but she lived nearly ten more years.

Southern Baptists generally do not oppose passive euthanasia because we distinguish intentional killing from allowing one to die.

Most Christians believe it is morally and biblically acceptable for patients to refuse or withdraw medical treatment when death is imminent and do not categorize such practice as euthanasia or "mercy killing."

However, Southern Baptists are on record as opposing the withdrawal of food and water (hydration) because when food and water are withdrawn, the patient dies from starvation and/or dehydration. The withdrawal of food and water becomes the cause of death, and thus, is an act of active euthanasia.

In the case of Nancy Cruzan, decided by the United States Supreme Court, the parents requested permission to remove Nancy's feeding tube. She was permanently uncon-

scious, but on no artificial life support. The removal of the feeding tube would cause Nancy to die from starvation. After a lengthy court battle, the tube was finally removed and she died.

The second point about active euthanasia is the fact that the patient has a terminal condition which is imminently fatal. If a patient is diagnosed today with terminal cancer, he or she may still have six months to six years of expected life. For a doctor to administer a lethal injection today in anticipation of a deteriorating condition or increased pain and suffering in the future is morally and legally an act of murder.

The euthanasia movement advocates suicide⁷ or killing persons who are not on the brink of death, but simply have a declining "quality of life." The "quality of life" ethic grants a decision-maker the right to determine the value of another's life and to kill individuals whose lives do not have enough "value."

The "quality of life" ethic is displayed in the last scene of Ken Kesey's novel *One Flew Over The Cuckoo's Nest*. Chief Bromden, the narrator, describes his growing realization that Big Nurse and the psychiatric staff have lobotomized his friend McMurphy as punishment for McMurphy's insubordination. He knows McMurphy wouldn't have wanted the institution to get the better of him and live a lobotomized life for "twenty or thirty years," so on the night Chief Bromden escapes from the mental hospital he first smothers McMurphy with a pillow.

The same "quality of life" ethic is further illustrated in George Orwell's novel *Animal Farm*. Boxer, the slow-witted but hard-working cart-horse, gives his every fiber of strength and energy to the animal farm. As he exerts himself over the years he grows weaker. He marks off the days to his

promised retirement. However, as retirement approaches, Napoleon and Squealer, the dictator pigs, realize that Boxer's value to the farm has lessened and that his upkeep will be expensive. The solution is to send him to the slaughterhouse under the guise of a trip to the veterinarian hospital.

A part of the euthanasia movement's philosophy is a "quality of life" ethic which may be used to justify killing the old, the weak, the mentally handicapped and the unwanted.

Those who advocate active euthanasia do so on several grounds. First, death is natural and inevitable, and pain and suffering serve no purpose. Mercy and compassion dictate

A part of the euthanasia movement's philosophy is a "quality of life" ethic which may be used to justify killing the old, the weak, the mentally handicapped and the unwanted.

that a patient be given or be allowed to take a lethal dose to relieve the suffering. Second, a patient has a right to die and to choose for himself whether to continue living or not. Third, the costs are disproportionate to the benefit for the patient, and society cannot bear the costs.

Euthanasia advocates stress that mercy and compassion dictate the need to relieve pain and suffering. Sometimes they even cite the passage "Blessed are the merciful" (Matt. 5:7 NIV).

The Bible does command Christians to be merciful, but nowhere in the Old or New Tes-

tament does "merciful" mean taking the life of another. Mercy typically means sparing one from death or punishment.

The euthanasia activists are also quick to cite real-life, heart-tugging examples of needless human suffering in an effort to frighten or scare us away from facing death.

The scare tactic was employed in John Bunyan's *Pilgrim's Progress*. In one scene, Giant Despair captured Christian and Hopeful and threw them into a dark dungeon. After beating the two severely, Giant Despair encouraged Christian and Hopeful to give up and commit suicide by telling them their situation was hopeless. When Giant Despair's words produced no results, he then showed the pair the mangled bones and skulls of other victims exposed in the graveyard. Christian again resisted the temptation to take his own life and eventually escaped.

The notion that an individual has "a right to die" is incompatible with the Christian belief that we are under God's authority. "You are not your own; you were bought with a price. Therefore honor God with your body" (1 Cor. 6:19-20 NIV).

Finally, cost is not a valid consideration for Christians to consider when evaluating life or death. The Good Samaritan paid his own money to tend to the needs of a desperate and dying stranger (Lk. 10:35).

III. A VIEW FROM SCRIPTURE

A. The use of the Bible in ethical and public policy debates

As Southern Baptists we believe that Holy Scripture is authoritative for our lives and that meditation upon the Word of God, under the guidance of the Holy Spirit will reveal God's will for our moral choices.

In fact, the *Baptist Faith and Message*,

article 1, clearly states the principle that the Bible is our authoritative guide on moral issues: "The Holy Bible was written by men divinely inspired and is the record of God's revelation of Himself to man. It is a perfect treasure of divine instruction. It has God for its author, salvation for its end, and truth, without any mixture of error for its matter. It reveals the principles by which God judges us; and therefore is, and will remain to the

The notion that an individual has "a right to die" is incompatible with the Christian belief that we are under God's authority.

end of the world, the true center of Christian union, and the supreme standard by which all human conduct, creeds, and religious opinions should be tried. The criterion by which the Bible is to be interpreted is Jesus Christ."

In today's secular society Christians are often intimidated by their opponents for relying on biblical or religious grounds for their positions on social issues such as abortion and euthanasia. In *The Naked Public Square*, author Richard John Neuhaus successfully refutes the notion that religiously based values should be excluded from public policy.

Jesus Christ commands His followers to be the salt of the earth, the foundation and preservers of society, not a garnish decoration. Article 15 of the *Baptist Faith and Message* says that Baptists are to work for the

will of Christ in human society and to provide for the needy and sick.

B. Traditional biblical arguments against active euthanasia

1. The sanctity of human life

"What is man, that thou art mindful of him" (Ps. 8:4)?

The Christian doctrine of the sanctity of human life changed Western culture and is the chasm that separates the ethical principles of Christianity from all other religions and philosophies.

Historically, Christians from the early church fathers and St. Augustine to twentieth-century theologians Karl Barth and Dietrich Bonhoeffer have opposed abortion, infanticide, suicide and the direct killing of the dying, based upon the doctrine of the sanctity of human life.

The doctrine of the sanctity of human life comes from two biblical principles:

(1) Human beings are created in the image of God (the *imago Dei*) (Gen. 1:26-27; 5:1; 9:6; 1 Cor. 11:7; 2 Cor. 3:18; Col. 3:10; Eph 4:24; Jas. 3:9), and; (2) the Sixth Commandment against murder and other similar passages:

"You shall not murder" (Ex. 20:13; Deut. 5:17 NIV).

"Do not put an innocent or honest person to death..." (Ex. 23:7 NIV).

"Anyone who strikes a man and kills him shall surely be put to death.... If a man schemes and kills another man deliberately, take him away from my altar and put him to death" (Ex. 21:12-14 NIV).

"There are six things the Lord hates... hands that shed innocent blood..." (Pro. 6:16-17 NIV).

An exact definition of the image of God in humankind is a much-debated and complex issue. We do know that all persons, includ-

ing the aged, the dying, the mentally and physically handicapped are "crowned with glory and majesty" (Ps. 8:3-6).

We also know that the image of God includes a physical, moral and spiritual dimension. For example, Southern Baptist theologian E.Y. Mullins wrote that the image of God includes our rational nature, conscience, emotional nature, will, self-determination, original sinlessness, dominion over nature and immortality.⁸

Some euthanasia advocates reduce the concept of the image of God into the secular

Historically, Christians... have opposed abortion, infanticide, suicide and the direct killing of the dying, based upon the doctrine of the sanctity of human life.

notion of personhood. The personhood concept is usually defined in terms of physical and mental abilities or capabilities and, thus, excludes human beings lacking those defined qualities. "Personhood analysis" ignores the full scriptural view of humankind.

2. The Christian's duty to care for the dying

Several biblical passages instruct us to care for the needy and helpless. The office of deacon in Acts 6 was created specifically to serve and feed the widows in the church.

In Matthew 25:31-46 we learn that we must demonstrate our compassion and mercy: "Come, you who are blessed by my Father; take your inheritance, the kingdom

prepared for you since the creation of the world. For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me" (Matt. 25:34-36 NIV).

Job was a perfect example for us: "I rescued the poor who cried for help, and the fatherless who had none to assist him. The man who was dying blessed me; I made the widow's heart sing" (Job 29:12-13 NIV).

In the final scene of Shakespeare's tragedy *Julius Caesar*, Brutus is defeated and intends to kill himself. He pleads for his longtime friend Volumnius to hold a sword while Brutus runs through it. Volumnius refuses and replies, "That's not an office for a friend, my lord."

Actively taking the life of a loved one is not the office of a Christian.

3. The Christian view of suffering and death

Jesus provides us with the proper Christian attitude toward suffering in the account of the Garden of Gethsemane, "Father, if you are willing, take this cup from me; yet not my will, but yours be done" (Lk. 22:42 NIV). Luke reports that Jesus was so anguished by His imminent suffering and death that "his sweat was like drops of blood falling to the ground" (Lk. 22:44 NIV).

Christians understand that suffering may have a spiritual purpose or value. We are not to seek suffering and are to avoid suffering when possible, but in the end we have a mission to proclaim Christ, and that is sometimes accomplished through our suffering.

Death is not to be feared by Christians. The apostle Paul said, "For to me, to live is Christ, to die is gain" (Phil. 1:21 NIV).

C. Have you considered my servant Job?

The Old Testament Book of Job provides a clear model for Christians examining the issues of pain, suffering, death and active euthanasia.

Job was a wealthy man, a man of political power and social prominence. He was an old man (32:6), with a wife and ten grown children of whom God said, "He is blameless and upright, a man who fears God and shuns evil" (1:8 NIV).

Job lost it all. On one day he lost his wealth, social and political status and ser-

We are not to seek suffering and are to avoid suffering when possible, but in the end we have a mission to proclaim Christ, and that is sometimes accomplished through our suffering.

vants. All ten children were killed when a house collapsed.

A short time later, Job was stricken with a painful disease. Scholars have been interested in identifying this disease and have carefully cataloged the symptoms: "anorexia, emaciation, fever, fits of depression, weeping, sleeplessness, nightmares, putrid breath, failing vision, rotting teeth and haggard looks."⁹

Job believed himself to be on the verge of death and wished for his immediate demise. He may have contemplated suicide. His wife

could not stand his misery any longer and begged him to curse God and ensure his immediate death.

Further, by the euthanasia advocates' standards, Job had lost all dignity. He lived in the city dump. His body was covered with boils. He became a laughingstock to his enemies and was avoided by some of his friends.

Job's misery, suffering and loss of "dignity" made him a prime candidate for a visit by Dr. Kevorkian.

However, notice that none of Job's four closest friends ever entertained the notion that someone should ease his pain and suffering by active euthanasia. Job never concluded that his life was not worth living.

Job used the circumstances of his immense pain and suffering to contemplate the meaning of life and death and his relation to God.

IV. A SOUTHERN BAPTIST RESPONSE TO ACTIVE EUTHANASIA

Southern Baptists have no "official" position on any matter because no one individual, association, board, commission or agency has authority to speak for the Southern Baptist denomination.

However, Southern Baptists as a group express their views on moral issues such as active euthanasia through the Christian Life Commission of the Southern Baptist Convention. The Christian Life Commission is governed by trustees elected by the Southern Baptist Convention. The trustees give policy and direction to the Commission staff and oversee the positions expressed in the Commission's literature.

The trustees expressed their view on euthanasia in the Christian Life Commission Annual Minutes, September 16, 1987, as follows: "Efforts shall be undertaken by the

Christian Life Commission staff to oppose infanticide and active euthanasia, including efforts to discourage any designation of food and/or water as 'extraordinary' medical care for some patients."

Southern Baptists also have expressed their positions on active euthanasia by resolutions passed at annual Conventions.

At the San Antonio, Texas, 1988 Convention, the messengers resolved that, "human life, from fertilization until natural death, is sacred and should be protected, not destroyed."

At the same Convention the messengers also resolved: "We recognize the validity of

Southern Baptists have no "official" position on any matter because no one individual, association, board, commission or agency has authority to speak for the Southern Baptist denomination.

living wills and organ donor cards, along with the right of the next of kin to make decisions regarding organ donations; and... that nothing in the resolution be construed to condone euthanasia, infanticide, abortion, or harvesting of fetal tissue for the procurement of organs."

At the Indianapolis, Indiana, 1992 Convention the messengers passed the following resolution on euthanasia and assisted suicide:

WHEREAS, The Bible teaches that God

created all human life in His own image and declares human life to be sacred from conception until death; and

WHEREAS, Southern Baptists have historically affirmed biblical teaching regarding the sanctity of human life; and

WHEREAS, A growing "quality of life" ethic has led to increasing acceptance of euthanasia and assisted suicide in the United States.

THEREFORE, Be it RESOLVED, That we the messengers to the Southern Baptist Convention, meeting in Indianapolis, Indiana, June 9-11, 1992, affirm the biblical prohibition against the taking of innocent human life by another person, or oneself, through euthanasia or assisted suicide; and

Be it further RESOLVED, That in light of the fact that the end of life may be painful, we urge scientists and physicians to continue their research into more effective pain management; and

Be it further RESOLVED, That we encourage hospitals, nursing care facilities, and hospices to increase their efforts to keep dying persons as comfortable as possible and call on Christians to help provide companionship and appropriate physical and spiritual ministry to persons who are dying, and

Be it further RESOLVED, That we oppose efforts to designate food and water as "extraordinary treatment," and urge that nutrition and hydration continue to be viewed as compassionate and ordinary medical care and humane treatment; and

Be it further RESOLVED, That we reject as appropriate any action which, of itself or by intention, causes a person's death; and

Be it finally RESOLVED, That we call upon federal, state, and local governments to prosecute under the law physicians or others who practice euthanasia or assist patients to commit suicide.

All of us will one day face the reality of death and dying. As our pain and suffering increase, it will be a natural Christian response to say, "On Jordan's stormy banks I stand, and cast a wishful eye to Canaan's fair and happy land, where my possessions lie." But let us remember as we stand on the river bank, it is not our Christian prerogative to either jump in or push our loved ones.

End Notes

¹A reference to this song is also found in a highly recommended book by Paul Ramsey, *Ethics at the Edges of Life* (New Haven: Yale University Press, 1980).

²Betzold, Michael. *Appointment with Doctor Death* (Troy, Mich.: Momentum Books, 1993), p. 318.

³"It's Over, Debbie" *Journal of the American Medical Association*, Vol. 259, No. 2 (Jan. 8, 1988), p. 272.

⁴Quill, Timothy E. "Death and Dignity—A Case of Individualized Decision Making." *New England Journal of Medicine* Vol. 324, p. 691-694 (1991).

⁵Fost, N. "Passive Euthanasia of Children with Down's Syndrome" *Archives of Internal Medicine* (Dec. 1992).

⁶The Southern Baptist Christian Life Commission supports living wills in most cases. See the pamphlet "A Time to Live, A Time to Die: Advance Directives and Living Wills."

⁷Suicide is a closely related topic to active euthanasia, but beyond the scope of this article. The Christian Life Commission publishes a pamphlet entitled "Critical Issues: Suicide Prevention" which concludes that Christians should not take their own lives.

⁸Mullins, E. Y. *The Christian Religion in Its Doctrinal Expressions*, pp. 257-260 as quoted in James Leo Garrett's *Systematic Theology* Vol. 1 (Grand Rapids, Mich.: Eerdmans, 1990), p. 402

⁹Anderson, Francis I. *Job* (London: Tynedale Press, 1976).

Unless otherwise noted, all scripture is from the King James Version.

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~~CRITICAL
ISSUES~~

Euthanasia

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CASE NO. 13-6018

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY PANZICA
Plaintiff/Appellant

v.

CORRECTIONS CORP OF AMERICA, et al
Defendants/Appellees

On Appeal from the United States District Court
for the Western District of Tennessee
Eastern Division

CORRECTED BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Plaintiff/Appellant, Anthony Panzica, makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? NO

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: N/A

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

If the answer is YES, list the identity of such corporation and the nature of the financial interest: N/A

s/D. Marty Lasley
Plaintiff/Appellant Counsel

October 29, 2013
(Date)

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REQUEST FOR ORAL ARGUMENT PURSUANT TO 6 Cir. R. 34

Requesting Oral Argument. A party desiring oral argument must include a statement in the brief explaining why the court should hear oral argument. The statement must not exceed one page.

I certify as counsel for the Appellant that I believe the issue presented in this appeal is one of first impression for the Sixth Circuit Court of Appeals since the United States Supreme Court ruling in *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), *reh'g denied* 549 U.S. 1362, 127 S. Ct. 2090, 167 L. Ed. 2d 807 (Apr. 16, 2007).

s/D. Marty Lasley, October 29, 2013

JURISDICTIONAL STATEMENT

The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its final order dismissing Panzica's action on July 5, 2013. Final Order, RE 54, PageID #321. Panzica filed a timely notice of appeal on August 1, 2013. Notice of Appeal, RE 54, PageID #322.

STATEMENT OF ISSUES

The sole issue in this case is whether the district court erred in holding that Appellant's Section 1983 claim was barred by the statute of limitations. The district court held that the applicable one-year statute of limitations began to run from the date Panzica knew or should have known of his injury (in December 2009 when he realized he was not being given proper good time credits) rather than the date of his release date from prison (November 19, 2010).

The entire case turns upon the proper interpretation of *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973 (2007), *reh'g denied* 549 U.S. 1362, 127 S. Ct. 2090, 167 L. Ed. 2d 807 (Apr. 16, 2007).

In *Wallace*, The United States Supreme Court held that the "limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends." Appellant's claim was timely filed if *Wallace* is applied.

STATEMENT OF THE CASE

The Appellant, Anthony Panzica, brought this action on November 18, 2011 against the Defendants, Corrections Corporation of America ("CCA"); Hardeman County Correctional Facilities Corporation; Hardeman County Correctional Facility ("HCCF"); Joe Easterling, in his official and individual capacities as warden of HCCF; and various John and Jane Does. Appellant alleged violations of the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983. Panzica also asserted claims under Tennessee state law.

Appellees filed a Motion for Dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and/or for Summary Judgment under Fed. R. Civ. P. 56. The district court granted the Motion on July 3, 2013 on the basis that the Section 1983 claim was filed untimely. The cause of action was filed on November 18, 2011, which would have been timely filed if the court had applied the date of release from prison as the date the statute began to run. In error, the district court found that the statute began to run in December 2009, the date Appellant began to realize he was not receiving the proper number of good time credits. Memorandum Opinion, RE 53, PageID #311-321. The district court entered an Order of Dismissal on July 5, 2013. Dismissal Order, RE 54, PageID #321.

Appellant filed a timely Notice of Appeal on August 1, 2013. Notice of Appeal, RE 55, PageID #322.

STATEMENT OF THE FACTS

On December 8, 2008, Appellant Anthony Panzica (hereinafter “Panzica” or “Appellant”) pled *nolo contendere* to a single count of statutory rape by an authority figure and received a three (3) year sentence of confinement. A three (3) year sentence is 1,095 days. Complaint, RE 1, Page ID #3. Panzica was granted 74 days toward his sentence for his time as a pre-trial detainee from September 25, 2008 through December 8, 2008. Upon sentencing, Panzica was incarcerated at West Tennessee State Penitentiary where he remained until February 4, 2009. On this date, Panzica was transferred to Hardeman County Correctional Facility (“HCCF”) until his release date on November 19, 2010. Plaintiff spent a total of 785 days incarcerated. Def State Undisputed Facts, RE 34-1, PageID #225-26.

Panzica asserted that, throughout his incarceration, he was “shorted” sentence credit by Appellees. He asserted that he was shorted six (6) days of sentence credit during January, February, March, April, and July of 2009, for a total of thirty (30) days during 2009. He asserted that he was denied or shorted a total of forty-two (42) days of sentence credit by Appellees. Complaint, RE 1, PageID #1-7.

The district court found that this concern of Panzica constituted “discovery” or reasonable knowledge of a cause of action “accrued” when Panzica was fully aware of this alleged cause of action while incarcerated at HCCF.

Mr. Panzica filed the present action on November 18, 2011.

Appellant brought this action pursuant to 42 U.S.C. § 1983, asserting that his constitutional rights were violated by Appellees regarding the alleged shortage of sentence credit.

Panzica alleged the Appellees’ and the Tennessee Department of Correction’s (“TDOC”) actions improperly lengthening his period of incarceration. He asserted, pursuant to Tennessee state tort law, that Appellees effectively falsely imprisoned him. He further alleged that Appellees’ actions constituted negligence. Complaint, RE 1, PageID #1-8.

SUMMARY OF ARGUMENT

The applicable statute of limitation (one-year) begins to toll from the date of the end of the alleged false imprisonment, not from the date of discovery.

ARGUMENT

I. Statute of Limitations Does Not Accrue Until Plaintiff Was Released From His False Imprisonment

This court reviews a district court’s grant of summary judgment *de novo*. *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir.2010) (citation omitted). Summary judgment is proper where “the movant shows that there is no genuine dispute as to

any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The court must consider the facts and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The trial court found that Appellant failed to state a claim against Appellees upon which relief can be granted and dismissed Appellant’s case pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of civil Procedure Rule 56 because the court concluded Panzica’s 42 U.S.C. § 1983 claim was filed beyond the applicable statute of limitations.

With due respect, the trial court utterly misread and misapplied the leading case on the matter, *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), *reh’g denied* 549 U.S. 1362, 127 S. Ct. 2090, 167 L. Ed. 2d 807 (April 16, 2007). Justice Scalia, writing for a 7-2 majority states:

“Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts. *Owens v. Okure*, 488 U. S. 235, 249, 250 (1989); *Wilson v. Garcia*, 471 U. S. 261, 279, 280 (1985).

While we have never stated so expressly, the accrual date of a Section 1983 cause of action is a question of federal law that is not resolved by reference to state law. The parties agree, the Seventh Circuit in this case so held, see 440 F. 3d, at 424, and we are aware of no federal court of appeals holding to the contrary. Aspects of Section 1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles. See Heck, *supra*, at 483; *Carey v. Phipus*, 435 U. S. 247, 257, 258 (1978). Under those

principles, it is the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action... *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U. S. 96, 98 (1941)), that is, when the plaintiff can file suit and obtain relief. *Bay Area Laundry*, supra, at 201. There can be no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention, so the statute of limitations would normally commence to run from that date.

There is, however, a refinement to be considered, arising from the common law's distinctive treatment of the torts of false arrest and false imprisonment, [t]he . . . cause[s] of action [that] provid[e] the closest analogy to claims of the type considered here, Heck, supra, at 484. See 1 D. Dobbs, Law of Torts Section 47, p. 88 (2001). False arrest and false imprisonment overlap; the former is a species of the latter. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets; and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is. □ M. Newell, Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process §2, p. 57 (1892) (footnotes omitted). See also 7 S. Speiser, C. Krause, & A. Gans, American Law of Torts §27:2, pp. 940ñ 942 (1990).

We shall thus refer to the two torts together as false imprisonment. That tort provides the proper analogy to the cause of action asserted against the present respondents for the following reason: The sort of unlawful detention remediable by the tort of false imprisonment is detention without legal process, see, e.g., W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §11, p. 54, §119, pp. 885ñ886 (5th ed. 1984); 7 Speiser, supra, Section 27:2, at 943ñ944, and the allegations before us arise from respondent's detention of petitioner without legal process in January 1994. They did not have a warrant for his arrest.

The running of the statute of limitations on false imprisonment is subject to a distinctive rule--dictated, perhaps, by the reality that the victim may not be able to sue while he is still imprisoned: "**Limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends.**" 2 H. Wood, Limitation of Actions Section 187d(4), p. 878 (4th rev. ed. 1916); see also 4 Restatement (Second) of Torts Section 899, Comment c (1977); A. Underhill, Principles of Law of Torts 202 (1881). **Thus, to determine the beginning of the**

limitations period in this case, we must determine when petitioner's false imprisonment came to an end. *Id.* at 388-89. (emphasis added).

The principle announced in *Wallace* has been followed by the 1st Circuit in *Harrington v. City of Nashau et al.*, 610 F.3d 24; 2010 U.S. App. LEXIS 13210 (1st Cir. 2010). The *Harrington* court stated:

“Although section 1983 provides a federal cause of action, the length of the limitations period is drawn from state law. [**7] *Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007); *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005). The federal court must borrow the limitations period from the forum state. *Owens v. Okure*, 488 U.S. 235, 239, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989); *Centro Medico*, 406 F.3d at 6.

In this instance, the parties agree that the section 1983 claims are governed, temporally, by New Hampshire's three-year statute of limitations for personal injury tort claims. *See* N.H. Rev. Stat. Ann. § 508:4. Because the plaintiff commenced her action on September 22, 2007, her false imprisonment claim is time-barred if it accrued more than three years prior to that date.

Unlike the limitations period itself, the accrual date of a section 1983 claim is a matter of federal law and, therefore, is "governed by federal rules conforming in general to common-law tort principles." *Wallace*, 549 U.S. at 388. ***The limitations period for a Fourth Amendment claim of false imprisonment begins to run when the false imprisonment ends***; that is, when the putative plaintiff is either released or detained pursuant to legal process. *See id.* at 389; *Mondragon v. Thompson*, 519 F.3d 1078, 1082-83 (10th Cir. 2008).” (emphasis added).

Further, as cited by the *Harrington* court, the 10th Circuit also has applied and followed the principle announced in *Wallace* in the case of *Mondragon v. Thompson*, 519 F.3d 1078, 1082-83 (10th Cir. 2008). The *Mondragon* court stated:

“Both Fourth Amendment claims and due process claims for unconstitutional imprisonment are subject to special federal rules of accrual. As the Supreme Court explained in *Wallace*, the statute of limitations for a Fourth Amendment claim for

false arrest or imprisonment "begin[s] to run . . . when the alleged false imprisonment ends." 127 S. Ct. at 1096 (internal quotation marks omitted). The false imprisonment ends for these [**9] purposes either [*1083] when the victim is released or when the victim's imprisonment becomes "pursuant to [legal] process--when, for example, he is bound over by a magistrate or arraigned on charges." *Id.* (emphasis omitted). ***Thus, either the date of release or the date of sufficient legal process starts the statute of limitations running for the Fourth Amendment claim.*** *Mondragon v. Thompson*, 519 F.3d 1078, 1082-83 (10th Cir. 2008)(emphasis added).

The principle in *Wallace v. Kato* comes from the Restatement of Torts

(Second), Section 899 (1977) subsection *c.* *Time when statute begins to run:*

“Statutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises. Although the courts have not been consistent in applying this limitation strictly, the interpretation of the statute as applied to torts has been such that the statute does not usually begin to run until the tort is complete, and may not begin to run even then if there has been a series of continuous acts.

A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Thus when one makes a fraudulent misrepresentation to another, the tort is not complete until the other acts upon it to his detriment.

....**For false imprisonment, the statute begins to run only when the imprisonment ends, since the period of imprisonment is treated as a unit.**” (emphasis added).

The district court’s error is based upon the fact that Wallace continued to be incarcerated long after his false imprisonment ended. When he was finally released from prison, he sued under Section 1983 for false imprisonment and asserted that his statute of limitations began to run from the date he was ultimately released. The Supreme Court said no, his cause of action accrued when his false imprisonment

ended. Wallace's last day of false imprisonment was the day when legal process was initiated against him. While still in the prison cell, his incarceration went from "false" to lawful. That is when his Section 1983 action began to accrue.

In the present case, Appellant claims that his last 42 days or so, were false imprisonment, all the days before those last 42, were lawful. His "false imprisonment began in early October 2010 and ended on November 19, 2010.

By the very plain and simple language of Wallace, November 19, 2010 is the day his claim began to accrue, and thus his filing on November 18, 2011 was timely and within the one-year statute of limitations.

CONCLUSION

WHEREFORE, Appellant respectfully requests that the Court reverse the district court and remand this case to be reset on district court's docket.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify as counsel for the Appellant, that this Corrected Brief is in all respects, in compliance with the applicable provisions of Rule 32(a)(7)(B) and (C) of the *Federal Rules of Appellate Procedure* by computerized word count (The font for the entire Corrected Brief is Times New Roman at 14 point and the word processing program used is *Word 2008 for Mac*), contains 2639 words, and that it is otherwise in compliance with Rule 37 of the *Federal Rules of Civil Procedure*.

s/D. Marty Lasley, October 29, 2013

Certificate of Service

This is to certify that I have serve the above Corrected Brief on opposing counsel by filing the above pleading electronically with the via the Court's ECF system which automatically sends a copy to the email address of Defendants' counsel listed in the Court's ECF system on the following:

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**APPELLANT'S DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

As counsel for Appellant Anthony Panzica, pursuant to Sixth Circuit Rule 30(a)(1) and (b)(2), there are no documents needed for this appeal not already apart of the District Court's electronic record.

Description of Entry	Date Entered	Record Entry No.
Docket Sheet	N/A	N/A
Complaint	11/18/11	RE 1 PageID #1-8
Def Motion Sum J	01/11/13	RE 34-1 PageID# 120
Def Statement Undisp Facts	01/11/13	RE 34-4PageID #225-28
Plaintiff's Response	03/11/13	RE 45 PageID #252
Plaintiff's Affidavit	03/11/13	RE 45-2PageID #260-64
Plaintiff's Undisputed Facts	03/11/13	RE 45-3 PageID#265-66
Memorandum Opinion	07/03/13	RE 53 PageID #311-20
Order of Dismissal	07/05/13	RE 54 PageID #321
Notice of Appeal	08/01/13	RE 55 PageID #322