

IN THE GENERAL SESSIONS COURT FOR DAVIDSON COUNTY,
TENNESSEE

██████████,)
)
 Petitioner,)
)
 v.) Case No. ██████████)
))
 STATE OF TENNESSEE,)
))
 Respondent.)

Case No. ██████████

2016 SEP 16 AM 11:19
COMMERCIAL COURT

PETITION FOR WRIT OF *AUDITA QUERELA* VACATING PETITIONER'S
CONVICTION UNDER TENNESSEE'S HOMOSEXUAL PRACTICES ACT

Comes now Petitioner ██████████, by and through undersigned counsel, and respectfully petitions this Court to issue a writ of *audita querela* vacating Petitioner's 1995 guilty plea under Tennessee's former "Homosexual Practices Act."¹ As grounds for this petition, the Petitioner respectfully states as follows:

1. On August 13, 1995, Petitioner was arrested for violating the Tennessee Homosexual Practices Act, formerly codified at Tenn. Code Ann. § 39-13-510 (1991). At the time of Petitioner's arrest, this statute provided as follows:

"Homosexual acts—It is a Class C misdemeanor for any person to engage in consensual sexual penetration, as defined in § 39-13-501(7), with a person of the same gender."

2. In pertinent part, Petitioner's citation alleged that he "was engaged in sexual intercourse with another male subject" in violation of Tenn. Code Ann. § 39-13-510. See

¹ Given the sensitive and private nature of the facts underlying this petition, the Petitioner respectfully moves this Court to order the Clerk to place this petition under seal and/or to redact any personally identifiable information regarding Petitioner before permitting this pleading to be viewed by a member of the public.

Exhibit A-2. Petitioner's citation was signed by Officer David Geary, and Petitioner was booked on August 16, 1995. *Id.*

3. Petitioner did not contest the charged offense. Accordingly, on September 26, 1995, he pleaded guilty to a Class C misdemeanor in Case No. [REDACTED] pursuant to the provisions of Tenn. Code Ann. § 40-35-313. *Id.* at A-3. As a consequence of his conviction, Petitioner was assessed penalties including supervised probation and fines and fees totaling \$160.13. *Id.* at A-4.

4. Petitioner's misdemeanor conviction for engaging in consensual sex with another adult male still remains on his criminal record today. *See Exhibit B.* Petitioner's conviction also subjects Petitioner to significant and ongoing legal disabilities. These disabilities include, but are not limited to, the following:

i. **Legalized discrimination in hiring, housing, and other opportunities based on the fact of his conviction;** *see, e.g., The U.S. Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982), Feb. 4, 1987 (outlining when discrimination against those with criminal records is permissible in hiring decisions); U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, Apr. 4, 2016 (outlining when discrimination against those with criminal records is permissible in housing and real estate transactions);*

ii. **Mandatory payment of a \$350.00 expungement fee and a \$100.00 clerk fee as a precondition to expunging the charge from his record;** *see Tenn. Code Ann. § 40-32-101(i) ("A person applying for expunction of records pursuant to this section or § 40-35-313 shall be charged the appropriate court clerk's fee pursuant to § 8-21-401, in addition to any other fees required by this section or § 40-35-313, unless the person is entitled to have such records removed and destroyed without cost to the person."); Tenn.*

Op. Att’y Gen. No. 14-77 (Aug. 25, 2014) (“The \$350 statutory fee required by § 42-32-101 is mandatory and cannot be waived.”); and

iii. **Permanent foreclosure of his right to any future judicial or pre-trial diversion.** *See* Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(e) (“‘qualified defendant’ means a defendant who: . . . Has not previously been granted judicial diversion under this chapter or pretrial diversion.”).

5. On January 26, 1996, Tennessee’s Homosexual Practices Act was invalidated by the Tennessee Court of Appeals as an unconstitutional violation of the Tennessee Constitution’s guarantee of a fundamental right to privacy. *See Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) *abrogated in part on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008). Specifically, the Court of Appeals held:

Pursuant to this state’s constitution and constitutional jurisprudence, we conclude that our citizens’ fundamental right to privacy (“the right to be let alone”) encompasses the right of the plaintiffs to engage in consensual, private, non-commercial, sexual conduct, because that activity “involv[es] intimate questions of personal and family concern.” Therefore, we hold that the Homosexual Practices Act, T.C.A. § 39-13-510, which criminalizes such conduct, is unconstitutional.

Id.

6. Seven years later, the Supreme Court of the United States held that the Due Process Clause of the United States Constitution similarly forbids governments from criminalizing consensual sex between adults of the same gender. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In *Lawrence*, the U.S. Supreme Court held:

[This case] involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private

sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Id.

7. Significantly, Petitioner's conviction under the Tennessee Homosexual Practices Act predated both the Tennessee Court of Appeals' decision in *Campbell* and the U.S. Supreme Court's decision in *Lawrence*. Accordingly, his conviction was facially valid when entered. Thereafter, however, Petitioner's conviction became voidable on the basis of two separate legal defenses that became cognizable only after Petitioner's judgment became final.

8. Given that meritorious legal defenses to Tennessee's now-void Homosexual Practices Act arose after Petitioner's judgment became final, Petitioner is entitled to the issuance of a writ of *audita querela*. The writ of *audita querela* is a rare but consequential common law writ "issued to afford a remedy to a defendant against whom judgment had been rendered, *but who had a new matter in defense* (e.g., a release) arising, or at least raisable for the first time, after judgment." *United States v. Ayala*, 894 F.2d 425, 430 (D.C. Cir. 1990) (quoting Arthur A. Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2101 (1985)). *See also* 7A C.J.S. Audita Querela § 4 ("audita querela may issue against judgments that were valid when rendered, while coram nobis would be used against judgments that were never valid."); *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992) (holding that the writ of *audita querela* "provides relief from the consequences of a conviction when a defense or discharge arises subsequent to entry of the final judgment"); *United States v. Ghebreziabher*, 701 F. Supp. 115, 117 (E.D. La. 1988) ("Audita querela is a 'common law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the

judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise.” (quoting Black’s Law Dictionary (5th Ed.)); *United States v. Salgado*, 692 F. Supp. 1265, 1269 (E.D. Wash. 1988) (same); *United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir.1995) (“Audita querela is probably available where there is a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and that is not redressable pursuant to another post-conviction remedy.”).

9. This Court is empowered to issue “all writs and process necessary to the exercise and enforcement of its jurisdiction.” *Dodds v. Duncan*, 80 Tenn. 731, 735 (1884). *Cf.* Tenn. Code Ann. § 29-1-105 (“In all proper cases, [this court] may use all other extraordinary process of the court of chancery, and in the same way as that court, when necessary to effect the ends of justice.”). Significantly, the Tennessee Court of Criminal Appeals has also assumed, without deciding, that the criminal writ of *audita querela* remains viable in Tennessee. *See Seaton v. State*, No. E199901312CCAR3CD, 2000 WL 1177462, at *3 (Tenn. Crim. App. Aug. 21, 2000) (assuming that writs of *audita querela* may issue where a petitioner can “demonstrate[] any post-judgment occurrence, which would entitle him to issuance of this writ.”).²

10. Of note, however, “the writ of *audita querela* can only be available where

² A separate panel of the Court of Criminal Appeals has concluded that “Tennessee Code Annotated section 27–8–102 (2000) reflects that the writ of *audita querela* is obsolete by providing that the statutory writ of certiorari lies “[i]nstead of *audita querela*[.]” *Dellinger v. State*, No. E-2013-02094-CCA-R3-ECN, 2015 WL 4931576, at *13 (Tenn. Crim. App. Aug. 18, 2015), appeal denied (May 6, 2016). Significantly, the latter panel does not appear to have attempted to distinguish between the civil writ of *audita querela* and the criminal writ of *audita querela*, which are distinct from one another. Regardless, however, if the *Dellinger* court was correct that the writ of certiorari replaced the writ of *audita querela* in substance, then the Petitioner respectfully requests that this Court construe this pleading as a petition for writ of certiorari instead. *See Estate of Doyle v. Hunt*, 60 S.W.3d 838, 842 (Tenn. Ct. App. 2001) (“A trial court is not bound by the title of a pleading, but rather the court is to give effect to the pleading’s substance and treat it according to the relief sought therein.”).

there is a legal objection to a conviction, which has arisen subsequent to that conviction, and which is not redressable pursuant to another post-conviction remedy.” *United States v. Holder*, 936 F.2d 1, 5 (1st Cir.1991). See also *United States v. Reyes*, 945 F.2d 862, 866 (5th Cir.1991) (same); *Balsley v. Com.*, 428 S.W.2d 614, 616 (Ky. 1967) (“an audita querela lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is . . . a writ of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law.” (quoting 3 Blackstone's Commentaries 405–406)). In this instance, because the Petitioner’s charge under Tennessee’s Homosexual Practices Act was resolved both via a guilty plea and pursuant to the diversion statute, none of the traditional post-conviction remedies contemplated by Tennessee law is available to him. See, e.g., *Frazier v. State*, No. M-2014-02374-SC-R11-ECN, 2016 WL 3668035, at *6 (Tenn. July 7, 2016) (“the coram nobis statute is not available as a procedural mechanism for collaterally attacking a guilty plea.”); *Rodriguez v. State*, 437 S.W.3d 450, 457 (Tenn. 2014) (“Although the judicial diversion statute has a component of guilt that could be characterized as a conviction in the general sense, the statute forecloses the entry of a judgment of conviction unless the defendant violates the terms of his diversion. . . . [W]e conclude that a guilty plea expunged following successful completion of judicial diversion is not a conviction within the meaning of the Post-Conviction Act.”).

11. Accordingly, Petitioner satisfies the conditions necessary to qualify for issuance of the writ of *audita querela*, issuance of the writ is necessary to the exercise of this court’s jurisdiction, and issuance of the writ is essential to effect the ends of justice. See *Dodds*, 80 Tenn. at 735; Tenn. Code Ann. § 29-1-105. As a result, the writ should


issue.

Relief Requested

For the foregoing reasons, the Petitioner respectfully requests that this Court issue a writ of *audita querela*:

- (1) vacating his conviction under Tennessee's Homosexual Practices Act;
- (2) returning all fines and fees paid by Petitioner as a consequence of such conviction; and
- (3) dissolving all legal disabilities against Petitioner arising thereunder.

Respectfully submitted,

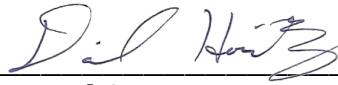
By: 
Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Pro Bono Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2016, a true and exact copy of the foregoing was hand-delivered via the Criminal Court Clerk's drop box to:

Katie Ladefoged, Esq.
Assistant District Attorney
Office of the District Attorney General
Washington Square Building, 5th Floor
222 2nd Avenue North, Suite 500
Nashville, TN 37201-1649

By: 

Daniel A. Horwitz, Esq.

Exhibit A

CRIMINAL COURT

[Handwritten signature/initials]

CITATION NO.	SC [REDACTED]
DEFENDANT	[REDACTED]
CHARGE	<i>Homosexual Acts</i>

NOTATIONS

<i>8:30</i>	<i>8-16-95</i>	
<i>1:00</i>	<i>9-26-95</i>	<i>N/S</i>
<i>9:00</i>	<i>11-28-95</i>	
<i>1:30</i>	<i>10-25-95</i>	
<i>9:00</i>	<i>11-29-95</i>	

Attly: Gerald Richardson

PAID
Aug 13 1996
162.13

STATE MISDEMEANOR CITATION

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Complaint
Copy

No. SC [REDACTED]

In The Metropolitan General Sessions Court:

ON SUN 13 AUG 1995 : 10:20
DAY OF WEEK DATE MONTH YEAR A.M. P.M.

LAST NAME [REDACTED]
FIRST NAME [REDACTED]

IDENTIFIERS
RACE [REDACTED] SEX [REDACTED] HEIGHT [REDACTED] WEIGHT [REDACTED] EYES [REDACTED] HAIR [REDACTED] MONTH [REDACTED] DAY [REDACTED] YEAR [REDACTED]

ADDRESS [REDACTED]

EMPLOY. OR SCHOOL [REDACTED]
OPERATE. L.I.C. OR OTHER L.I. [REDACTED] TYPE OP STATE TN

LOCATION WHERE VIOLATION AT [REDACTED] NEAR [REDACTED]

I THE UNDERSIGNED HAVE PROBABLE CAUSE THAT THE DEFENDANT NAMED, DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE IN VIOLATION OF T.C.A. 39-13-510

BY: Homosexual Acts / Subject was engaged in sexual intercourse with another male subject at the above location.

COMPLAINT NUMBER 27613 RELATED WARRANT NUMBER(S) [REDACTED] CONTINUED ON REVERSE AFFIDAVIT WIT. INFO.

PROSECUTOR SIGN [Signature] PROSECUTOR, IF PRIVATE (PRINT) (ADDRESS ON REVERSE)

SWORN TO AND SUBSCRIBED BEFORE THIS 13 DAY OF AUGUST 1995 DAVID E. Geary ISSUING OFFICER (Print)

JUDGE OR AUTHORIZED OFFICIAL [Signature] EMP. NO. 62166

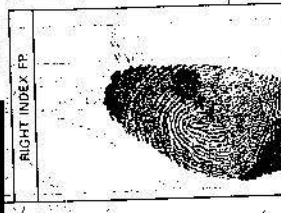
DEFENDANT'S RESPONSIBILITIES 8:30 AM No. 164470

Metropolitan General Sessions Court, Night Court Courtroom, Justice Center, 200 James Robertson Pkwy., 2nd Ave. N. Entrance, Nashville, TN
BOOKING / COURT DATE 16 AUG 1995 2:30 P.M. NIGHTCOURT COURTROOM

WARNING: Failure to appear, either for booking & processing or for court, constitutes two (2) separate misdemeanor offenses, each punishable by fine not exceeding \$250.00 or by a jail sentence of up to six (6) months and / or both in the discretion of the court.
COURT ACTIVITY

I hereby affix my signature and finger print with the understanding that such is NOT A PLEA OF GUILTY, but to certify that I received a copy of this citation and agree to appear as indicated above without issuance of a warrant, as provided by T.C.A. Section 40-7-118.

Defendant's Signature [Signature]



NOT AN ADMISSION OF GUILT

CONTINUATION OF AFFIDAVIT

Empty rectangular box for case details.

PRIVATE PROSECUTOR INFORMATION

Form with fields: Name, Phone, Address, City, Zip Code.

WITNESS INFORMATION

Form with fields: Name, Phone, Address, City, Zip Code.

I WAIVE MY RIGHT TO COUNSEL IN THIS CASE
WAIVER

The Defendant _____

pleads NOT GUILTY GUILTY to the offense of:

and waives his right to be tried only by indictment or presentment preferred by a Grand Jury, and likewise _____

Defendant's signature

Whereupon said defendant appeared before the Judge of the Court of General Sessions of Davidson County, Tennessee, on said charge; was informed by said Judge of the offense with which he was charged, of his right to make a statement in reference to the charge or his right to waive such statement, and being asked by said Judge whether he desired to plead guilty, or not guilty, said defendant waived the right to a hearing of this case by a Grand Jury and the right to be put on trial upon indictment or presentment, and waived the right to a trial by a jury, and

then entered a plea of NOT GUILTY to said charge and requested that this case be heard and determined by this Court and said Judge upon the warrant without indictment or jury and upon said plea the Court having heard the evidence produced by the State and by Defendant and argument of counsel for defendant, find the defendant guilty of the offense charged in the warrant and orders and adjuges that defendant pay a fine

of \$ 500 and all the costs of this cause, in default of payment or failure to secure which fine and costs or either as prescribed by law; that he be confined in the Workhouse of Davidson County, Tennessee, until he works out or satisfies the same or until this judgment is complied with in the manner prescribed by law, and that in addition to said fine and costs said defendant be committed to and confined in said Workhouse of Davidson County for a period of:

40-35-313; 3m PRB SPV LWB

This 26 day of SEP 1995

[Signature]
Judge, General Sessions Court

Warrant/Case # _____

Offense _____

Name _____

Add _____ Zip _____

DLN _____ DLN _____

EMP _____ DLN _____

NOK _____ DLN _____

SSN _____

COURT ACTIVITY _____

Arresting Agency: _____

Officer, serve Subpoena, \$5.00 @ witness \$ _____
Officer, serve Soite Eachas, \$11.00 each \$ _____
Soite Prictas Rec, Nulla Bona, \$5.00 \$ _____
Exec. Rec Nulla Bona, \$5.00 \$ _____

Date	Rec No.	Priv Tax	Dr Ed Tax	ART	CICF	State Late Pen	Civ Tax	Cv Late Pen	CK Fees	Trav Exp	Arst Fees	Jail Fees	BAC Test	TBI Lab	Pto Def	HBCPA	Prob Fees	Shor Fees	LDI Func	T.B.L.F.	Fine
		23.75	2.00	2.75					34.80		15.00				12.50		48.00				50.00
<i>Wickett A124376</i>																					
<i>763</i>																					

80/1000

Exhibit B



▾ Select Search Type ▾ Case Number

Case Number [Empty Input Field]

[Redacted]
Date of Birth: [Redacted] - OCA Number: [Redacted]

[View Detailed Criminal History](#) ▶

Case: [Redacted]
Case Status: Completed Court Process
Defendant Status: Completed Court Process

Charged/Cited Offense

Homosexual Acts
Disposition: Guilty 9/26/1995
Amended:
Convicted:

[+ All Available Cases for \[Redacted\]](#)

Bond

Attorney

[Attorney Of Record Request](#)

Appearance Details

[+ Show Past Appearances](#)