IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

STATE OF TENNESSEE,	§	
	§	
Respondent-Appellee,	§	
	§	
v.	§	M2018-00152-CCA-R3-CO
	§	
CALVIN EUGENE BRYANT,	§	Criminal Court for Davidson County
	§	
Petitioner-Appellant.	§	No. 2008-B-1478

PRINCIPAL BRIEF OF APPELLANT CALVIN EUGENE BRYANT

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IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Bryant was eligible for a judicial recommendation of clemency.

2. Whether Mr. Bryant was prejudiced by the material misadvice of his trial counsel.

3. Whether the Respondent had prosecutorial discretion to remedy Mr. Bryant's unjust sentence by re-offering a previous plea agreement that is consistent with its reformed charging policies.

4. Whether Mr. Bryant's sentence was arbitrary or excessive under the Eighth Amendment to the United States Constitution or Article I, § 16 of the Tennessee Constitution as applied to the circumstances of his case.

V. STANDARDS OF REVIEW

"The issues on appeal in this case require the interpretation of statutes. Such issues present questions of law, subject to de novo review with no presumption of correctness in the [trial court's] decisions." *Spires v. Simpson*, No. E2015-00697-SC-R11-CV, 2017 WL 6602434, at *4 (Tenn. Dec. 27, 2017).

Mr. Bryant's appeal also presents mixed questions of law and fact. "Cases that involve mixed questions of law and fact are subject to de novo review." *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

VI. STATEMENT OF THE CASE

A decade ago, Calvin Bryant was a beloved college student, brother, and son who had dreams of playing in the NFL. As a result of an intensely punitive, strict-liability, mandatory minimum sentencing enhancement that is virtually unparalleled in its severity, however, Mr. Bryant received a longer sentence for committing a *first-time, non-violent offense* than he would have received if he had committed a *severe, violent crime* like Rape or Second Degree Murder. Accordingly, Mr. Bryant has spent the past ten years of his life in prison.

Given the almost incomprehensible severity of his punishment and the fact that it is grossly out of step with contemporary standards of decency, Mr. Bryant petitioned the trial court for sentencing relief on several bases:

First, Mr. Bryant argued that his grossly disproportionate sentence justified postponing the execution of the balance of his sentence pursuant to Tennessee Code Annotated § 40-22-101 and § 40-22-102—Tennessee's largely disused "judicial recommendation of clemency" statutes—pending gubernatorial action on an application for a pardon or commutation.

Second, Mr. Bryant argued that he was deficiently and prejudicially advised not to accept an offered plea bargain based on affirmative misadvice from his trial counsel as to whether Tennessee's "Drug-Free School Zone Act" enhancement applied to facilitation charges. Accordingly, Mr. Bryant contended that based on his undisputed claim of ineffective assistance of counsel, "[t]he correct remedy . . . is to order the State to reoffer the plea agreement" and permit him to plead guilty to facilitation. *Lafler v. Cooper*, 566 U.S. 156, 174 (2012).

Third, given that the merits of Mr. Bryant's petition for sentencing relief were

entirely unopposed, Mr. Bryant contended that the Respondent should be able to exercise its prosecutorial power and discretion to re-offer him a previously extended plea bargain consistent with its reformed charging policies "[p]ursuant to the *Holloway* Doctrine" and its progeny, as set forth in *United States v. Holloway,* 68 F. Supp. 3d 310 (E.D.N.Y. 2014).[1]

Fourth, Mr. Bryant argued that as applied to the unique circumstances of his case, his grossly disproportionate sentence violated both the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution.

In light of the extraordinary nature of his case and widespread agreement that the decade that Mr. Bryant has already spent in prison represents sufficient punishment for his first-time, non-violent crime, the merits of Mr. Bryant's petition were not opposed by the Respondent during the proceedings below.[2] Nonetheless, after agreeing that Mr. Bryant's sentence "can be viewed as harsh" and acknowledging that "courts and some members of the community would be hard-pressed to describe [it] as fair,"[3] the trial court denied Mr. Bryant relief under every theory presented.[4] Accordingly, this appeal followed.

VII. STATEMENT OF FACTS

In November 2017, Mr. Bryant filed a petition for sentencing relief setting forth 198 separately numbered allegations.[5] Thereafter, the Respondent "indicated its non-objection to the underlying merits of the Petitioner's request" and did not oppose his

[1] R. at 247-55.
[2] R. at 260 (noting "the State's non-opposition to the merits of the instant petition").
[3] R. at 281-82.
[4] R. at 261-83.
[5] R. at 44-85.

petition for sentencing relief.[6] Accordingly, the facts of this case and the legal claims that Mr. Bryant presented were unopposed.

In 2009, Calvin Bryant was convicted of selling ecstasy pills to an adult government informant at his home in Nashville's Edgehill Housing Projects.[7] Regrettably, Mr. Bryant's home was also located within a school zone.[8] As a consequence, Mr. Bryant is currently serving out the eleventh year of a 17-year sentence for a first-time, non-violent drug offense that he committed when he was only twenty-two (22) years old.[9]

Mr. Bryant's unusually severe sentence was triggered by a strict liability, since-reformed sentencing enhancement that failed to account for any of his substantially mitigating personal circumstances.[10] As a result, Mr. Bryant received a considerably longer sentence for committing a *first-time, non-violent* offense than he would have received if he had committed a *severe, violent crime* such as Rape, Second Degree Murder, Aggravated Robbery, Aggravated Vehicular Homicide, or Attempted First Degree Murder.[11]

Given the almost incomprehensible severity of Mr. Bryant's sentence and the extraordinary mitigating factors involved in his case, cries for sentencing relief have come from all corners. *See, e.g.*, J.R. Lind, *Nashville Case Highlights Drug-Free School Zone Reform Efforts: Tennessee's drug-free school zone law is under the microscope as a first-time, non-violent offender fights his 15 year sentence*, NASHVILLE PATCH, Nov. 28, 2017, https://patch.com/tennessee/nashville/nashville-case-highlights-drug-free-

[6] R. at 260.
[7] R. at 20-24.
[8] R. at 51.
[9] R. at 58, ¶ 68.
[10] R. at 44.
[11] *Id.*

school-zone-reform-efforts; C.J. Ciaramella, *How a Drug-Free School Zone Sent a Tennessee College Student to Prison For 17 Years*, REASON (Dec. 14, 2017 2:12 p.m.), https://reason.com/blog/2017/12/14/how-drug-free-school-zone-laws-sent-a-te; Steven Hale, *Council Members Petition Judge Over Drug-Free School Zone Case*, NASHVILLE SCENE, Dec. 8, 2017, https://www.nashvillescene.com/news/pith-in-the-wind/article/20985229/council-members-petition-judge-over-drugfree-school-zone-case; Adam Tamburin, *He got 17 years for selling drugs near school. Now 12 Nashville officials are fighting on his behalf.,* TENNESSEAN, Dec. 8, 2017, https://www.tennessean.com/story/news/2017/12/08/nashville-council-members-urge-relief-man-sentenced-under-drug-free-school-zone-law/934617001/; Press Release, FAMM, FAMM Reacts to Denial in Calvin Bryant's Drug-Free School Zone Case (Jan. 22, 2018), https://famm.org/famm-reacts-to-denial-in-calvin-bryants-drug-free-school-zone-case/. *See also* R. at 94 (Affidavit of State Representative Brenda Gilmore); R. at 96 (Affidavit of Clinton Gray); R. at 98 (Affidavit of Nashville NAACP President Ludye Wallace) R. at 100 (Affidavit of Tennessee State NAACP Chair Marilyn Brown); R. at 102 (Affidavit of Chenika Miller); R. at 104 (Affidavit of Janice Blackburn); R. at 106 (Affidavit of Kim D. Ross); R. at 108 (Affidavit of Christal Williams); R. at 110 (Affidavit of LaShana Bryant); R. at 112-13 (Affidavit of Mason Caples); R. at 115-16 (Affidavit of Allencia Blackburn); R. at 118 (Affidavit of Annetta Bryant); R. at 120 (Affidavit of Miesha Bryant); R. at 122 (Affidavit of Erica Howse); R. at 124-25 (Affidavit of Steve Beach).

Notably, though, Mr. Bryant's supporters do not merely include his friends and family, local and national media outlets, or elected officials <u>*outside*</u> the criminal justice system. Instead, even the most critical officials <u>*inside*</u> the criminal justice system—

including one of the prosecutors who put Mr. Bryant in prison—agree that the exercise of prosecutorial discretion is proper under the unique circumstances of his case, and that Mr. Bryant should be afforded relief.

During the proceedings below, the Assistant District Attorney who prosecuted Mr. Bryant actively supported his release.[12] He specifically testified by affidavit that:

> I [] fail to see how an additional six years of incarceration will improve Mr. Bryant's amenability to correction or would be required to maintain public safety. I additionally fail to see how his release at a time earlier than 2023—and after over nine years of incarceration—will deprecate the seriousness of the offenses for which he was convicted or significantly imperil public safety.[13]

Further, Nashville's *current* District Attorney does not oppose Mr. Bryant's petition for sentencing relief in the instant case, either. *See* R. at 260 ("the Petitioner is correct in observing that the State indicated its non-objection to the underlying merits of the Petitioner's request"). The Respondent's lack of opposition to Mr. Bryant's petition for resentencing accounts for the absence of any response to Mr. Bryant's petition in the record of this case.[14] During oral argument before the trial court, the Respondent also specifically stated that "prosecutorial discretion is built into the system to deal with" cases like Mr. Bryant's, and that "[i]f this Court grants this petition, we will handle this case as we treat all other" cases under Nashville's since-reformed use of Tennessee's school zone enhancement,[15] which is now applied only to cases at schools or to sales involving children.[16]

Of special note, among defendants whose sentences were enhanced under Tennessee Code Annotated § 39-17-432, Mr. Bryant's sentence also stands in a class of

[12] *Id.*
[13] R. at 91, ¶¶ 11-12.
[14] *See* Tr. at 7-9, 18-19.
[15] Tr. at 18: 1-5.
[16] R. at 55, ¶¶ 45-47.

its own. Specifically, even without regard to Mr. Bryant's youth, his substantially mitigating personal circumstances, or the non-violent nature of his crime, Mr. Bryant has the dubious distinction of being the only defendant in the history of Nashville to be punished with § 39-17-432's mandatory minimum sentencing enhancement for a first-time offense.

Given the location-based nature of Tennessee's Drug-Free School Zone enhancement, Mr. Bryant's sentence was also enhanced dramatically based upon his poverty. Specifically, if Mr. Bryant had lived in a wealthy, residentially-zoned suburb like Belle Meade, then he likely would have been eligible for release after serving just two years and five months in prison for the exact same conduct.[17] Because Mr. Bryant lived in Nashville's Edgehill Housing Projects, however, Mr. Bryant must serve a mandatory minimum sentence of at least fifteen (15) years before he even becomes eligible for parole.[18]

Most importantly, though, in the time since Mr. Bryant's conviction, the Respondent's use of § 39-17-432's intensely punitive sentencing enhancement has also evolved in several significant ways. For example, in 2015 and 2016, respectively, the Tennessee Supreme Court held both that defendants charged under § 39-17-432 are eligible for judicial diversion and that § 39-17-432's enhanced sentencing provisions do not apply to convictions for facilitation. *See State v. Dycus*, 456 S.W.3d 918, 929 (Tenn. 2015) ("we hold that the mandatory minimum service provision of the Drug–Free School Zone Act does not render offenses committed under the Act ineligible for judicial diversion."); *State v. Gibson*, 506 S.W.3d 450, 452 (Tenn. 2016) ("[W]e hold the Act

[17] R. at 45-46.
[18] R. at 71, ¶ 133; R at 137-42.

does not apply to a conviction for facilitation."). Further, the Respondent's implementation of Tennessee Code Annotated § 39-17-432 has since been reformed operationally by the 20th Judicial District to avoid precisely the type of strict liability penalty that applied in Mr. Bryant's case. Under the Respondent's reformed policy, the Respondent now uses § 39-17-432 only to enhance the sentences of those who violate its essential purpose of keeping drugs away from children.[19]

Moreover, evolving national standards of decency since Mr. Bryant's conviction reflect that—as applied to the specific circumstances of his case—Tennessee's Drug-Free School Zone Act enhancement is significantly out of step with national norms and incompatible with contemporary standards of decency. While many states have adopted some version of a drug-free school zone law, Tennessee's sentencing enhancement for school zone offenses is virtually unparalleled in its severity. For instance, Tennessee is one of just three states to elevate an underlying drug offense committed in a school zone by a full felony class.[20] Further, many states "apply an exception to their drug-free zone laws if the offense occurs within a private residence so long as no children are present."[21] Other states have adopted reforms like "chang[ing] state law to grant judges discretion in applying the school zone penalty in certain drug offenses based on 'good cause.'"[22] Still other states "eliminated the zones around public housing complexes and youth program centers" and "added the requirement that a minor must be reasonably

[19] *See, e.g.*, Teresa Wiltz, *Why States Are Taking a Fresh Look at Drug-Free Zones,* PEW: STATELINE BLOG (Sept. 15, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/15/why-states-are-taking-a-fresh-look-at-drug-free-zones ("Funk ran for office in 2014 promising not to prosecute the school zone laws unless a child was endangered[.]").
[20] NICOLE D. PORTER & TYLER CLEMONS, THE SENTENCING PROJECT, DRUG-FREE ZONE LAWS: AN OVERVIEW OF STATE POLICIES 3 (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Drug-Free-Zone-Laws.pdf.
[21] *Id.*
[22] *Id.*

expected to be present when the underlying drug offense occurs."[23]

Critically, any one of these reforms would have spared Mr. Bryant from an intensely punitive sentencing enhancement that places his first-time, non-violent drug offense in a class above even the most severe violent crimes like rape and murder. Even worse: before the present Davidson County District Attorney reformed the Respondent's use of Tenn. Code Ann. § 39-17-432 to effectuate the law's actual intent, Nashville wielded the Drug-Free School Zone enhancement with such a profoundly racially discriminatory impact that its previous use "is very difficult to explain on nonracial grounds." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Indeed, Davidson County's own Grand Jury made a specific determination that the Respondent's previous application of the school zone enhancement was both arbitrary and capricious. *See* R. at 148, DAVIDSON CTY. GRAND JURY, FINAL REPORT (2014), http://trialcourts.nashville.gov/wp-content/uploads/2015/05/October-December-20142.pdf ("The decision to seek increased penalties resulting from school zone violations seemed to be arbitrarily reached at times. The law needs to be applied equally, not arbitrarily and capriciously."). Although people of all races in Nashville use and sell drugs at roughly equal rates, 87% of Davidson County defendants whose sentences were enhanced under Tennessee Code Annotated § 39-17-432 were people of color.[24] Additionally, like Mr. Bryant, 78% of defendants who were sentenced under § 39-17-432 were black.[25] Consequently, given the Respondent's selective use of § 39-17-432's enhancement on apparent racial grounds, Mr. Bryant averred that his punishment was not only excessive as applied, but that it was unconstitutionally arbitrary as well.

[23] *Id.* at 4. *See also* R. at 163.
[24] R. at 47.
[25] *Id.*

VIII. SUMMARY OF ARGUMENT

The trial court denied Mr. Bryant's petition for a judicial recommendation of clemency under both Tennessee Code Annotated § 40-22-101 and § 40-22-102 on the basis that under Tennessee's judicial recommendation of clemency statutes, "a sentence may only be suspended pending an application for clemency where the defendant has pled [sic] guilty."[26] However, the trial court's conclusion in this regard is wholly incompatible with both clemency statutes' plain text and applicable precedent, which make clear beyond dispute that a guilty plea is not required.

Separately, Mr. Bryant was counseled not to accept an offered plea bargain due to affirmative misadvice as to whether § 39-17-432's sentencing enhancement applied to facilitation charges.[27] The fact that the plea bargain at issue was both offered and rejected based on his trial counsel's affirmative misadvice is not disputed. Further, it is clearly established that providing affirmative misadvice constitutes deficient performance. Mr. Bryant was also severely prejudiced by the affirmative misadvice that he received. As such, "'[t]he correct remedy . . . is to order the State to reoffer the plea agreement' and permit him to plead guilty to facilitation." *Lafler*, 566 U.S. at 174. In rejecting this straightforward result, however, the trial court erred by holding that Mr. Bryant's claim was time-barred—even though the Respondent deliberately declined to raise the statute of limitations as a defense and waived it as a result.

Further, given that the merits of Mr. Bryant's petition for sentencing relief were unopposed and that the Respondent formally "indicated its non-objection to the underlying merits of the Petitioner's request,"[28] Mr. Bryant contended that the

[26] R. at 281.
[27] R. at 54, ¶¶ 43-44.
[28] R. at 260.

Respondent should be able to exercise its exclusive prosecutorial power and discretion to resentence him "[p]ursuant to the *Holloway* Doctrine" and its progeny, as set forth in *Holloway,* 68 F. Supp. 3d 310.[29] In denying the Respondent the authority to re-offer Mr. Bryant a guilty plea that is consistent with its current charging policies, however, the trial court erroneously interfered with the Respondent's prosecutorial authority.

Finally, as applied to the unique and extraordinary circumstances of his case, Mr. Bryant's grossly disproportionate sentence violated both the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution. In rejecting those claims, the trial court erred as a matter of law by failing to consider all relevant circumstances. It also erred by denying Mr. Bryant sentencing relief under the Eighth Amendment and Article I, § 16 as applied.

IX. ARGUMENT

A. TENNESSEE'S "JUDICIAL RECOMMENDATION OF CLEMENCY" STATUTES DO NOT REQUIRE A GUILTY PLEA.

Dating back centuries, Tennessee law has contemplated judicial recommendations of clemency that permit trial courts to suspend the execution of a defendant's sentence in extraordinary cases pending gubernatorial action on the defendant's application for clemency. *See* Tenn. Code Ann. § 40-22-101, 102. "Until the early 1920s, clemency served as the primary temper on often harsh sentences and injustices within the judicial system, where many crimes were capital offenses." R. at 182, Benjamin K. Raybin, *Pardon Me: How Executive Clemency Works in Tennessee (and How It Doesn't)*, 52 TENN. B.J. 4 (Aug. 2016). "Tennessee's historical reliance on clemency is demonstrated by the still-existing but disused statutory procedure for

[29] R. at 247-55.

judicial recommendations for a pardon or commutation." *Id.* (citing Tenn. Code Ann. § 40-22-101, 102).

During the proceedings below, Mr. Bryant sought an order "postponing the execution of the balance of his sentence pursuant to Tennessee Code Annotated § 40-22-101 pending gubernatorial action on an application for pardon or commutation."[30] Mr. Bryant specifically argued that given the extraordinary circumstances of his case, he should be afforded relief under § 40-22-101's broad judicial recommendation of clemency provision, which applies expansively to "all proper cases."[31] *Id.* Mr. Bryant also contended that he satisfied the specific statutory guidelines set forth under § 40-22-102, which contemplates a judicial recommendation of clemency under certain narrowly defined circumstances.[32]

In ruling upon Mr. Bryant's application for a judicial recommendation of clemency, the trial court acknowledged that "in spite of the lack of use of the statutes, they continue to be in effect."[33] The trial court also correctly observed that "[t]he statutes appear to provide for a judicial recommendation of clemency and the accompanying relief in two different situations."[34] Nonetheless, the trial court concluded that "because the Petitioner did not plead guilty in the instant case, the Court does not have the authority to suspend the execution of his sentence pending an application for clemency."[35] Because § 40-22-101 does not even conceivably require a guilty plea, however, and because § 40-22-102 does not require a guilty plea, either, this holding was demonstrably in error.

[30] R. at 86.
[31] R. at 85.
[32] R. at 240.
[33] R. at 280.
[34] *Id.*
[35] R. at 281.

1. Tennessee Code Annotated § 40-22-101 does not require a guilty plea.

The trial court's conclusion that § 40-22-101 requires a guilty plea as a condition of a judicial recommendation of clemency is incompatible with the statute's plain text and applicable precedent. In full, § 40-22-101 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.

Quite plainly, § 40-22-101 does not mention, reference, or contemplate a guilty plea. Instead, it empowers a presiding judge to postpone the execution of a defendant's sentence "in **all** proper cases" involving a "conviction and sentence of a defendant to imprisonment." *Id.* (emphasis added).

By contrast, the prerequisite supplied by the trial court—a guilty plea—appears nowhere in § 40-22-101. Given that § 40-22-101's "statutory language is clear and unambiguous," however, the trial court should have "appl[ied] the plain language in its normal and accepted use." *Boarman v. Jaynes*, 109 S.W.3d 286, 291 (Tenn. 2003).

As importantly, precedent from the period when Tennessee's judicial clemency statutes were in common use confirms without any doubt that a defendant need not plead guilty in order to qualify for relief under Tennessee Code Annotated § 40-22-101. For example, in *Allen v. State*, 8 Tenn. 294, 294 (Sup. Ct. Err. & App. 1827), the defendant "was tried at the Circuit Court of Green County, September term, 1826, for the murder of James Houston. He was found not guilty of murder, but guilty of manslaughter; and judgment was rendered that he be branded, imprisoned six months, and pay the costs of the prosecution." *Id.*

Following the defendant's conviction—which was a product of a trial, not a guilty

plea, *see id.*—the defendant moved to "have the execution of said judgment respited, for the purpose of permitting him to apply to the governor for a pardon," and "in the mean time," he moved to "be admitted to bail." *Id.* at 295. The trial court denied relief, and the defendant appealed. On appeal, the defendant argued that "the motion made in the Court below, for time to apply for the pardon, set forth in the memorandum in the transcript, ought to have been sustained by the judge . . . ." *Id.*

Upon review, the Supreme Court of Errors and Appeals of Tennessee agreed with the defendant. *Id.* at 248 ("This Court have little doubt but that in cases of manslaughter, the execution of the judgment ought to be suspended, for the burning in the hand is the most important part solicited as the object of pardon, which, if inflicted, the benefit of the privilege would be much impaired."). Accordingly, the Court suspended the defendant's judgment pending his application for clemency. *Id.* at 299 ("Let execution of the judgment in this case be suspended until the further order of this Court, except as to the costs, for which an execution may now issue; and that the plaintiff in error enter into recognizance, himself in the sum of $5,000, with five securities, each in the sum of $1,000, that he will appear.").

Thus, the plain text of Tennessee Code Annotated § 40-22-101 reflects that a guilty plea is not required to seek judicial clemency, and precedent confirms the matter. *See Allen*, 8 Tenn. at 294. Accordingly, the trial court's contrary holding that a guilty plea is a prerequisite to seeking a judicial recommendation of clemency under § 40-22-101 was without basis. *Id.*

2. Tennessee Code Annotated § 40-22-102 also does not require a guilty plea.

Notwithstanding the trial court's holding on the matter, § 40-22-102 does not constrain judicial clemency recommendations under § 40-22-101. Further, Tennessee

Code Annotated § 40-22-102 does not require a defendant to plead guilty in order to apply for clemency, either.

As the trial court correctly acknowledged, § 40-22-101 and § 40-22-102 are two different statutes that "provide for a judicial recommendation of clemency and the accompanying relief in two different situations."[36] Consequently, even if a guilty plea were required under § 40-22-10**2**—and it is not—such a requirement would have no bearing on whether a guilty plea is required under § 40-22-10**1**. As noted above, § 40-22-101 does not remotely contemplate such a requirement. *See supra,* Section IX-A.

Further, § 40-22-102 does not require a guilty plea, either. In full, it reads:

> Whenever a plea of guilty is entered by the defendant to an indictment charging a felony, and it appears to the circuit or criminal court judge receiving the plea that the prisoner is only technically guilty, or that there are circumstances or conditions connected with the alleged crime or in the defendant's life and surroundings tending to mitigate the offense, **or if 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. (emphasis added).

The proper and most straightforward reading of this statute is that it contemplates a recommendation of clemency "in the discretion of the trial judge, when, in his opinion, one or more of the specifically listed circumstances exist." *Saeger v. State*, 592 S.W.2d 909, 909 (Tenn. Crim. App. 1979). In other words: all of the circumstances described in Tennessee Code Annotated § 40-22-102 are not required for a judicial recommendation of clemency to be appropriate. Instead,

[36] R. at 280.

organized according to its punctuation, § 40-22-102 contemplates a judicial recommendation of clemency under the following circumstances:

> [1] Whenever a plea of guilty is entered by the defendant to an indictment charging a felony, **and**
>
> > [A] it appears to the circuit or criminal court judge receiving the plea that the prisoner is only technically guilty, **or**
> >
> > [B] that there are circumstances or conditions connected with the alleged crime or in the defendant's life and surroundings tending to mitigate the offense, **or**
>
> [2] if it is the prisoner's first offense, **and**
>
> > [A] it is not likely that the prisoner will again engage in an offensive and criminal course of conduct if released, **and**
> >
> > [B] 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 . . . .

Id. (emphasis added).

Thus, in the first instance a judicial recommendation of clemency may be issued under § 40-22-102 following a felony guilty plea involving either technical guilt or especially mitigated circumstances. Additionally—and independently—a judicial recommendation of clemency may be issued under § 40-22-102 in cases involving a defendant's "first offense" if it is both unlikely that the defendant will reoffend and if "the public good does not require that the defendant suffer the disgrace of imprisonment at hard labor in the penitentiary." *Saeger*, 592 S.W.2d at 909. As noted, Tennessee Code Annotated § 40-22-102's criteria are also separate from those set forth under § 40-22-101, because the two statutes apply to "different situations."[37]

Admittedly, in typical cases, establishing § 40-22-102's clemency factors will be

[37] *Id.*

extraordinarily difficult. *Saeger*, 592 S.W.2d at 909. Here, however, the latter set of circumstances governing "first offenses"—where a defendant is both unlikely to reoffend and where the public good does not require imprisonment—is easily met.

In addition to the overwhelming community support that he continues to enjoy, Mr. Bryant is a first-time, non-violent offender whose *own prosecutor* has testified that the public good would not be served by his continued incarceration, and the Respondent itself does not oppose his claim for relief.[38] Only the rarest cases will involve this extraordinary confluence of circumstances. In Mr. Bryant's unique case, though, a judicial recommendation of clemency under Tennessee Code Annotated § 40-22-102 is proper.

3. This Court may make a judicial recommendation of clemency.

Where, as here, a defendant makes a compelling demonstration that judicial clemency is appropriate and that the trial court has erred in denying it, appellate courts are empowered to remedy the error by affording the defendant his requested relief. *See Allen*, 8 Tenn. at 299. *See also* 11 Tenn. Prac. Crim. Prac. & Proc., § 33:6 (Dec. 2017) ("the trial judge *or an appellate court* may also stay the execution of the sentence so that the defendant can apply for relief from the governor.") (emphasis added) (citing Tenn. Code Ann. § 40-22-101; *Allen*, 8 Tenn. 294).

In the instant case, the extraordinary circumstances of Mr. Bryant's case militate heavily in favor of recommending clemency. *See generally* R. at 80, ¶ 182—R. at 85, ¶ 198. The trial court also erred in denying Mr. Bryant clemency based on an erroneous interpretation of Tennessee's judicial clemency statutes. Accordingly, the trial court's order denying Mr. Bryant a judicial recommendation of clemency should be reversed,

[38] R. at 91, ¶¶ 11-12; R. at 260.

and this Court should issue the recommendation in the trial court's place.

B. MR. BRYANT WAS PREJUDICED BY THE MATERIAL MISADVICE OF HIS COUNSEL.

In seeking sentencing relief, Mr. Bryant alleged that he was denied the effective assistance of counsel based on affirmative misadvice from his trial counsel that caused him to reject a favorable plea bargain.[39] Critically, the facts regarding Mr. Bryant's ineffective assistance of counsel claim are also undisputed.[40]

Prior to Mr. Bryant's trial, Mr. Bryant's trial counsel "entered into plea negotiations with representatives from the Davidson County District Attorney's Office."[41] Mr. Bryant's trial counsel recalled that "during the plea negotiations, the State extended the offer of allowing Mr. Bryant to plea[d] guilty to the lesser charge of facilitation on each count."[42] Under the offered plea, "[a]ll counts would run concurrent for a total sentence of 8 years."[43] However, "the facilitation offer was rejected because of the belief it was to be served at 100%."[44] For its part, the Respondent similarly confirmed on the record that: "It is our understanding that [] the plea offer that was made was a plea at 100 percent back at that time."[45]

Almost a decade later, Mr. Bryant came to learn that the advice that he had received had been inaccurate. Specifically, in *State v. Gibson*, 506 S.W.3d at 452, the Tennessee Supreme Court held that Tennessee Code Annotated § 39-17-432's enhancement "does not apply to a conviction for facilitation." Further, as Mr. Bryant observed in his petition:

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[39] R. at 54-55, 73. *See also* R. at 235.
[40] R. at 153; Tr. at 20.
[41] R. at 153.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Tr. at 20.

> An unenhanced facilitation conviction would have rendered Mr. Bryant eligible for both early parole eligibility and a significantly reduced sentence. Accordingly, if he had accepted this offer, then Mr. Bryant would have been released from prison several years ago. *Bryant v. State*, 460 S.W.3d 513, 530 (Tenn. 2015) ("[A] conviction for the facilitation of this offense, a Class B felony, could have resulted in a sentence of as little as eight years.").[46]

"To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding." *Howard v. State*, No. W201701890CCAR3PC, 2018 WL 3996874, at *5 (Tenn. Crim. App. Aug. 21, 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "'In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice.'" *Smith v. State*, No. M201700321CCAR3PC, 2018 WL 3803081, at *5 (Tenn. Crim. App. Aug. 9, 2018) (quoting *Lafler*, 566 U.S. at 163). In the instant case, both deficiency and prejudice are easily established.

1. Affirmative misadvice constitutes deficient performance.

It has long been settled that affirmative misadvice constitutes deficient performance. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 384 (2010) ("affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance."); *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (finding an attorney rendered deficient performance when he provided advice that was "flatly incorrect"); *Maples v. Stegall*, 340 F.3d 433, 439 (6th Cir. 2003) (holding that the provision of "patently erroneous" legal advice is deficient performance); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (holding that counsel's "complete ignorance of the relevant law under which his client was charged, and his consequent

[46] R. at 54-55, ¶ 44.

gross misadvice to his client regarding the client's potential prison sentence, certainly fell below an objective standard of reasonableness under prevailing professional norms"); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) ("Mr. Girard's recitation of the law . . . was clearly wrong . . . and cannot be said to constitute reasonable strategy."); *McAdoo v. Elo*, 365 F.3d 487, 499 (6th Cir. 2004) (stating that if counsel incorrectly advised petitioner about maximum prison sentence before a guilty plea, a petitioner's "argument that his counsel's performance was deficient may have merit"). Indeed, "affirmative misadvice" is so universally acknowledged to constitute deficient performance that even the government has advanced it—albeit with the (rejected) goal of ***limiting*** ineffective assistance of counsel claims to affirmative advice—as a basis for establishing deficiency. *See United States v. Aguiar*, 894 F.3d 351, 358 (D.C. Cir. 2018) (noting that in *Padilla v. Kentucky*, "the Court rejected the government's view that *Strickland* should be limited to situations where the defendant has received 'affirmative misadvice' on matters in the criminal case").

Here, the record demonstrates conclusively that "the facilitation offer was rejected" by Mr. Bryant due to his trial counsel's advice that "it was to be served at 100%."[47] In truth, though, a facilitation conviction would not have been "served at 100%," because § 39-17-432's enhancement "does not apply to a conviction for facilitation." *Gibson*, 506 S.W.3d at 452. Accordingly, Mr. Bryant's trial counsel affirmatively misadvised him as to the sentence that he would have received had he pleaded guilty, and that affirmative advice constituted deficient performance.

2. Mr. Bryant was prejudiced by the affirmative misadvice of his trial counsel.

In the context of a rejected plea bargain, the Tennessee Supreme Court has

[47] *Id.*

adopted the following test for determining prejudice:

> [A] defendant claiming that trial counsel's performance was deficient in the plea negotiations process has the burden to show by a reasonable probability that, but for counsel's deficient representation, (1) the defendant would have accepted the plea, (2) the prosecution would not have withdrawn the offer, and (3) the trial court would have accepted the terms of the offer, such that the penalty under its terms would have been less severe than the penalty actually imposed.

Nesbit v. State, 452 S.W.3d 779, 800–01 (Tenn. 2014) (citing *Lafler*, 566 U.S. at 164).

These factors, too, are easily established.

First, the record makes plain that the offered plea was rejected solely "because of the belief it was to be served at 100%."[48] This fact is uncontested.

Second, the record makes plain that not only would the Respondent "not have withdrawn the offer"—it *is still willing to extend it today*."[49] Indeed, the Respondent has intimated that it is willing to extend an offer that is even *more* favorable to Mr. Bryant, stating on the record that if he is afforded the relief he is seeking, "we will handle this case as we treat all other criminal pending cases,"[50] which are now subject to a significant less punitive charging policy.

Third, the record indicates that the trial court would have accepted the terms of the offer—which was far less severe than Mr. Bryant's current 17-year sentence—and, indeed, that it routinely accepts such offers in similar cases, where the School Zone enhancement is consistently abandoned as a matter of prosecutorial discretion.[51]

Under these circumstances, the U.S. Supreme Court has established the proper remedy. In *Lafler v. Cooper*, the Court explained:

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[48] *Id.*
[49] R. at 260 (noting the Respondent had "indicated its non-objection to the underlying merits of the Petitioner's request.").
[50] Tr. at 18.
[51] *See, e.g.,* R. at 57. *See also* Tr. at 18.

> In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. *See, e.g., Williams*, 571 F.3d, at 1088; *Riggs v. Fairman*, 399 F.3d 1179, 1181 (C.A.9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

566 U.S. at 171.

Thus, the proper remedy in Mr. Bryant's case is clear: this Court should "require the prosecution to reoffer the plea proposal" and enable him to plead guilty to two counts of facilitation to be served concurrently for a total sentence of eight (8) years. *Id.* Thereafter, because Mr. Bryant intends to accept the offer, the trial court "can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

3. The Trial Court's contrary conclusions were without merit.

In rejecting the conclusion and unopposed remedy described above, the trial court relied upon three grounds: (i) that the statute of limitations had expired, (ii) that due process tolling was inapplicable, and (iii) that the performance of Mr. Bryant's trial counsel was not deficient. Each is unpersuasive.

i. The statute of limitations was not raised intentionally, and thus was waived.

First, the trial court concluded that the statute of limitations had expired.[52] Critically, however, the Respondent did not invoke the statute of limitations or oppose

[52] R. at 274.

Mr. Bryant's petition at all *by design*. Accordingly, whether abandoned formally or otherwise, the Post-Conviction Procedure Act's ("PCPA") statute of limitations—which is an affirmative defense, and *not* a jurisdictional restriction—was waived. *See Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997) ("Moreover, **the [Post-Conviction Procedure Act's] statute of limitations is an affirmative defense which the State must plead and prove**. *Smith v. State*, 873 S.W.2d 5, 6 (Tenn. Crim. App. 1993). **Failure to do so constitutes a waiver of the defense.**") (emphasis added). *See also* Tenn. Sup. Ct. R. 28, § 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.").

ii. Mr. Bryant would have been entitled to Due Process tolling.

Even if the Respondent had *not* deliberately declined to raise the statute of limitations as a defense—and it did—Mr. Bryant was also entitled to due process tolling for a later-arising claim. The Tennessee Supreme Court has long held that due process requires that the PCPA'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, this Court 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 also governed post-conviction due process tolling for decades—even predating the Act's 1996 amendments. *See, e.g., Sands*, 903 S.W.2d at 301 ("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, Mr. Bryant alleged that he was advised not to accept a plea bargain for the crime of facilitation "due to the Parties' mutual misunderstanding that Tennessee Code Annotated § 39-17-432's mandatory sentencing enhancement applied to facilitation convictions."[53] He also alleged that the fact that facilitation convictions are not eligible for enhanced sentencing under § 39-17-432 did not become clear to him until the Tennessee Supreme Court issued its final mandate in *Gibson* in December 2016. 506 S.W.3d at 452 ("[W]e hold the Act does not apply to a conviction for facilitation.").

Moreover, Mr. Bryant's later-arising realization that he had been misadvised was entirely reasonable. Indeed, the Respondent itself was under the same misimpression that facilitation convictions were subject to enhanced sentencing under Tennessee Code Annotated § 39-17-432 until *Gibson* was decided, because *Gibson* arose out of the same judicial district, and the Respondent contended that § 39-17-432 applied to facilitation convictions in that very case. *See Gibson*, 506 S.W.3d at 452 ("The State argues the Act establishes a separate criminal offense classified at a higher level because a violation of

[53] R. at 73.

Tennessee Code Annotated section 39–17–432(b) is charged as a separate offense"). In fact, in *Gibson*, the Respondent sought and <u>*obtained*</u> § 39-17-432's enhancement for a facilitation conviction before the 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 Tennessee Code Annotated § 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 Gibson*, 506 S.W.3d at 452 ("[W]e hold the Act does not apply to a conviction for facilitation."). The Petitioner also diligently pursued his right to resentencing thereafter, having initiated his petition for resentencing within a year of *Gibson*'s mandate. Accordingly, having promptly applied to re-open his post-conviction petition following the Supreme Court's mandate in *Gibson*, even if the Respondent had not deliberately waived the PCPA's limitations period, the trial court should have tolled the limitations period on the basis that Mr. Bryant's claim was "later-arising."

<u>iii. The trial court's holding that his trial counsel's affirmative misadvice was not deficient is unsupportable.</u>

Finally, the trial court intimated that despite his trial counsel's acknowledged and undisputed misadvice, Mr. Bryant's trial counsel may not have performed deficiently. Specifically, the trial court indicated, in a footnote, that:

> [I]f the Court found that the law on this issue was not established until after the *Gibson* decision, the Court would be hard-pressed to then find that in spite of this, [Mr. Bryant's trial counsel] should have known that the Act did not apply to facilitation such that her representation of the Petitioner was deficient. Thus, if the claim were later-arising, [trial

> counsel's] representation was not deficient, and the Petitioner would not be entitled to relief for ineffective assistance of counsel.[54]

This analysis is clearly wrong for several reasons:

First, in a separate section of the very same order, the trial court found that "the Tennessee Supreme Court's analysis in interpreting the Act's applicability to convictions for facilitation was straightforward," that it merely involved "the plain meaning of the statute," and that it "did not [involve] any complex canons of statutory interpretation."[55] In other words: for purposes of the timing of Mr. Bryant's claim, the trial court concluded that his trial counsel's error was glaring and obvious, and that his claim should have been brought within the traditional limitations period as a result. For purposes of determining whether Mr. Bryant's trial counsel's performance was deficient, however, the trial court held that his trial counsel's error was entirely reasonable, because there was no reason why his trial counsel "should have known that the Act did not apply to facilitation . . . ."[56] These conclusions are irreconcilable.

Second, the trial court misconstrued the relevant inquiry. When Mr. Bryant's trial counsel discovered (or should have discovered) her error is immaterial. *See Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) ("attorney misrepresentation may toll the post-conviction statute of limitations *despite the presence of statutory language stating that the statute of limitations shall not be tolled for any reason*"). Instead, it is blackletter law that "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708 (1948). Consequently, all that matters is that Mr. Bryant's trial

[54] R. at 268.
[55] R. at 267, n.8.
[56] *Id.*

counsel erroneously advised him, and that Mr. Bryant reasonably relied upon his trial counsel's misadvice to his detriment. Put simply: "In our justice system, attorneys are expected to know the law and to provide competent advice to their clients, and their clients are entitled to rely upon it. A justice system that rejected such threshold principles would cease to be recognizable as such[.]" *See* Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 HARV. LATINO L. REV. 1, 20 (2016).

Third, Mr. Bryant's entitlement to relief under the PCPA does not depend upon his claim being "later-arising" for due process purposes. As noted above, the Respondent deliberately declined to invoke the PCPA's statute of limitations, and that intentional "[f]ailure to do so constitute[d] a waiver of the defense." *Rickman*, 972 S.W.2d at 691. Consequently, the trial court's recognition that it was "straightforward" that § 39-17-432's enhancement did not apply to facilitation charges significantly bolsters Mr. Bryant's ineffective assistance of counsel claim, rather than undermining it.

C. THE SEPARATION OF POWERS DOCTRINE EMPOWERS DISTRICT ATTORNEYS TO EXERCISE PROSECUTORIAL DISCRETION TO REMEDY UNJUST SENTENCES.

During oral argument on Mr. Bryant's petition, the trial court correctly noted that the District Attorney formally "indicated its non-objection to the underlying merits of the Petitioner's request."[57] In so doing, the Respondent specifically observed that "prosecutorial discretion is built into the system to deal with" cases like Mr. Bryant's.[58] The Respondent further indicated that "[i]f this Court grants this petition, we will handle this case as we treat all other" cases under Nashville's since-reformed use of Tennessee's school zone enhancement,[59] which the 20th Judicial District now applies

[57] R. at 260.
[58] Tr. at 18:1-3.
[59] Tr. at 18: 1-5.

only to cases at schools or to drug sales involving children.[60]

In federal courts, prosecutors' exercise of their authority to remedy unjust sentences like Mr. Bryant's after a conviction has come to be known as the "*Holloway* Doctrine" following *United States v. Holloway,* 68 F. Supp. 3d 310.[61] "In *Holloway*, the Department of Justice agreed to exercise its authority to demonstrate leniency. As the district court in that case recognized, such authority 'will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly.'" *Bugg v. United States*, No. 1:06-CR-135, 2017 WL 2637721, at *5 (E.D. Tenn. June 19, 2017) (quoting *Holloway*, 68 F. Supp. 3d at 316). Since *Holloway*, in rare cases meriting extraordinary leniency, prosecutors have exercised their authority to correct an unjust sentence when all other avenues for relief have been exhausted.

"[T]he one consistent theme for the Courts that have addressed the *Holloway* decision is that unless the government acquiesces to the reduction [in a defendant's sentence], there is no jurisdiction for the district court to reduce the Petitioner's sentence." *See Whitt v. United States*, No. 1:95 CR 33, 2017 WL 5257709, at *3 (N.D. Ind. Nov. 13, 2017) (collecting cases). *See also Acuna v. United States*, No. 07-00615 SOM, 2016 WL 3747531, at *3 (D. Haw. July 8, 2016) ("*Holloway* is contingent on the Government's acquiescence"); *United States v. Smith*, No: 2:06–cr–42–FtM–29SPC, 2017 WL 2889307, at *2 (M.D. Fla. July 7, 2017) ("Mr. Holloway would not have been eligible for relief without the government's agreement, and the government has not agreed to any such reduction in this case."). "Indeed, the *Holloway* court itself recognized the importance of the government's agreement to its resentencing . . . ('the

[60] R. at 55, ¶¶ 45-47.
[61] R. at 247-55.

significance of the government's agreement is already clear: it has authorized me to give Holloway back more than 30 years of his life')." *United States v. Hendrix*, No. 07 C 4041, 2018 WL 1064705, at *2 (N.D. Ill. Feb. 27, 2018) (citing *Holloway*, 68 F. Supp. 3d at 315–16).

In rejecting the Government's authority to "give [a defendant] back" his life when extraordinary circumstances merit leniency, *id.*, the trial court minimized the *Holloway* Doctrine as mere "persuasive authority."[62] Critically, however, the notion that prosecutors are empowered to exercise their discretion to remedy unjust sentences is not merely a product of federal practice, which is why state variants are so commonplace when extraordinary cases warrant discretionary relief. *See generally* R. at 195-231. Instead, it is a product of the Separation of Powers doctrine itself.

"Under the United States Constitution and the law of Tennessee, the State is given broad discretion over the control of criminal prosecutions." *State v. Harris*, 33 S.W.3d 767, 771 (Tenn. 2000). "The decisions of our [Supreme] Court similarly provide that the State has the 'sole duty, authority, and discretion to prosecute criminal matters.'" *Id.* (quoting *State v. Spradlin*, 12 S.W.3d 432, 436 (Tenn. 2000); *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209–10 (Tenn. 1999)).

At the very outset of a case, district attorneys enjoy exclusive and virtually unreviewable authority whether to charge a defendant or not. As this Court has previously observed, subject only to constitutional constraints: "So long as the prosecutor has probable cause to believe that the accused committed an offense, the decision whether to prosecute, and what charge to bring before a grand jury, generally rests entirely in the discretion of the prosecutor." *State v. Lunati*, 665 S.W.2d 739, 746

[62] R. at 260.

(Tenn. Crim. App. 1983). Thus, when it comes to charging decisions, a district attorney:

> [I]s answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very real sense this is the most powerful office in Tennessee today. Its responsibilities are awesome; the potential for abuse is frightening. Indeed, as an incident of separation of powers, the courts may not interfere with the discretion of the District Attorney in their control over criminal prosecutions.

Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978).

While such wide discretion introduces clear "potential for abuse" into the prosecutorial process, *see id.*, it also introduces concomitant potential for mercy. "As a corollary of the wide discretion vested in a district attorney general, it has long been recognized that the office has the inherent responsibility and duty to seek justice rather than to be just an advocate for the State's victory at any cost." *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994). Indeed, in *Foute v. State*, 4 Tenn. 98, 99 (Sup. Ct. Err. & App. 1816), the Tennessee Supreme Court of Errors and Appeals described the responsibilities of the office of district attorney general as follows:

> He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either.

In the instant case, the Respondent indicated that it did not oppose exercising its discretion in the direction of mercy.[63] As noted, this is also one of the ***responsibilities*** of prosecutors, albeit one that frequently goes unmet. *Id.* And although prosecutorial discretion is not absolute after the charging process has been completed, *see Dearborne*,

[63] R. at 260 (noting "the State's non-opposition to the merits of the instant petition").

575 S.W.2d at 262 (quoting *Pace v. State*, 566 S.W.2d 861, 867 (Tenn. 1978)), neither is it lost. Indeed, even following a conviction, there are circumstances when, in the interests of justice, a prosecutor is *obligated* to seek to remedy a defendant's sentence even if all other avenues for relief have been exhausted. *See, e.g.,* Tenn. Sup. Ct. R. 8, RPC 3.8(h) ("When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.").

Further, even after the charging process has begun, the judiciary's authority to interfere with the exercise of prosecutorial discretion remains narrowly limited. *See, e.g., Harris*, 33 S.W.3d at 771 ("The record does not reflect any manifest public interest sufficient to merit the trial court's restraint of the State's discretion; indeed, the trial court seems to have merely substituted its judgment for the State's regarding which of the two indictments should be pursued. Such a unilateral check of prosecutorial discretion, without apparent or articulated justification, is beyond the trial court's authority. Therefore, we conclude that the trial court abused its discretion in denying the State's motion to nolle prosequi the original indictment."). Nonetheless, just as prosecutors must act in the interest of justice in appropriate circumstances following a conviction, so, too, is the judicial branch empowered and obligated to do so under appropriate circumstances as well. *See, e.g., Lafler*, 566 U.S. at 174 ("The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.").

Finally, the right to extend a plea bargain to a defendant (or not) is the State's alone. *See State v. Hodges*, 815 S.W.2d 151, 155 (Tenn. 1991). Given this context, the trial court's conclusion that the Respondent was *forbidden* from re-offering Mr. Bryant a previously extended plea bargain that both comports with his jurisdiction's current

charging policies and was previously rejected due to undisputed affirmative misadvice from Mr. Bryant's trial counsel is unsupportable.

For all of these reasons, Davidson County's elected District Attorney was empowered to exercise his office's prosecutorial discretion to remedy Mr. Bryant's unjust sentence by extending him a previously offered plea bargain. As such, the trial court's Order prohibiting him from exercising that discretion should be reversed.

D. MR. BRYANT'S SENTENCE WAS ARBITRARY AND EXCESSIVE AS APPLIED.

1. In adjudicating Mr. Bryant's Eighth Amendment and Article I, § 16 claims, the trial court failed to consider all relevant circumstances of Mr. Bryant's sentence.

The trial court also erred in denying Mr. Bryant relief with respect to his Eighth Amendment and Article I, § 16 claims. Before doing so, however, the trial court intimated—wrongly—that a statute of limitations that the Respondent did not invoke was a jurisdictional bar to considering those claims.[64] Nonetheless, the trial court fully adjudicated Mr. Bryant's as-applied Eighth Amendment and Article I, § 16 claims on their merits.[65] Regrettably, however, it did so incorrectly.

The trial court specifically determined that although Mr. Bryant received a longer sentence for a first-time, non-violent offense than he would have received if he had committed a severe, violent crime like Rape or Second Degree Murder, Mr. Bryant's

[64] In addition to the fact that—as noted in previous sections—the statute of limitations was never invoked as a defense and was waived as a result, Eighth Amendment claims ripen as societal standards of decency evolve. Accordingly, the date of a defendant's conviction is an inappropriate point of reference, because a sentence beyond the State's constitutional authority is subject to being remedied retroactively. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) ("We recognize that the petitioner's motion to reopen did not, and could not at the time it was filed, assert a 'final appellate ruling' with regard to the unconstitutionality of executing the mentally retarded. Having now determined that the unique circumstance of this case raises a constitutional issue that warrants review and that our holding—a new rule of constitutional law—warrants retroactive application, we believe fundamental fairness dictates that the petitioner have a meaningful opportunity to raise this issue.").

[65] R. at 268-75.

sentence did not give rise to an inference of gross disproportionality.[66] Critically, though, the trial court's Eighth Amendment analysis was materially incomplete. In particular, the trial court failed to consider the uncontested facts that:

(1) Mr. Bryant was the only defendant in the history of the jurisdiction to receive Tennessee Code Annotated § 39-17-432's sentencing enhancement for a first-time offense;

(2) School Zone violations were previously applied "arbitrarily and capriciously" within the jurisdiction; and

(3) Davidson County's previous application of § 39-17-432 was race-based.[67]

All three of these circumstances were critical to Mr. Bryant's claim that his sentence was arbitrary and excessive, and the trial court erred by failing to consider them. *See Graham v. Florida*, 560 U.S. 48, 59 (2010) (holding that courts must consider "**all** of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.") (emphasis added). Mr. Bryant's Eighth Amendment claim should be remanded with instructions to consider each of these additional circumstances as a result. *Id.*

2. Mr. Bryant's sentence was constitutionally excessive.

Considering "all" of the circumstances of his case, *id.,* Mr. Bryant's sentence violated the Eighth Amendment as applied. The Eighth Amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII. Central to its protection is the principle that punishment for a crime must be "graduated and proportioned to the offense." *Graham*, 560 U.S. at 59. As such, "the Eighth Amendment's ban on cruel and

[66] *Id.*
[67] *See* R. at 268-75.

unusual punishments 'prohibits . . . sentences that are disproportionate to the crime committed.'" *Ewing v. California*, 538 U.S. 11, 22 (2003) (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)). This "constitutional principle of proportionality has been recognized explicitly [by the Supreme] Court for almost a century." *Id.*

Based on the constitutional principle of proportionality, the Eighth Amendment "proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311, n.7 (2002)). Courts measure proportionality by reference to "the evolving standards of decency that mark the progress of a maturing society," rather than by the standards in place at the time of sentencing. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). When a petitioner challenges a defined term-of-years sentence as excessive and disproportionate under the Eighth Amendment, courts must consider "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59. *See also United States v. Slatten*, 865 F.3d 767, 811 (D.C. Cir. 2017) ("When addressing an as-applied [Eighth Amendment] challenge, courts begin 'by comparing the gravity of the offense and the severity of the sentence' based on 'all of the circumstances of the case.'").

In resolving an Eighth Amendment claim, the Supreme Court has instructed courts to assess the proportionality of a defendant's sentence according to three objective criteria:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem, 463 U.S. at 292. In the instant case, all three of these criteria favor Mr. Bryant.

i(a). Gravity of the Offense

"When evaluating the severity of a crime, [courts] consider the harm caused or threatened to the victim or society and the culpability and degree of involvement of the defendant." *Id.* at 812 (quotations omitted) (citing *Solem*, 463 U.S. at 292). Here, Mr. Bryant non-violently sold drugs to an aggressive government informant who: (1) contacted Mr. Bryant repeatedly, (2) reminded Mr. Bryant that "he had helped raise him," (3) insisted that he needed to acquire drugs to earn money to feed his family, and (4) pleaded with Mr. Bryant to help him. *Bryant v. State*, No. M2009-01718-CCA-R3-CD, 2010 WL 4324287, at *9 (Tenn. Crim. App. Nov. 1, 2010). The informant's demands were sufficiently aggressive that Mr. Bryant's first trial concluded in a hung jury based on entrapment. *Id.* at *10. Eventually, however, after multiple attempts to convince Mr. Bryant to sell him drugs, the informant prevailed. *Id. See also* R. at 56-57.

Additionally, Mr. Bryant neither planned nor threatened violence during the sales at issue, and no violence resulted from them. No children were involved in the sales. Mr. Bryant's crime was also victimless within the meaning of Tennessee Code Annotated § 40-38-302(4)(A)(i). Without question, no member of society experienced any harm as a consequence of the sales. Consequently, considering "all of the circumstances of the case," *Graham*, 560 U.S. at 59, the gravity and severity of Mr. Bryant's offense are comparable to the tens of thousands of other defendants in the jurisdiction who made non-violent drug sales to adults—not one of whom ever received a sentence as severe as Mr. Bryant's for a first-time offense.[68]

Significantly, Mr. Bryant does not dispute his culpability for the sales at issue.

[68] R. at 71, ¶ 130.

However, Mr. Bryant's culpability for the *enhanced* penalty that triggered his excessive sentence is non-existent by statutory design. Here, Mr. Bryant's unusually severe sentence was triggered by a strict liability, mandatory minimum sentencing enhancement that does not require any degree of culpability and is entirely unconcerned with a defendant's mental state. *See, e.g.*, *State v. Smith*, 48 S.W.3d 159, 166, n.3 (Tenn. Crim. App. 2000) ("[A] defendant need not be aware of his presence in the school zone or intend to sell drugs inside a school zone in order to trigger an enhanced criminal penalty under the Drug-Free School Zone Act."). Accordingly, the fact that the drug sales for which he was convicted were neither made nor even alleged to have been made in intentional, knowing, reckless, or even negligent violation of Tennessee Code Annotated § 39-17-432 did not affect his sentence. With this context in mind, Mr. Bryant's culpability was comparable to the tens of thousands of other non-violent defendants who engaged in drug transactions but who did not do so with any resulting harm to children or intent to harm children.

Critically, courts afford less deference to legislatively mandated terms of imprisonment where, as here, a statute's application in a given instance only marginally relates to the legislature's purpose when it created the statute. *See Slatten*, 865 F.3d at 812 (holding that deference is improper "when a statute's application only tangentially relates to [the legislature's] purpose for creating the statute in the first place"). *See also Gonzalez v. Duncan*, 551 F.3d 875, 884–86 (9th Cir. 2008) (holding that the application of a statute to a defendant under circumstances that were only tangentially related to the legislature's reason for creating the law undermined the gravity of the offense). In the instant case, the legislature's stated purpose when it created Tennessee Code Annotated § 39-17-432 was to provide "all students in this state an environment in which they can

learn without the distractions and dangers that are incident to the occurrence of drug activity in or around school facilities." *Smith*, 48 S.W.3d at 163. Rather than advancing this purpose, though, § 39-17-432's application to Mr. Bryant *undermines* legislative intent for several reasons:

First, Mr. Bryant conducted the sales at the urging of—and at a location selected by—a government informant. Thus, rather than *preventing* the "dangers that are incident to the occurrence of drug activity in or around school facilities," the government's informant *cultivated* them.

In detailing her "ever increasing concern regarding enhancement of convictions under [Tennessee Code Annotated § 39-17-432]," *see State v. Peters*, No. E2014-02322-CCA-R3-CD, 2015 WL 6768615, at *11 (Tenn. Crim. App. Nov. 5, 2015) (McMullen, J., "reluctantly" concurring), one member of this Court has indicated that such circumstances directly undermine § 39-17-432's legislative intent, noting:

> I simply do not believe that the Tennessee legislature intended the scope of the Act to include drugs brought into the protected school zone by law enforcement's own design. This concept of luring, which commonly takes the form of an undercover sting operation, is inconsistent with the legislative intent of the Act and defeats the overall purpose of "creat[ing] a drug-free school zone to reduce the occurrence of illegal drug activity in and around school facilities in order to enhance the learning environment."

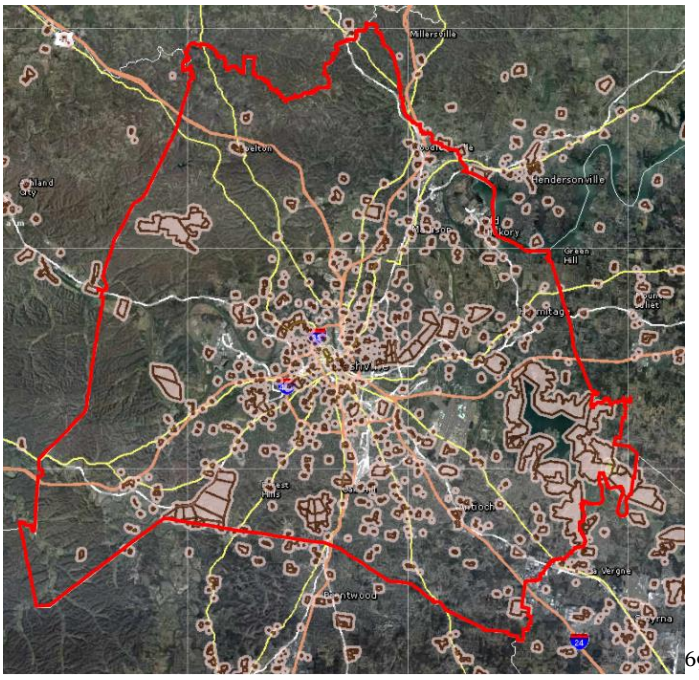
Id. (quoting *Smith*, 48 S.W.3d at 168).

Precisely this scenario occurred here. Accordingly, Tennessee Code Annotated § 39-17-432's application to Mr. Bryant contravened—rather than advanced—the legislature's stated purpose in enacting § 39-17-432. The gravity of Mr. Bryant's offense should be reduced accordingly.

Second, Mr. Bryant made the non-violent drug sales at issue to an adult at Mr.

Bryant's residence, rather than to a child at a school. As a result, the sales were not the same or even similar to drug sales made to a child inside a school facility. Nonetheless, § 39-17-432 treats Mr. Bryant's sales to an adult government informant at his own residence as if they were identical to drug sales made to a child on school grounds. Punishing a drug sale to an adult at a defendant's residence with the same severity as a drug sale to a child at a school, however, advances no coherent statutory purpose.

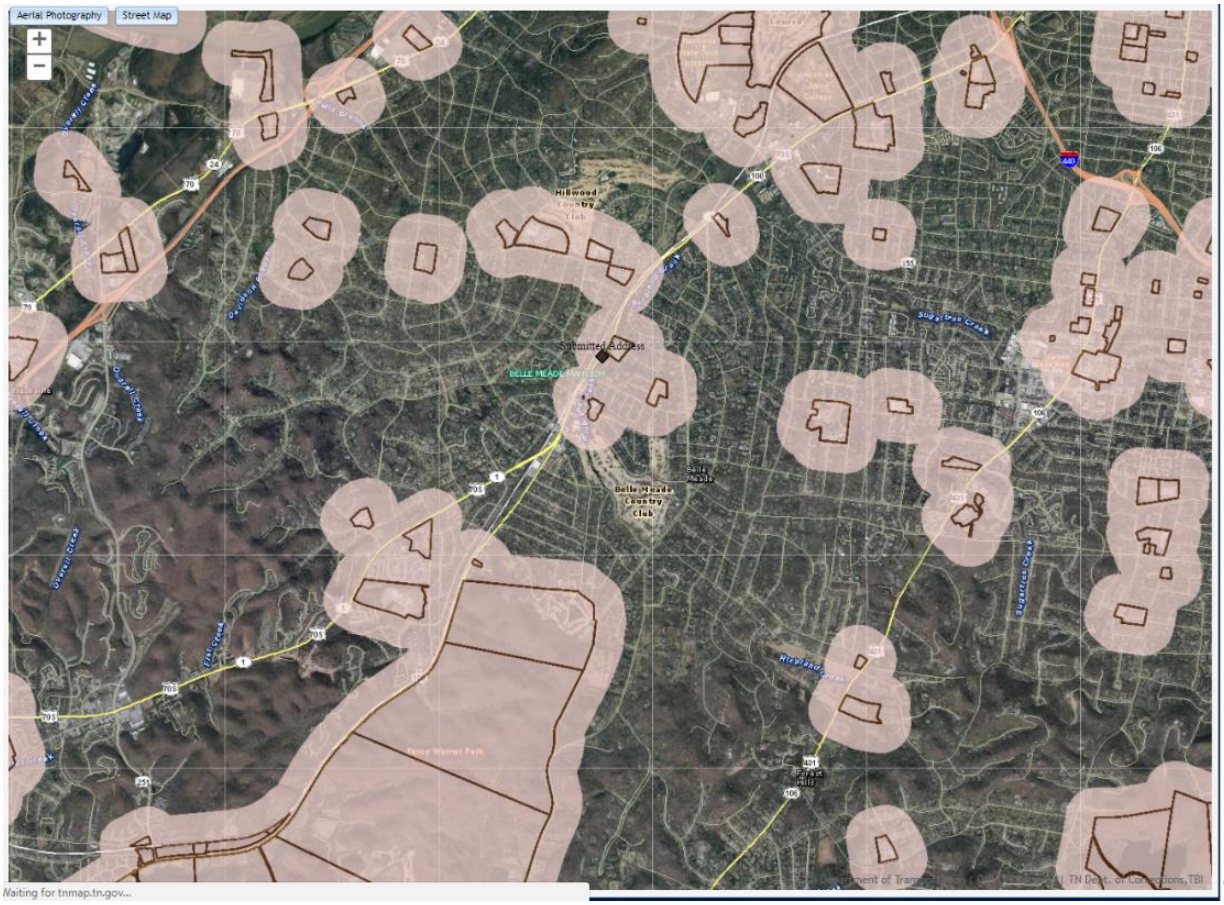
Third, applying § 39-17-432 as a strict liability enhancement to all drug sales that occur "within one thousand feet (1,000') of . . . a public or private elementary school, middle school, secondary school, preschool, child care agency, or public library, recreational center or park" significantly undermines the legislature's efforts to create meaningful drug-free school zones. The vast breadth of the "protected" zones at issue—which span more than 3.1 million square feet *each*—covers almost every habitable portion of Nashville and virtually all of its urban core:



[69]

[69] *Drug Free Zones*, TENN. BUREAU OF INVESTIGATION,

Admittedly, though, significant portions of wealthy, residentially-zoned suburban communities—like Belle Meade—do not qualify as "protected" areas:



[70]

As far as poor communities go, however, only rural communities on the far outskirts of Davidson County—like farmland in Joelton—avoid heavy school zone concentration.[71] By comparison, Mr. Bryant's Edgehill neighborhood looks like this:

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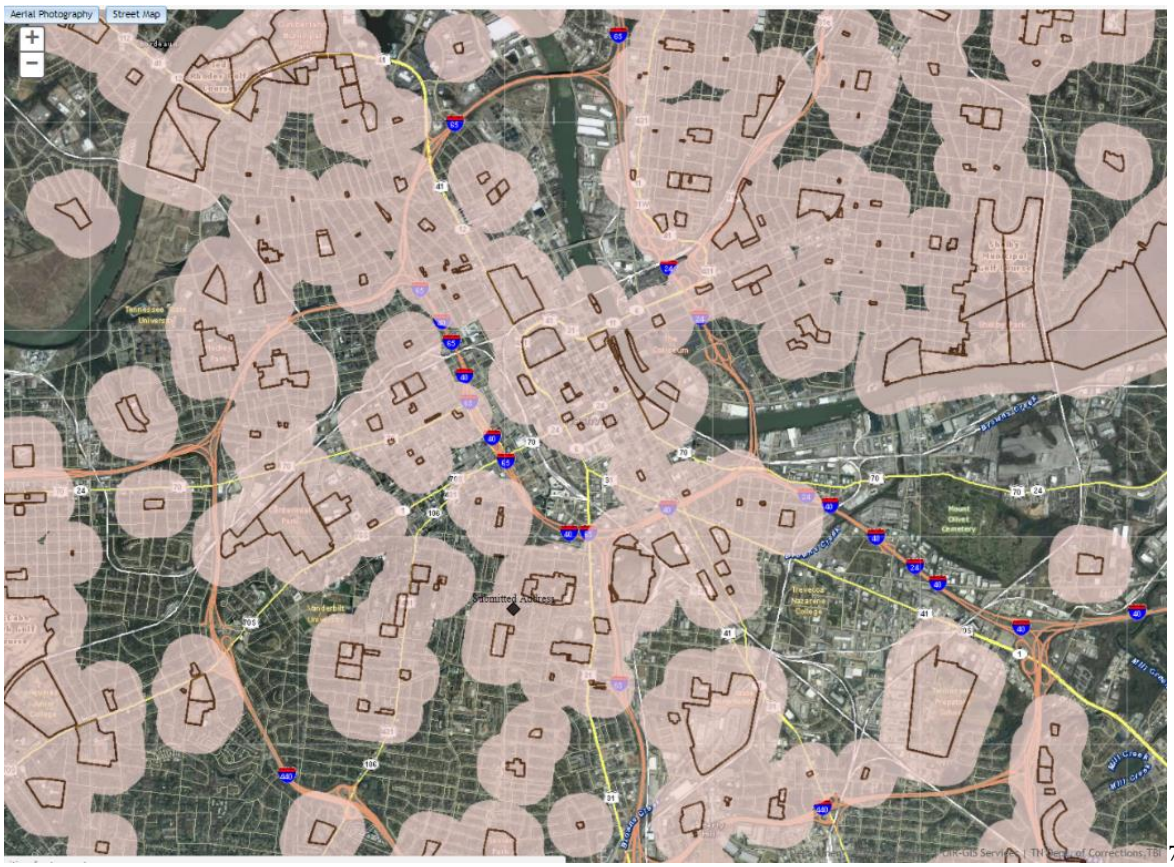
http://tbidrugfreezones.tbi.tn.gov/tbi_drugfreezones/ (last visited Oct. 22, 2017, 7:17 p.m.) (search: "Davidson County").

[70] *Id.* (search: "5025 Harding Pike, Nashville, TN 37205").

[71] *See* image at R. at 63, ¶ 102.



[72]

Thus, when § 39-17-432 is applied strictly—as it was in Mr. Bryant's case—virtually every drug transaction within Nashville's city limits is eligible for enhanced sentencing. *See id.* *See also* R. at 155 ("Years ago, Tennessee enacted the Drug Free School Zone laws aimed at enhancing the punishment for those that sell drugs near minors. No one can challenge the intent of the law; however, there is nothing that prevents the application of such laws against virtually any criminal defendant in a city such as Nashville.").

Failing to distinguish between, on the one hand, drug sales *at a school to a child*, and on the other, drug sales *at a person's home to an adult* devastates Tennessee Code Annotated § 39-17-432's central legislative purpose, because it completely eliminates the

[72] *Drug Free Zones*, *supra* note 66 (search: "1277 12th Ave S, Nashville, TN 37203").

statute's added incentive not to sell drugs near children. *See, e.g.,* R. at 157, Associated Press, *Doubts Spread About Drug-free School Zone Laws: Questions About Effectiveness Prompt States to Propose Smaller Zones*, NBC NEWS, Mar. 23, 2006, 12:33 a.m., http://www.nbcnews.com/id/11964167/ns/us_news-education/t/doubts-spread-about-drug-free-school-zone-laws/ ("**When the overlap of zones in densely populated areas covers the entire city, the idea of special protection loses its meaning . . . . <u>If every place is a stay-away zone, no place is a stay-away zone</u>**.") (emphasis added).

Thus, the severity of Mr. Bryant's crime and his culpability are similarly comparable to standard drug offenders who are responsible for non-violent drug sales between adults, not those responsible for selling drugs to children at schools. And critically, if Mr. Bryant had been prosecuted as a standard drug offender—rather than being prosecuted as an enhanced offender under Tennessee Code Annotated § 39-17-432—then he would have been released from prison nearly seven years ago.[73]

<u>i(b). Harshness of the Penalty</u>

In evaluating the harshness of a penalty, relevant factors include the defendant's criminal history and whether a defendant is "a first offender." *Solem*, 463 U.S. at 296. *See also Ewing*, 538 U.S. at 29 ("In weighing the gravity of [the defendant's] offense, we must place on the scales not only his current felony, but also his . . . history"); *Slatten*, 865 F.3d at 812 (citing *Rummel v. Estelle*, 445 U.S. 263, 276 (1980)) ("The Court may also consider the defendant's criminal history.").[74] "In fact, in virtually every instance

[73] *See* R. at 129.

[74] If a defendant has a prior criminal record, then courts also consider whether a defendant's prior convictions were violent and whether a defendant's prior conviction was "a crime against a person." *Solem v. Helm*, 463 U.S. 277, 296 (1983). *See also Ewing v. California*, 538 U.S. 11, 29 (2003) ("In

where the Supreme Court has upheld the imposition of a harsh sentence for a relatively minor nonviolent crime for an as-applied challenge, it has done so in the context of a recidivist criminal." *Slatten*, 865 F.3d at 814. As such, a defendant's lack of a prior criminal record is a significant factor with respect to the Eighth Amendment's proportionality analysis. *See id.*; *see also id.* at 815 ("We also find it highly significant that none of the defendants sentenced under Section 924(c) have any prior convictions . . . . [A] regime of strict liability resulting in draconian punishment is usually reserved for hardened criminals . . . . [C]lean criminal records weigh against the imposition of a harsh, mandatory sentence.").

In the instant case, Mr. Bryant was a first-time adult offender who had no prior adult criminal history.[75] Consequently, this factor also militates against the constitutionality of Mr. Bryant's extraordinarily harsh, 17-year sentence—15 years of which are mandatory.

In evaluating the harshness of a sentence, the Supreme Court additionally "relie[s] heavily" on when a defendant will become eligible for parole. *Solem*, 463 U.S. at 296 (citing *Rummel*, 445 U.S. at 280-81). Here, Mr. Bryant does not become eligible for parole until he has served a 15-year mandatory minimum prison sentence.[76] By any measure, becoming eligible for parole only after serving fifteen (15) years in prison for a first-time, non-violent offense is extraordinarily harsh. Consequently, this factor weighs against the constitutionality of Mr. Bryant's sentence as well.

ii. Sentences Imposed on Other Criminals in the Same Jurisdiction

A defined term-of-years sentence is constitutionally excessive when it is grossly

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weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.").

[75] R. at 58, ¶ 68.

[76] *See* R. at 91, ¶¶ 8-10.

disproportionate to the offense. *See, e.g.*, *Weems v. United States*, 217 U.S. 349 (1910) (holding that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was constitutionally excessive). *See also Rummel*, 445 U.S. at 271 (holding that the Eighth Amendment prohibits "grossly disproportionate" sentences); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (same). Comparing a defendant's sentence to sentences imposed on other criminals in the same jurisdiction represents an objective measure of proportionality that courts must consider in determining whether a sentence is excessive. *See Solem*, 463 U.S. at 292.

When comparing a defendant's sentence to other sentences imposed in the same jurisdiction, courts consider two separate questions. *First*, courts consider whether the law punishes the offense more severely than other, more serious crimes in the jurisdiction. *See, e.g.*, *Slatten*, 865 F.3d at 818 (comparing defendants' 30-year sentences under 18 U.S.C. § 924 to "other federal crimes with similar sentences"). *Second*, courts consider whether the defendant received a more severe punishment than other criminals in the jurisdiction for the same crime. *See id.* (comparing defendants' 30-year sentences under 18 U.S.C. § 924 to "other instances in which Section 924(c) has been applied . . . ."). Both of these considerations militate in favor of a finding that Mr. Bryant's sentence is excessive as well.

a. Mr. Bryant's offense was punished more severely than far more serious, violent crimes in this jurisdiction.

Mr. Bryant's non-violent offense was indisputably punished more severely than other far more serious *violent* crimes in Tennessee.[77] Tennessee's Senate Judiciary Committee has formally recognized this reality as a significant incoherence in

[77] *See* R. at 128.

Tennessee's sentencing regime.[78] Under that Committee's own analysis, Mr. Bryant's sentence is grossly disproportionate because it is markedly more severe than sentences imposed for significantly more serious *violent* crimes in Tennessee.

As Tennessee's Senate Judiciary Committee concluded, as a Range I offender, Mr. Bryant's 17-year (15-year mandatory minimum) sentence for a first-time, non-violent drug offense compares to far more serious violent crimes as follows:

Rape[79]

- Unlawful sexual penetration of a victim by the defendant
- Class B Felony, Sentencing Range of 8-12 years (if Range I offender)
- Sentence: 7 years (8 years (min. range) at 85%)

Second Degree Murder

- Knowing killing of another
- Class A Felony, Sentencing Range of 15-25 years (if Range I offender)
- Sentence: 13 years (15 years (min. range) at 85%)

Aggravated Robbery

- Robbery with a weapon or where victim suffers serious bodily injury
- Class B Felony, Sentencing Range of 8-12 years (if Range I offender)
- Sentence: 7 years (8 years (min. range) at [70]%[80])

Aggravated Vehicular Homicide

- Drunk driver with blood alcohol content over [0.20] kills someone
- Class A Felony, Sentencing Range of 15-25 years (if Range I offender)
- Sentence: 11 years (25 years (max range) at 45%)

Attempted First Degree Murder Where Serious Bodily Injury Occurs

- Attempted murder with intent and the victim suffers serious bodily injury

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[78] R. at 127-29.

[79] Mr. Bryant quotes all of these comparisons directly from the Senate's Judiciary Committee's memorandum, located at R. 127-35. For ease of comparison, however, a simpler indication of the sentence that a similar defendant would have faced for Rape would be as follows:

- Unlawful sexual penetration of a victim by the defendant
- Class B Felony, Sentencing Range of 8-12 years (if Range I offender)
- Minimum sentence: 6 years, 10 months (8 years (min. range) at 85%)
- Maximum Sentence: 10 years, 3 months (12 years (max. range) at 85%)

[80] The Senate's memorandum provides for release eligibility at 85% of an Aggravated Robbery sentence. Pursuant to Tennessee Code Annotated § 40-35-501(k)(1), however, the release eligibility for Aggravated Robbery (for a Range I offender) is actually 70% including sentence reduction credits.

but does not die
- Class A Felony, Sentencing Range of 15-25 years (if Range I offender)
- Sentence: 11 years (15 years (min. range) at 75%)

b. <u>Mr. Bryant was punished more severely than other criminals in the jurisdiction who committed the *same* crime.</u>

Mr. Bryant's punishment was also significantly more severe than the sentences imposed on other defendants in Tennessee who committed the <u>*same*</u> (or a more serious) drug crimes. *See, e.g.*, Teresa Wiltz, *Why States Are Taking a Fresh Look at Drug-Free Zones*, PEW: STATELINE BLOG (Sept. 15, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/15/why-states-are-taking-a-fresh-look-at-drug-free-zones ("[I]n Tennessee, a small-time dealer in a city can end up doing much more prison time than, say, a meth manufacturer in the country, just on the basis of geography."). *See also We Can All Win,* POD SAVE THE PEOPLE (Sep. 19, 2017), https://itunes.apple.com/us/podcast/pod-save-the-people/id1230148653?mt=2&i=392439311 (Tennessee Senate Minority Leader Lee Harris discussing vastly disparate sentencing for drug crimes in Tennessee due to Tennessee Code Annotated § 39-17-432).

Given that the overwhelming majority of drug sales that take place in Nashville occur "within one thousand feet (1,000') of . . . a public or private elementary school, middle school, secondary school, preschool, child care agency, or public library, recreational center or park," virtually every drug transaction in the city is eligible for the sentencing enhancement contained in Tennessee Code Annotated § 39-17-432.[81] Even so, in the more than two decades since § 39-17-432 was enacted, only 436 defendants in

[81] *See* Vincent Patrick Wyatt, *Drug Free School Zones Raise Stakes in Nashville, Tennessee*, AVVO (Jan. 11, 2012), https://www.avvo.com/legal-guides/ugc/drug-free-school-zones-raise-stakes-in-nashville-tennessee. *See also* images at R. at 63-64, ¶¶ 102, 104.

all of Tennessee have ever been punished with § 39-17-432's sentencing enhancement.[82] In total, only 62 defendants have ever received an enhanced sentence pursuant to § 39-17-432 in Davidson County.[83] Further, with the sole exception of Mr. Bryant, no defendant in Nashville has ever been sentenced under § 39-17-432 who did not have prior adult criminal history.[84]

Further, given the residential, location-based nature of the sentencing enhancement at issue, Mr. Bryant likely would not even have been eligible for an enhanced sentence under § 39-17-432 but for his poverty.[85] Specifically, if Mr. Bryant had lived in a suburban community zoned strictly for residential use,[86] then he would have been eligible for release after serving just two years and five months in prison.[87] Because Mr. Bryant lived in the Edgehill Housing Projects, however, Mr. Bryant must serve a mandatory minimum sentence of at least fifteen (15) years before he even becomes eligible for parole.

Critically, the length of Mr. Bryant's sentence also turned on the timing of his offense, rather its severity or his own culpability. Specifically, Mr. Bryant was punished much more severely for his crime because he committed it in 2009, rather than in 2014 or later.

In the time since Mr. Bryant's conviction in 2009, the use of § 39-17-432's intensely punitive sentencing enhancement has been reformed in at least three significant ways:

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[82] *See* R. at 71, ¶ 128.
[83] R. at 58, ¶ 64.
[84] R. at 71, ¶ 130.
[85] *See*, *e.g.*, R at 139; Teresa Wiltz, *Why States Are Taking a Fresh Look at Drug-Free Zones*, PEW: STATELINE BLOG (Sept. 15, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/15/why-states-are-taking-a-fresh-look-at-drug-free-zones.
[86] *See*, *e.g.*, image at R. at 64, ¶ 103.
[87] *See* R. at 129.

First, the Tennessee Supreme Court reformed § 39-17-432 to permit eligibility for judicial diversion—an option that was not clearly available to Mr. Bryant at the time of his sentencing. *See Dycus*, 456 S.W.3d at 929 ("[W]e hold that the mandatory minimum service provision of the Drug–Free School Zone Act does not render offenses committed under the Act ineligible for judicial diversion.").

Owing to his status as a first-time, non-violent offender, Mr. Bryant would have been a strong candidate for diversion if this option had been available to him. Mr. Bryant's candidacy for diversion also would have been supported by his deep and extensive roots in his community, which still supports him today. *See, e.g.,* R. at 94 (Affidavit of State Representative Brenda Gilmore); R. at 96 (Affidavit of Clinton Gray); R. at 98 (Affidavit of Nashville NAACP President Ludye Wallace) R. at 100 (Affidavit of Tennessee State NAACP Chair Marilyn Brown); R. at 102 (Affidavit of Chenika Miller); R. at 104 (Affidavit of Janice Blackburn); R. at 106 (Affidavit of Kim D. Ross); R. at 108 (Affidavit of Christal Williams); R. at 110 (Affidavit of LaShana Bryant); R. at 112-13 (Affidavit of Mason Caples); R. at 115-16 (Affidavit of Allencia Blackburn); R. at 118 (Affidavit of Annetta Bryant); R. at 120 (Affidavit of Miesha Bryant); R. at 122 (Affidavit of Erica Howse); R. at 124-25 (Affidavit of Steve Beach). If Mr. Bryant had received judicial diversion, then he would not have served any time in prison at all. Instead, however, Mr. Bryant has been incarcerated for the past decade, with 5-7 years left to serve.

Second, in the time since Mr. Bryant's conviction, the Tennessee Supreme Court has clarified that courts cannot enhance sentences pursuant to Tennessee Code Annotated § 39-17-432 if a defendant is convicted of facilitation. *Gibson*, 506 S.W.3d at 452 ("[W]e hold the Act does not apply to a conviction for facilitation."). During his

prosecution, Mr. Bryant could have resolved this case as a conviction for facilitation.[88] However, he did not do so due to having received affirmative misadvice from his trial counsel based on the Parties' mutual misunderstanding that Tennessee Code Annotated § 39-17-432's mandatory sentencing enhancement applied to facilitation convictions.[89] Because an unenhanced facilitation conviction would have rendered Mr. Bryant eligible for both early parole eligibility and a significantly reduced sentence, such a resolution would have resulted in Mr. Bryant being released from prison several years ago. *Bryant*, 460 S.W.3d at 530 ("[A] conviction for the facilitation of this offense, a Class B felony, could have resulted in a sentence of as little as eight years.").

Third, and most significantly, in the time since Mr. Bryant's conviction, the Respondent has operationally reformed its use of Tennessee Code Annotated § 39-17-432. Specifically, to avoid enforcing § 39-17-432 as a strict liability enhancement that undermines its intended purpose, the Respondent now applies § 39-17-432 only to defendants who intended to violate its essential purpose of keeping drugs away from children. *See* J.R. Lind, *Nashville Case Highlights Drug-Free School Zone Reform Efforts*, NASHVILLE PATCH, NOV. 28, 2017, https://patch.com/tennessee/nashville/nashville-case-highlights-drug-free-school-zone-reform-efforts ("Since his 2014 election, Nashville's District Attorney-General Glenn Funk has changed his office's policy on prosecuting the offense . . . . [O]nly one drug-free school zone case has been taken to the grand jury during his tenure and [] 'his policy is to only submit cases in which school children are placed in danger by the activity of the defendant.'"). Thus, if Mr. Bryant committed *the very same offense*

[88] *See* R. at 153.
[89] *Id.*

today, then he would not even have been prosecuted for the enhancement under which he was convicted. *Id.*

Disturbingly, prior to the Respondent's reformed use of Tennessee Code Annotated § 39-17-432, Davidson County's application of § 39-17-432 was also unmistakably race-based.[90] In Nashville, nearly 90% of the defendants who received § 39-17-432's enhancement were black or Latino, notwithstanding the fact that people of color use and sell drugs at approximately the same rates as their white counterparts.[91] Race, of course, is an arbitrary factor that cannot serve as a basis for an enhanced sentence, and "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Buck v. Davis*, 137 S. Ct. 759, 766 (2017) (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

Thus, taken together, if Mr. Bryant had been prosecuted at any time following the Respondent's reformed use of Tennessee Code Annotated § 39-17-432 in 2014; or if he had been prosecuted after the Tennessee Supreme Court's 2015 decision in *Dycus*, 456 S.W.3d 918; or if he had been prosecuted after the Tennessee Supreme Court's 2016 decision in *Gibson*, 506 S.W.3d 450; or if he had been rich or white rather than poor and black, then Mr. Bryant would not have received the almost incomprehensibly severe 17-year sentence for a first-time, non-violent offense that he did.

iii. Sentences Imposed for Commission of the Same Crime in Other Jurisdictions

Many states have adopted some version of a drug-free school zone law. Tennessee's sentencing enhancement for school zone offenses, however, is almost unparalleled in its severity. *See, e.g.*, R. at 140, Teresa Wiltz, *Why States Are Taking a*

[90] *See* R. at 131-35.
[91] R. at 47.

Fresh Look at Drug-Free Zones, PEW: STATELINE BLOG (Sept. 15, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/15/why-states-are-taking-a-fresh-look-at-drug-free-zones ("Tennessee has one of the more restrictive drug-free zone laws in the country.").

Tennessee is one of just three states in the union to elevate an underlying drug offense committed in a school zone by a full felony class. *See* R. at 162, NICOLE D. PORTER & TYLER CLEMONS, THE SENTENCING PROJECT, DRUG-FREE ZONE LAWS: AN OVERVIEW OF STATE POLICIES 3 (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Drug-Free-Zone-Laws.pdf ("Kansas, Nebraska, and Tennessee elevate the felony class of the underlying drug offense when it is committed within a drug-free zone, thereby exposing the defendant to harsher penalties."). Consequently, Tennessee stands nearly alone in applying such a severe sentencing enhancement to Mr. Bryant's conduct. *Id*.

Importantly, this idiosyncrasy provides an objective, reliable indication that Mr. Bryant's enhanced sentence does not conform to national, contemporary standards of decency. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (holding that, for purposes of an Eighth Amendment claim, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"). In fact, Tennessee Code Annotated § 39-17-432's sentencing enhancement does not even conform to *Tennesseans'* standards of decency. *See* R. at 172, Joshua Cannon, *80 Percent of Tennesseans Want Drug-Free School Zone Law Reform*, MEMPHIS FLYER (Aug. 31, 2016, 12:56 p.m.), https://www.memphisflyer.com/NewsBlog/archives/2016/08/31/80-percent-of-tennesseans-want-drug-free-school-zone-law-reform ("About 84 percent of those polled

support major or minor reforms to the law. Tennessee residents — 62 percent — say policy that clarifies the law's intent should enhance penalties when children are present. Support for reform garnered interest from both parties, with 90 percent of Democrats and 80 percent of Republicans supporting a reform to the law.").

Further, to account for both the racially discriminatory effects of broadly-defined drug-free zones and their failure to provide deterrent value, "[m]any other states already reviewed their drug-free zone legislation, found substantial defects, and made beneficial corrections to their law." R. at 174, Devon C. Muse, *Tennessee's Drug-Free Zone Law: Defective By Design?*, MEMPHIS LAWYER 16 (Aug. 25, 2016), https://www.memphisbar.org/sites/499/uploaded/files/DRUG_FREE_ZONE_REPORT.pdf. *Cf.* Devon C. Muse, *Tennessee's Drug-Free Zone Law: A Comparative Analysis*, MEMPHIS LAWYER 16 (Aug. 25, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833370 ("[m]any states, including those with localities similar to Tennessee, reviewed their [drug-free zone laws], found significant unwanted effects, and made beneficial changes to their law."). Tennessee, however, still has not made any changes at all.

As one such example, "seven states—Alaska, Georgia, Louisiana, Montana, New Jersey, Texas, and Washington—apply an exception to their drug-free zone laws if the offense occurs within a private residence so long as no children are present . . . ." *See* PORTER & CLEMONS, *supra*. In the instant case, such an exception would have prevented Mr. Bryant's sentence from being enhanced.

Other states have adopted reforms like "chang[ing] state law to grant judges discretion in applying the school zone penalty in certain drug offenses based on 'good cause.'" *Id.* Mr. Bryant would have been an excellent candidate for such discretion, but

unfortunately, Tennessee has not adopted this reform, either.

Other states took different approaches still. For example, in Indiana:

> [T]o address the concerns of the Indiana Supreme Court as well as the issues documented in the DePauw University study, the legislature passed and Governor Mike Pence signed a bill that substantially reformed the state's law. The bill reduced Indiana's zones from 1,000 feet to 500 feet and eliminated the zones around public housing complexes and youth program centers. It also added the requirement that a minor must be reasonably expected to be present when the underlying drug offense occurs.

Id. at 4.

Reforms like these, too, would have protected Mr. Bryant from having his sentence enhanced under Tennessee Code Annotated § 39-17-432. Tennessee law, however, does not include them. Indeed, despite its significant racially discriminatory effects—and despite the absence of any evidence that Tennessee's extraordinarily broad and selectively-applied school zone enhancement has advanced legislative intent to prevent drug sales in school zones in any meaningful way—§ 39-17-432 remains legislatively unreformed in any regard. *See* Steven Hale, *How District Attorneys Killed Drug-Free School Zone Reform*, NASHVILLE SCENE, May 1, 2018, https://www.nashvillescene.com/news/pith-in-the-wind/article/21003068/how-district-attorneys-killed-drugfree-school-zone-reform.

Consequently—and notwithstanding formal legislative acknowledgement that Tennessee Code Annotated § 39-17-432 creates grossly excessive sentencing disparities[92]—§ 39-17-432 remains out of step with the *trend* of jurisdictions that have taken legislative steps to reform their school zone laws as well. This fact, too, supports a finding that Mr. Bryant's sentence contravenes the Eighth Amendment. *See Atkins*, 536

[92] R. 127-35.

U.S. at 315 (noting that, for Eighth Amendment purposes, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change").

Compounding the problem, Davidson County's own Grand Jury has observed and specifically decried the fact that Tennessee Code Annotated § 39-17-432's grossly excessive disparity was applied *arbitrarily*, stating:

> A consistent decision needs to be reached on when increased penalties are sought for drug-free school zone offenses. **The decision to seek increased penalties resulting from school zone violations seemed to be arbitrarily reached at times. The law needs to be applied equally, not arbitrarily and capriciously.**[93]

As such, a comparison of § 39-17-432 to the penalties assessed in other jurisdictions reflects that it is incompatible with the Eighth Amendment's evolving standards of decency as applied to the circumstances of Mr. Bryant's case as well.

3. Mr. Bryant's sentence violates Article I, Section 16 of the Tennessee Constitution as applied.

Based on the grossly disproportionate sentence that Mr. Bryant received—both in absolute terms and compared with other similarly-situated defendants in Nashville and across Tennessee—Mr. Bryant's sentence also violates Article I, § 16 of the Tennessee Constitution.

Under similar circumstances, other jurisdictions have released defendants like Mr. Bryant under the more expansive provisions of their state constitutions. *See, e.g.,* Steve Visser, *Clayton Judge Frees Man, Saying Prison Term Was "Just Not Right"*, ATLANTA J.-CONST., July 7, 2015, http://www.ajc.com/news/crime--law/clayton-judge-frees-man-saying-prison-term-was-just-not-right/oHJLob6FD2FXrw5ry9AZEI/. *See*

[93] R. at 148.

also R. at 195-231. With respect to Tennessee's Constitution, our Court of Criminal Appeals has explained that: "Article I, Section 16 of the Tennessee Constitution is subject to a more expansive interpretation than the Eighth Amendment to the federal constitution and, accordingly . . . that the Tennessee Constitution mandates a proportionality inquiry even in noncapital cases." *Smith*, 48 S.W.3d at 170-71 (citing *Harris*, 844 S.W.2d at 602-03).

In evaluating whether a sentence is excessive under Article I, Section 16, this Court has instructed that:

> Determining whether a penalty for a particular offense raises an inference of gross disproportionality entails a comparison between the gravity of the offense and the harshness of the penalty. Factors relevant to the gravity of an offense include (1) the nature of the crime, including whether society views the crime as serious or relatively minor and whether the crime is violent or non-violent; (2) the circumstances of the crime, including the culpability of the offender, as reflected by his intent and motive, and the magnitude of the crime; and (3) the existence and nature of any prior felonies if used to enhance the defendant's penalty.

Id.

i. Nature of the Crime

Mr. Bryant's crime was a non-violent drug sale to an adult government informant. By any rational measure, non-violently selling drugs to an adult is not as serious as committing a violent crime such as Rape, Second Degree Murder, Aggravated Robbery, Aggravated Vehicular Homicide, or Attempted First Degree Murder. As such, a non-violent drug sale should not be punished more severely than ***any*** of these crimes—much less all of them.[94] Notwithstanding the permitted punishment for school zone offenses, Tennessee also considers violations of Tennessee Code Annotated § 39-17-432 to be less significant than other serious felonies as a matter of law, because

[94] *See* R. at 128.

unlike serious felonies, § 39-17-432 violations are eligible for judicial diversion. *See Dycus*, 456 S.W.3d at 929 ("[W]e hold that the mandatory minimum service provision of the Drug-Free School Zone Act does not render offenses committed under the Act ineligible for judicial diversion.").

ii. Circumstances of the Crime

The circumstances of Mr. Bryant's crime were indisputably non-violent. Mr. Bryant's culpability is also diminished by the fact that one or more members of the first jury that tried him determined that he had been entrapped by a government informant.[95]

While illegal, the circumstances of Mr. Bryant's crime were no worse than the hundreds of thousands of other, similar drug sales that have occurred in this jurisdiction since the legislature enacted Tennessee Code Annotated § 39-17-432. Further, because the controlled substances at issue were procured by a government informant, the magnitude of Mr. Bryant's crime was also less severe than other, similar drug sales, because no member of the public was harmed.

iii. The Existence and Nature of Any Prior Felonies Used to enhance the Defendant's Penalty

Mr. Bryant has no prior adult felony convictions. Mr. Bryant also has no prior adult misdemeanor convictions. In fact, Mr. Bryant has no prior adult criminal record at all.[96]

Mr. Bryant's lack of a prior criminal record renders his sentence unique in application, severity, and kind. Consequently, placing him in sharp contrast to recidivist

[95] *See* R. at 56-57.
[96] *See* R. at 58, ¶ 67.

offenders, Mr. Bryant's lack of prior criminal history weighs heavily in favor of a finding that § 39-17-432 is unconstitutional as applied to him. *Cf. Smith*, 48 S.W.3d at 172 (highlighting the fact that a defendant's enhanced sentence was "the direct result not merely of an isolated instance of possession inside a school zone of nine or ten rocks of crack cocaine with intent to sell, *but of a pattern of drug dealing evidenced by his seven prior convictions of felony drug offenses and his consequent status as a career offender.*") (emphasis added). Accordingly, Mr. Bryant's grossly excessive sentence is incompatible with the more protective provisions of Article I, Section 16 of Tennessee's Constitution as well. *Id.* at 171.

X. CONCLUSION

For the foregoing reasons, this Court should **ISSUE** Mr. Bryant a judicial recommendation of clemency, and the judgment of the Criminal Court of Davidson County should be **REVERSED**.

Respectfully submitted,

By:

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2018, a true and exact copy of the foregoing was mailed via UPS, postage prepaid, emailed, and/or served through the Court's e-filing system to the following:

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