

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE, DIVISION I

2017 DEC 14 AM 10:07

CRIMINAL

CALVIN EUGENE BRYANT, )  
 )  
 *Petitioner,* )  
 )  
 v. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 *Respondent.* )

Case: 2008-B-1478

Judge Steve R. Dozier

**PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIS  
COURT'S JURISDICTION TO ADJUDICATE HIS CLAIMS FOR RELIEF**

Comes now the Petitioner, by and through undersigned counsel, and provides this supplemental filing in support of this Court's jurisdiction to adjudicate his claims.

**I. Summary of Claims Invoking This Court's Jurisdiction**

The Petitioner has raised statutory claims, federal constitutional claims, and state constitutional claims in support of his petition for resentencing. In furtherance of those claims, the Petitioner has invoked this Court's jurisdiction under four separate provisions:

- (1) Tenn. Code Ann. § 40-30-101, *et seq.* (the Post-Conviction Procedure Act);
- (2) Tenn. Code Ann. § 29-21-101 (state habeas corpus); and
- (3) Tenn. Code Ann. § 40-22-101 (judicial recommendation of clemency); and
- (4) Tenn. Code Ann. § 40-26-105 (writ of error coram nobis).

*See Petitioner's Verified Petition for Sentencing Relief, ¶ 1.*

For the reasons that follow, given the unique facts of his case, these provisions afford this Court unfettered jurisdiction to adjudicate all of the Petitioner's claims.

## II. Jurisdiction

### 1. The Post-Conviction Procedure Act

#### **a. Due Process Tolling for Later-Arising Claims**

Generally, the Post-Conviction Procedure Act contemplates a one-year limitations period. *See* Tenn. Code Ann. § 40-30-102(a). However, the Tennessee Supreme Court has long held that due process requires that the Act's limitations period be tolled in appropriate circumstances. *See generally* Brennan T. Hughes, *Due Process Tolling of the Post-Conviction Statute of Limitations in Tennessee After Whitehead v. State*, 10 TENN. J.L. & POL'Y 8, 11 (2014) ("As of 2013, the court had designated three categories of circumstances that called for due process tolling: later-arising claims, mental incompetence, and serious attorney misconduct."). *See also* *Lackey v. State*, No. M2012-01482-CCA-R3PC, 2013 WL 5232345, at \*5 (Tenn. Crim. App. Sept. 17, 2013) ("In the recent case of *Artis Whitehead v. State*, our supreme court discussed the matter of due process in a post-conviction context. The court identified three circumstances in which due process requires tolling the post-conviction statute of limitations. The first of the three circumstances involves claims for relief that arise after the statute of limitations has expired.") (internal citation omitted).

Most pertinently, the Tennessee Supreme Court has held that "later-arising" claims require due process tolling, because a petitioner cannot fairly be expected to pursue a claim for relief before it has ripened, before it has been recognized, or before it has become legally cognizable. *Id.* *See also* *Whitehead v. State*, 402 S.W.3d 615, 623 (Tenn. 2013) ("To date, this Court has identified three circumstances in which due process requires tolling the post-conviction statute of limitations. The first circumstance involves claims for relief that arise after the statute of limitations has expired."). To determine

whether a post-conviction claim qualifies as “later-arising” for due process purposes, the Court of Criminal Appeals has instructed as follows:

[P]rinciples of due process may allow for the tolling of the statute of limitations in limited circumstances. See *Williams v. State*, 44 S.W.3d 464, 468 (Tenn.2001); *Workman v. State*, 41 S.W.3d 100, 103 (Tenn.2001); *Seals v. State*, 23 S.W.3d 272, 279 (Tenn.2000); *Burford v. State*, 845 S.W.2d 204, 208 (Tenn.1992). To determine whether due process tolling applies, courts should examine: (1) when the limitations period would normally have begun to run; (2) whether the grounds for relief arose after the limitations period normally would have commenced; and (3) if the grounds are later-arising, would a strict application of the limitations period deny the petitioner a reasonable opportunity to present the claim. *Sands v. State*, 903 S.W.2d 297, 301 (Tenn.1995).

*Woodard v. State*, No. M2013-01857-CCA-R3PC, 2014 WL 4536641, at \*9 (Tenn. Crim. App. Sept. 15, 2014).

Of note, the test described in *Woodard* has governed post-conviction due process tolling for decades—even predating the Act’s 1996 amendments. See, e.g., *Sands v. State*, 903 S.W.2d 297, 301 (Tenn. 1995) (“in certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds for relief, whether legal or factual, arise after the ‘final action of the highest state appellate court to which an appeal is taken’—or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run. In applying the *Burford* rule to specific factual situations, courts should utilize a three-step process: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are ‘later-arising,’ determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.”).

In the instant case, the Petitioner has alleged that he was advised not to accept a plea bargain for the crime of facilitation “due to the Parties’ mutual misunderstanding that Tenn. Code Ann. § 39-17-432’s mandatory sentencing enhancement applied to facilitation convictions.” *See Petitioner’s Verified Petition for Sentencing Relief*, ¶ 142. The Petitioner has also alleged that the fact that facilitation convictions are not eligible for enhanced sentencing under Tenn. Code Ann. § 39-17-432 did not become clear until December of 2016. The facts underlying this claim also do not appear to be in dispute.

Here, the Petitioner’s trial counsel has sworn that “[a] facilitation offer was rejected because of the belief it was to be served at 100%.” *See Petitioner’s Verified Petition for Sentencing Relief*, Exhibit 20. There is also little doubt that at the time of the Petitioner’s trial, the Respondent was under the same misimpression that facilitation convictions were subject to enhanced sentencing under Tenn. Code Ann. § 39-17-432, because the Respondent contended that Tenn. Code Ann. § 39-17-432 applied to facilitation convictions as recently as last year. *See State v. Gibson*, 506 S.W.3d 450, 452 (2016) (“The State argues the Act establishes a separate criminal offense classified at a higher level because a violation of Tennessee Code Annotated section 39–17–432(b) is charged as a separate offense”). In fact, in *Gibson*—which arose directly out of this jurisdiction (the Honorable Monte Watkins presiding)—the Respondent sought and actually obtained Tenn. Code Ann. § 39-17-432’s enhancement for a facilitation conviction before our Supreme Court reversed the trial court’s ruling. *See id.* at 455 (“The trial court applied the Act and imposed a sentence of twelve years based on a conviction of a Class B felony and required the sentence to be served at 100 percent.”).

The Parties’ mutual misimpression that Tenn. Code Ann. § 39-17-432’s mandatory sentencing does not apply to convictions for facilitation was not corrected until the

Tennessee Supreme Court issued its final mandate in *Gibson* on December 6, 2017. *See id.* at 452 (“[W]e hold the Act does not apply to a conviction for facilitation.”). The Petitioner has also diligently pursued his right to resentencing since then, having initiated his petition for resentencing within one year of *Gibson*’s mandate. Accordingly, having promptly applied to re-open his post-conviction petition following the Supreme Court’s mandate in *Gibson*, this Court has jurisdiction to toll the traditional limitations period and adjudicate the Petitioner’s claims on the basis that they were “later-arising.”

The Petitioner has also alleged that his Eighth Amendment and Article I, Section 16 claims are based on later-arising developments and evolving standards of decency that only recently became cognizable as well. *See Petitioner’s Verified Petition for Sentencing Relief*, ¶¶ 3-9. In the event that the Petitioner’s claim regarding his facilitation offer is recognized, however, adjudicating the Petitioner’s federal and state constitutional claims becomes unnecessary. *See, e.g., Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011) (“Where an appeal can be resolved on non-constitutional grounds, we avoid deciding constitutional issues.”); *Haynes v. City of Pigeon Forge*, 883 S.W.2d 619, 620 (Tenn. Ct. App. 1994) (“this state’s case law mandates that courts avoid deciding constitutional issues when a case can be resolved on non-constitutional grounds.”).

**b. Statutory Retroactivity under Tenn. Code Ann. § 40-30-117(1) and *Teague v. Lane***

In addition to due process tolling, the Post-Conviction Procedure Act contains a statutory retroactivity provision permitting petitions to be reopened retroactively under narrowly defined circumstances. *See* Tenn. Code Ann. § 40-30-117(1). The Post-Conviction Procedure Act subsequently defines the appropriate standard for retroactivity in Tenn. Code Ann. § 40-30-122.

The Tennessee Supreme Court recent clarified that the retroactivity standard set forth in Tenn. Code Ann. § 40-30-122 represents a formal codification of the retroactivity rules adopted by the United States Supreme Court in *Teague v. Lane*. See *Bush v. State*, 428 S.W.3d 1, 20 (Tenn. 2014) (“we have determined that, by adopting Tenn. Code Ann. § 40-30-122, the General Assembly intended to replace the retroactivity standard this Court adopted in *Meadows v. State* with the functional equivalent of the federal standard from *Teague v. Lane*”). Under *Teague*, new rules apply retroactively to all cases pending on direct—but not collateral—review. See *id.* at 10. However, *Teague* also provides that “settled” constitutional rules apply retroactively on both direct and collateral review. See *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (“Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.”). See also *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (“Only when we apply a settled rule may a person avail herself of the decision on collateral review.”).

Under the unique facts of his case, Mr. Bryant is entitled to retrospective relief on collateral review because the Tennessee Supreme Court’s holding in *Gibson* affected his settled constitutional right to the effective assistance of counsel. In *Lafler v. Cooper*, 566 U.S. 156, 174 (2012), the United States Supreme Court held that under the familiar ineffective assistance of counsel framework established in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), a defendant may prevail on a claim of ineffective assistance of counsel during plea bargaining where he can prove that “but for counsel’s deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea.” *Lafler*, 566 U.S. at 174. Under such circumstances, “[t]he correct remedy . . . is to order the State to reoffer the plea agreement.” *Id.*

At the time of his trial, there is little doubt that Mr. Bryant had a long-settled constitutional right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“the Court has recognized that ‘the right to counsel is the right to the effective assistance of counsel.’”) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). Here, the Petitioner was advised not to accept a plea bargain to facilitation because his attorney believed that “it was to be served at 100%.” *See Petitioner’s Verified Petition for Sentencing Relief*, Exhibit 20. After the Tennessee Supreme Court held in *Gibson* that “the Act does not apply to a conviction for facilitation,” however, *see id.* at 506 S.W.3d at 452, it became clear that the Petitioner had been misadvised to his detriment. Under these circumstances, “[t]he correct remedy . . . is to order the State to reoffer the plea agreement” and permit him to plead guilty to facilitation instead. *Lafler*, 566 U.S. at 174.

### **c. Waiver of Limitations Period**

Separately, the limitations period set forth in Tenn. Code Ann. § 40-30-102(a) is an affirmative statutory defense that must be raised by the Respondent. *See* Tenn. R. S Ct., Rule 28, Tennessee Rules of Post-Conviction Procedure § 2(B) (“An answer is a response filed by the state to the petition for post-conviction relief that admits or denies every claim in the petition and which raises affirmative and specific statutory defenses.”). As such, if the defense is waived in the interests of justice, or if it is otherwise abandoned by the Respondent, then it is subject to waiver. *See, e.g., Capers v. State*, No. M2002-00403-CCA-R3CO, 2002 WL 31757515, at \*1 (Tenn. Crim. App. Dec. 9, 2002) (“As this Court has previously recognized, ‘the statute of limitations [applicable to writs of error coram nobis] is an affirmative defense which must be specifically plead or is deemed

waived.”) (citing *Newsome v. State*, 995 S.W.2d 129, 133 n. 5 (Tenn.Crim.App.1998)). See also *Sands v. State*, 903 S.W.2d 297, 299 (Tenn. 1995).

Whether to plead the statute of limitations as an affirmative defense is a matter that is left exclusively to the discretion of the Respondent, who is “the master of the claim.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Cf. *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 879 (E.D. Tenn. 2002) (noting that a litigant “is the master of his own complaint.”).

## 2. State Habeas Corpus

Tennessee’s state habeas corpus statute provides that:

Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in subsection (b) and in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint.”

Tenn. Code Ann. § 29-21-101(a).

Further, our Supreme Court has held that “[h]abeas corpus has no statutory time limitation.” *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). Thus, “[e]ven after a post-conviction petition is dismissed as untimely, a prisoner may assert in a petition for a writ of habeas corpus that his conviction is void or that he is being wrongfully confined beyond his term of imprisonment.” *Id.* In other words: “The statute of limitations on the filing of post-conviction petitions is inapplicable to habeas corpus proceedings, because the two avenues of collateral attack are theoretically and statutorily distinct.” *Id.*

In the instant case, Mr. Bryant has alleged that both the Eighth Amendment and Article I, Section 16 place substantive limits on the permissible length of his sentence. See *Petitioner’s Verified Petition for Sentencing Relief*, pp. 15-37. Thus, he argues, he is being wrongfully confined beyond a constitutional term of imprisonment. *Id.* As such, the



Petitioner's constitutional claims are fully cognizable pursuant to Tenn. Code Ann. § 29-21-101. This Court is fully empowered to adjudicate the Petitioner's claims for state habeas corpus relief without regard to any limitations period as a result. *See Potts*, 833 S.W.2d at 62.

3. Tenn. Code Ann. § 40-22-101 (judicial recommendation of clemency).

The Petitioner has also applied for judicial clemency, and he has petitioned this court to "suspend the remainder of Mr. Bryant's sentence pursuant to Tenn. Code Ann. § 40-22-101 pending gubernatorial action on an application for a pardon or commutation."

Tenn. Code Ann. § 40-22-101 specifically provides that:

In case of the conviction and sentence of a defendant to imprisonment, the presiding judge may, in all proper cases, postpone the execution of the sentence for the amount of time as may be necessary to make application to the executive for a pardon or commutation of punishment.

*Id.*

In determining whether a sentence is "proper" to suspend within the meaning of Tenn. Code Ann. § 40-22-101, Tenn. Code Ann. § 40-22-102 instructs that:

[I]f it is the prisoner's first offense, and it is not likely that the prisoner will again engage in an offensive and criminal course of conduct if released, and in the opinion of the presiding judge the public good does not require that the defendant suffer the disgrace of imprisonment at hard labor in the penitentiary, the execution of sentence and judgment may, in the discretion of the judge, be suspended until the next term of the court, so as to enable application to be made to the governor for a pardon.

*Id.*

Just as pursuing gubernatorial clemency contains no limitations period, no limitations period exists to pursue a claim for judicial clemency under Tenn. Code Ann. § 40-22-101. Accordingly, this court has unfettered jurisdiction to adjudicate Mr. Bryant's claim for judicial clemency as well. *Id.*

#### 4. Writ of error coram nobis.

Fourth and finally, Tenn. Code Ann. § 40-26-105 provides that a writ of error coram nobis may issue to provide relief for “errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding.” *Id.* “The writ of error coram nobis is an ‘extraordinary procedural remedy,’ filling only a ‘slight gap into which few cases fall.’” *Freshwater v. State*, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004) (quoting *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999)). The express “purpose of this remedy ‘is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment.’” *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting *State ex rel. Carlson v. State*, 219 Tenn. 80, 407 S.W.2d 165, 167 (1966)).

For the reasons set forth above, if, at the time of the Petitioner’s trial, the Parties and the Court had been aware of the fact that facilitation convictions were ineligible for enhanced sentencing under Tenn. Code Ann. § 39-17-432, then the instant case would likely have settled, or else resulted in a request for a facilitation instruction that could well have resulted in a lesser verdict. *See Bryant v. State*, 460 S.W.3d 513, 533 (Tenn. 2015) (Wade, J., dissenting) (“Viewing this proof in the light most favorable to the existence of the lesser included offense, a rational juror could have concluded that the Petitioner merely acted as a ‘go-between’ in these transactions, thereby providing substantial assistance to the unidentified dealer in the sale of a controlled substance without intending to promote or benefit from the offenses.”); *overruled by Moore v. State*, 485 S.W.3d 411, 421 (Tenn. 2016).

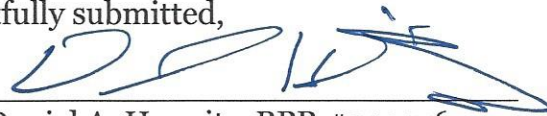
Because the Petitioner has diligently pursued his rights to resentencing after discovering that he would have been ineligible for enhanced sentencing had he accepted a guilty plea to facilitation, and because he has filed for such relief within one year of the Tennessee Supreme Court's mandate in *Gibson*, Mr. Bryant is entitled to issuance of the writ. *Cf. State v. Vasques*, 221 S.W.3d 514, 527 (Tenn. 2007) ("If the defendant is 'without fault' in the sense that the exercise of reasonable diligence would not have led to a timely discovery of the new information, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceeding in order to determine whether the new evidence may have led to a different result.").

### **III. Conclusion**

For the foregoing reasons, this Court has jurisdiction to adjudicate all of the Petitioner's claims under (1) Tenn. Code Ann. § 40-30-101, *et seq.* (the Post-Conviction Procedure Act); (2) Tenn. Code Ann. § 29-21-101 (state habeas corpus); (3) Tenn. Code Ann. § 40-22-101 (judicial recommendation of clemency); and (4) Tenn. Code Ann. § 40-26-105 (writ of error coram nobis).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of December, 2017, a true and exact copy of the foregoing was hand-delivered via the Criminal Court Clerk's drop box to:

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Assistant District Attorney Wesley King, Esq.  
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