

# POST CONVICITON REMEDIES

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## POST CONVICITON REMEMDIES

- POST CONVICTION PETITIONS
- MOTION TO REOPEN POST CONVICTION PROCEEDINGS
- POST CONVICTION DNA ANALYSIS
- STATE HABEAS ACTIONS
- WRIT OF ERROR CORAM NOBIS

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POST CONVICTION PROCEDURES ACT  
Tenn. Code Ann. §§40-30-101-313  
and  
TENNESSEE SUPREME COURT RULE 28

- Statute of limitation
- Jurisdiction
- Appointment of Counsel
- Grounds for Relief
- Procedures for bringing PC actions & Duties of the court in reviewing PC claims
- Post Conviction Hearing

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**Statute of Limitations**

Tenn. Code Ann. § 40-30-102(a)  
& Tenn. S. Ct. Rule 28 Sec. 4(B)

PC petitions must be filed within one year of the date of final action of the highest state appellate court to which an appeal is taken; or, if no appeal is taken, within one year of the date on which the judgement became final.

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**BUT. . . there are exceptions to every rule**

- Statutory Exceptions:  
Tenn. Code Ann. § 40-30-102(b)
  - Newly Recognized Constitutional Right with Retroactive Application
  - New Scientific Evidence Establishing Actual Innocence
  - Previous Conviction Used to Enhance Sentence is Subsequently Invalidated
- Due Process Considerations

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**Newly Recognized Constitutional Right  
with Retroactive Application**

Tenn. Code Ann. §40-30-102(b)(1)

If a defendant's claim is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required, then the petition will be accepted if filed within one year of the ruling that established the right.

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**New Scientific Evidence Establishing  
Actual Innocence**

Tenn. Code Ann. § 40-30-102(b)(2)

If a petitioner's claim is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted, then a delayed post-conviction petition may be granted by the court.

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**Where a previous conviction was used to enhance a  
defendant's sentence and the previous conviction  
has subsequently been invalidated**

Tenn. Code Ann. § 40-30-102(b)(3)

In order for a petitioner to receive consideration of his/her late filed claims of post conviction relief based upon this exception to the statute of limitations, the petitioner must show:

- the previous sentence was not the result of a guilty plea with an agreed upon sentence;
- the previous conviction has subsequently been held to be invalid; and
- the petition was filed within one year of the finality of the ruling holding the previous conviction to be invalid.

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## DUE PROCESS CONSIDERATIONS

- Tennessee Appellate Courts have been careful not to apply the statute of limitations in the Post Conviction Procedure Act in such a way as to preclude a petitioner from having a reasonable opportunity to raise a claim in a meaningful time and manner.
- Caldwell v. State, 917 S.W.2d 662 (Tenn. 1996):  
Tennessee Supreme Court held that under Buford v. State, 845 S.W.2d 204 (1992), and Sands v. State, 903 S.W.2d 297 (Tenn. 1995), there are certain circumstances in which a post conviction petition may be considered despite the fact that it is technically time barred.
- Seals v. State, 23 S.W.3d 272 (Tenn. 2000):  
The one year statute of limitations does not violate due process on its face; however, application of the statute must not deny a petitioner a reasonable opportunity to raise a claim in a meaningful way.

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## CALDWELL cont.

The Court in Caldwell put forth a three step process for determining whether due process should toll the statute of limitations:

- First the post conviction court should determine when the limitations period would normally have begun to run;
- The post conviction court should then determine whether grounds for relief actually arose after the limitations period would normally have commenced; and
- If the grounds are "later arising," the post conviction court should 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**.

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## Mental Incompetency of Petitioner

- The Tennessee appellate courts have specifically held that due process may require the tolling of the statute of limitations where a petitioner demonstrates "that he is unable either to manage his personal affairs or to understand his legal rights and liabilities."  
- State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001).
- To make a prima facie showing so that the statute of limitations may be tolled, "a post-conviction petition must include specific factual allegations that demonstrate the petitioner's inability to manage his personal affairs or understand his legal rights and liabilities. Unsupported, conclusory, or general allegations of mental illness will not be sufficient to require tolling and prevent summary dismissal under Tennessee Code Annotated section 40-30-206(b) & (f), Id.

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## WHAT EXACTLY DOES THAT MEAN?

- A prima facie showing of present mental incompetency requires more than conclusions or assertions and instead requires *specific factual allegations that demonstrate, by clear and convincing evidence, the petitioner's inability to manage his personal affairs or understand his legal rights and liabilities.* State v. Nix, 40 S.W.3d 459, 464 (Tenn. 2001); Holton v. State, 201 S.W.3d 626 (Tenn. 2006) and Reid v. State, 197 S.W.3d 694 (Tenn. 1996).
- The required prima facie showing may be satisfied by:
  - Attaching affidavits, depositions, medical reports, or other credible evidence that contains specific factual allegations showing the petitioner's incompetence. Id.
  - Petitioner may also rely upon affidavits and depositions from family members, prison officials, attorneys, or any other person having knowledge of the facts that demonstrate petitioner's incompetence. Id.

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## Hearing on Petitioner's Competency

- If court finds petitioner has made a prima facie showing, then a competency hearing should be held
- Parties should provide notice of any expert witnesses and provide a written report of the expert's opinions prior to the hearing

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## EFFECTS OF FINDING OF INCOMPETENCE

- A finding of incompetence requires neither a stay of the post conviction proceedings nor abeyance of individual issues; rather, where necessary, the post conviction court should appoint a "next friend" or guardian ad litem to pursue the action on behalf of the inmate. Reid v. State, 197 S.W.3d 694 (Tenn. 2006)
- Competency to Initiate proceedings:  
Where questions of petitioner's competence to initiate post-conviction proceedings arise, the court may allow a petition to be initiated on petitioner's behalf by a "next friend."
- Competency to Proceed:  
Once the petition has been filed and questions arise about a petitioner's competence to proceed, a court may appoint a "next friend" to proceed on petitioner's behalf

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**So the petition is timely and petitioner is not crazy - what next?**

- Was the petition filed in the court of conviction?
- Does the petition state a colorable claim for relief?
- Does the petition meet the pleading requirements of the statute?
- Does the petitioner currently have another petition for post conviction relief and/or another proceeding pending in either the trial or appellate courts that raises the same issues?
- Have petitioner's claims been previously raised and reviewed?
  - Prior PC petition
  - Pretermitted by decision of an appellate court
- Have petitioner's claims been waived?

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**I WANT MY LAWYER**

House v. State

911 S.W.2d 705, 712 (Tenn. 1995)  
There is no constitutional right to counsel  
in post-conviction proceedings  
BUT . . .

- The statute allows for the appointment of counsel. It does not however, ensure, petitioner's are provided competent counsel and there is no claim of ineffective assistance against post-conviction counsel.
- Before counsel is appointed, petitioner must have signed and verified the petitioner for post-conviction relief filed with the court. Except for in cases of mental incompetence, neither the lawyer or third party may assert standing to challenge the conviction and or sentence on petitioner's behalf.

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**I'M A BETTER LAWYER  
THAN MY LAWYER**

*PRO SE REPRESENTATION*

Although the statute creates a right to counsel,  
nothing in the statute requires petitioner to  
accept the aid of counsel and nothing  
specifically precludes a defendant from raising a  
post-conviction claim on his or her own.

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## Practical Implications of Pro Se Representation

- If petitioner is refusing to sign and verify the claims in the petition or amended petition prepared by counsel and expresses a desire to proceed pro se, and neither petitioner's behavior, records before the court or comments of counsel create a concern that the petitioner may not be competent to make such decisions, then the court may allow petitioner to proceed on his/her own behalf.
- All procedures appropriate to *pro se* litigants in other contexts, such as appointment of elbow counsel, etc. should apply to the post-conviction context as well.

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### Jerome Sidney Barrett v. State

No. M2015-01143-CCA-R3-PC (Tenn. Crim. App., September 12, 2016)

"While the constitutional right to self-representation does not apply to post-conviction proceedings, both the statutes authorizing the appointment of counsel in post-conviction proceedings and the rules implementing these statutes recognize that prisoners have the right of self-representation in post-conviction proceedings." Lovin v. State, 286 S.W.3d 275, 285 (Tenn. 2009). Prisoners may represent themselves if they do not request a lawyer or decline to accept an appointed lawyer if one is offered; however, such refusal must be in writing and is only effective when the court is satisfied that the prisoner fully understands the right to counsel and the consequences of proceeding pro se.

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### Barrett, cont.

- A prisoner's request to represent himself or herself in a post-conviction proceeding must:
  1. Be asserted in a timely manner;
  2. Be clear and unequivocal;
  3. Reflect a knowing and intelligent waiver of the right to counsel.
- To assure that the prisoner's waiver of his or her right to appointed counsel is knowing and intelligent, the court must conduct an intensive hearing on the record to advise the prisoner of the consequences of self-representation and to determine that the prisoner knows and understands the consequences of his or her decision. (See also Cottingham v. Cottingham, 193 S.W.3d 521, 536 (Tenn. 2006).

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## JURISDICTION

Tenn. Code Ann. § 40-30-104(a)  
& Tenn. S. Ct. Rule 28, Sec. 4(E):

A post conviction proceeding is commenced by filing a written petition with the clerk of the court in which the conviction occurred.

**NOTE:**

If the conviction was not obtained in a court of record, the petition shall be filed in a court of record having jurisdiction in the county in which the conviction occurred or the sentence was imposed.

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## WHO MAY PETITION?

• Tenn. Code Ann. § 40-30-102

*"a person in custody under a sentence of a court of this state . . ."*

• **"CUSTODY"**

• A petitioner, who is still on probation at the time he filed the petition, meets the technical requirements of being "in custody." Joseph Floyd v. State of Tennessee, No. W2015-02232-CCA-R3-PC 9 (Tenn. Crim. App. filed August 30, 2016)

• **"FUTURE COLLATERAL CONSEQUENCES"**

The "custody" requirement of the post-conviction statute is satisfied by the fact that a challenged conviction may be used to enhance a sentence on another conviction. Such challenges are allowed even if the sentence on the challenged conviction has been served or has expired at the time the post conviction petition is filed. Essentially, "in custody" for purposes of the Post Conviction Procedures Act includes "future collateral consequences" as a result of the conviction. The potential use of the conviction to enhance a subsequent sentence imposes a restraint on petitioner's liberty. Hickman v. State, 153 S.W.3d 16, 23 n.4 (Tenn. 2004); State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1997); Ledford v. State, 708 S.W.2d 419, 420 (Tenn. Crim. App. 1985).

• **"SENTENCE"**

• An order revoking probation merely ends the probation term, reinstates the original sentence, does not impose a new sentence, and is not a "sentence" that may be challenged under the Post-Conviction Procedure Act. Young v. State, 101 S.W.3d 430, 432 (Tenn. Crim. App. 2002).

• However, petitioner may challenge the revocation of a community corrections sentence in a post conviction petition. Carpenter v. State, 136 S.W.3d 608 (Tenn. 2004)

• Claims relating to the calculation of jail credits is not a proper claim for post conviction relief. Neal v. State, 2013 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. filed January 30, 2013)

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## GROUND FOR RELIEF

Tenn. Code Ann. § 40-30-103

Post-conviction relief is available when petitioner's conviction or sentence is *void or voidable* because abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.

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**POST CONVICTION PETITION  
Pleading Requirements**

- Tenn. Code Ann. § 40-30-104
  - Claims in the petition should relate to only one trial or proceeding. Separate trials, Guilty Pleas, etc., must have separate petitions. Tenn. Code Ann. § 40-30-104(c)
  - Petitioner should include all claims known to petitioner and should verify under oath that all such claims have been included in the petition. Tenn. Code Ann. § 40-30-104(d)
  - Petitioner must include allegations of fact supporting each claim for relief and set forth in the petition any allegations of fact explaining why each claim was not previously presented in an earlier proceeding. Tenn. Code Ann. § 40-30-104(e)
  - Petition may include affidavits; records or other evidence supporting the petition. Tenn. Code Ann. § 40-30-104(f)
  - Petitioner shall provide the names of any attorney who has given advise or assistance in the preparation of the petition

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**Tenn. Code Ann. § 40-30-106(d)  
SPECIFICITY REQUIRED**

*the petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition.*

**EXCEPTION FOR PRO SE LITIGANTS**

*If, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed*

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**Responsive Pleadings**

- Answer - Tenn. Code Ann. § 40-30-108(a):  
30 days after the filing of the amended petition, the state SHALL file an answer or other responsive pleading.
- Motion to Dismiss- Tenn. Code § 40-30-108(c):
  - Statute of Limitations
  - Wrong Jurisdiction
  - Claims covering more than one proceeding
  - There is a direct appeal or post conviction petition currently which raises the same claims currently pending in the appellate courts
  - Petition fails to demonstrate the claims were not waived or previously determined
  - The facts alleged fail to show the defendant is entitled to relief

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## Post Conviction Courts Initial Review of Petition

- Within 30 days of the filing of the original *pro se* petition or amended petition, the post conviction court shall examine the petition.
- If petition is not filed within the statute of limitations; is not filed in the correct court; a prior petition has been filed and resolved on the merits; or the court finds a petition is pending in another court – whether it be another trial or an appellate court, the post conviction may enter an order dismissing the petition.

**Failure to State Colorable Claim:**

- Tenn. Code Ann. § 40-30-107(a) & Tenn. Code Ann. § 40-20-106(f):  
If after consideration of the properly filed petition and the state's response the court finds the facts alleged, taken as true, fail to state a colorable claim, the petition **shall** be dismissed. Likewise, if the petition fails to show that the claims for relief have not been waived or previously determined, the petition **shall** be dismissed.
- A colorable claim is defined by Tennessee Supreme Court Rule 28(2)(H) as "*a claim, in a petition for post conviction relief, that, if taken as true, in light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedures Act.*" Arnold v. State 143 S.W.3d 786 (Tenn. 2004)

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## MOVING THIS TRAIN FORWARD - TIME LIMITS

- Once a petition has been filed, if it fails to state a factual basis for the grounds alleged in the petition and the petition was filed by a pro se litigant, the petitioner will have 15 days to file an amended petition complying with the statute. Tenn. Code Ann. § 40-30-106(d)
- If the amended petition is incomplete, the court shall determine if petitioner is indigent. If the court finds petitioner is indigent, the court may appoint counsel to represent petitioner. Tenn. Code Ann. § 40-30-106(e) and Tenn. Code Ann. § 40-30-107(b)(1)
- Newly appointed counsel shall have 30 days from the date of appointment to either file an amended petition or notice that no amended petition will be filed. Tenn. Code Ann. § 40-35-107(b)(2)
- Within 30 days of the filing of the amended petition or notice that no amended petition will be filed the trial court must review the pleadings and the record and determine if there is cause to dismiss the petition. If the court does not find cause to dismiss, then within 30 days, the court shall enter an order setting the matter for an evidentiary hearing. § 40-30-107(b)(2)
- If there is no summary dismissal after the court's initial review of the petition, the State shall file an answer or other responsive pleading shall be filed within 30 days, unless extended for good cause. Tenn. Code Ann. § 40-30-108(a)
- After reviewing the original pro se or amended petition and the State's response, the court shall determine if the court determines petitioner is not entitled to relief it shall dismiss the petitioner. However, if the petition is not dismissed, the court shall, within thirty days of the filing of the State's response, file an order setting the matter for a hearing.
- The evidentiary hearing SHALL be within 4 calendar months of the entry of the court's order. The 4 month timeline may be extended by order of the court based upon a finding that *unforeseeable circumstances render a continuance a manifest necessity*. Any such extension SHALL not exceed (60) days. Tenn. Code Ann. § 40-30-107(a)
- Tenn. Code Ann. § 40-30-108(b) empowers the State to obtain records or transcripts, if they are not included in the petition, that are material to the questioned raised in the petition.
- Within 60 days of the conclusion of the proof, the court shall enter a final written order setting forth all grounds presented, and the court's findings of fact and conclusions of law with regard to each ground. Such time limit may be extended upon a finding of manifest necessity. However, such extension shall not exceed 30 days.

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## POST CONVICTION PETITION TYPICAL CLAIMS FOR RELIEF

- Ineffective Assistance of Trial Counsel
- Ineffective Assistance of Appellate Counsel
- Trial Court Error
- Jury Issues
- Prosecutorial Misconduct
- Due Process Violations

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## Ineffective Assistance of Trial Counsel

### Strickland v. Washington & Baxter v. Rose

- Perfect Representation NOT required:  
Defendant in a criminal case is not entitled to perfect representation, **only constitutionally adequate representation.** Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996).
- **Two Prong Approach** to Determining Whether Petitioner is Entitled to Relief Based upon Counsel's Performance At Trial:  
Under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency.
  - **Deficient Performance**  
In order to establish trial counsel's performance was deficient, the petitioner must demonstrate counsel's representation fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).
  - **Prejudice**  
In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2008).

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## JUDGING COUNSEL'S PERFORMANCE

- **HINDSIGHT:**  
The petitioner is not entitled to the benefit of hindsight, may not second guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994).
- **VIEWING THE CASE AS COUNSEL VIEWED IT:**  
An attorney's performance should be judged within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In other words, "in considering claims of ineffective assistance of counsel, the reviewing court should consider not what is prudent or appropriate, but only what is constitutionally compelled." Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting United States v. Cronin, 466 U.S. 648, 665 n.38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).
- **TRIAL STRATEGY:**  
Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. House, 44 S.W.3d at 515.

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## BOTH PRONGS MUST BE SATISFIED

It is unnecessary for a court to address deficiency or prejudice in any particular order, or even to address both if the petitioner makes an insufficient showing on either. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069

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### Ineffective Assistance of Appellate Counsel

With regard to appellate representation, the courts of this state have held it is appellate counsel's responsibility to determine the issues to present on appeal. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986)(citing State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)). This responsibility addresses itself to the professional judgment and sound discretion of appellate counsel. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995). There is no constitutional requirement every conceivable issue be raised on appeal. Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). The determination of which issues to raise is a tactical or strategic choice. Id.

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### THE HEARING

- BURDEN OF PROOF
- DISCOVERY PROCESS
- WITNESSES

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### BURDEN OF PROOF

Petitioner bears the burden of proving that he is incompetent by **clear and convincing evidence** Tenn. Code Ann. § 40-30-110(f)

Evidence is *clear and convincing* when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240 (Tenn. Crim. App. 1998).

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DISCOVERY PROCEDURES FOR  
POST CONVICTION PROCEEDINGS

- Tennessee Rule of Evidence 16
- Tennessee Supreme Court Rule 28
- Balancing Post Convicted Counsel's Ethical Obligations with the Need of the Petitioner and State to Present Evidence

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Tennessee Supreme Court Rule 28

- Subsection 6(B)(3)(c) of Rule 28 directs the trial court upon a finding that the post-conviction petition contains a colorable claim to order disclosure by the State "of all that is required to be disclosed under Rule 16 of the Tennessee Rules of Criminal Procedure, to the extent relevant to the grounds alleged in the petition, and any other disclosure required by the state or federal constitution."
- Rule 28, section 6(C)(7) directs the State to comply with the court's order to permit discovery under Rule 16 of the Tennessee Rules of Criminal Procedure.
- Although Rule 28 does not specifically require reciprocal discovery, the statute clearly indicates that Tenn. R. Crim. P. 16 discovery measures should be applied to post conviction matters.

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PC HEARING  
WITNESSES & PROOF

- Tenn. Code Ann. § 40-30-110(c):  
Proof shall be limited to evidence of the allegations of fact in the petition.
- Defendant **SHALL** be a Witness  
Tenn. Crim. App. § 40-30-110(a):  
Petitioner shall appear and give testimony at the evidentiary hearing if petitioner raises substantial questions of fact as to events in which petitioner participated
- Failure to Present Witness  
"When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); see also Scott v. State, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, this is the only way the petitioner can establish that (1) a material witness existed who could have been discovered but for counsel's negligent investigation of the case; (2) a known witness was not interviewed; (3) the failure to discover or interview the witness caused him prejudice; or (4) the failure to present a known witness or call the witness to the stand resulted in the denial of critical evidence which caused the petitioner prejudice. Black, 794 S.W.2d at 757. Neither the trial court nor this Court can speculate on what a witness' testimony might have been if introduced by counsel. Id.

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## Trial Counsel As Witness

- Whenever available, trial counsel should always testify in a post conviction proceeding where there is an allegation he was ineffective. State v. Hopson, 559 S.W.2d 952 (Tenn. Crim. App. 1979)
- Balancing counsel's obligation to a former client and obligations within the post conviction process:
  - Counsel has an obligation to assist former client by providing records generated in the course of the representation and obligation to forward information to client's new counsel;
  - An allegation by a former client concerning trial counsel's performance necessarily constitutes a waiver of the attorney-client privilege with respect to the matters under challenge, and a waiver of the duty of confidentiality.

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## DELAY IS THE NAME OF THE GAME

### Motion for Continuance

- Decision of whether to grant a continuance rests with the sound discretion of the trial court;
- Overriding considerations:
  - Whether petitioner can receive a fair and full hearing despite being denied more time to investigate or prepare;
  - Will petitioner be prejudiced by the denial of his or her motion to continue the PC hearing
- Bare claims that additional investigation could have been conducted is not sufficient to demonstrate unfair prejudice so as to support a motion for continuance. Hodges v. State, 200 Tenn. Crim. App. LEXIS 810.

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## What if I change my mind?

### Withdrawing Petition for PC Relief

#### Tenn. Code Ann. § 40-30-109(c)

- A petitioner may withdraw their petition at any time prior to the hearing without prejudice to refile, but the withdrawn petition shall not toll the statute of limitations.
- Court should make sure petitioner:
  - Does not desire to proceed with any of his PC claims;
  - Understands the significance of withdrawing his PC petition;
  - Is knowingly, intelligently, and voluntarily withdrawing the petition;
  - Is competent to decide wither to withdraw the PC petition

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### COMPETENCE TO WITHDRAW PETITION

- Prior to allowing a petitioner to withdraw a court may be called upon to evaluate petitioner's present mental competence to decide to forego his post-conviction claims.
- Petitioner is presumed competent to withdraw a post conviction petition and waive PC relief.
- If competency is questioned, the petitioner bears the burden of establishing he or she is competent to waive any post-conviction claim;
- If a genuine issue regarding petitioner's present competency arises, the trial court shall enter an order appointing at least one, but no more than two, mental health professionals from lists submitted by the State and counsel for petitioner;
- The order shall direct the petitioner be evaluated by the mental health professional(s) to determine petitioner's competency and file written evaluations with the trial court within ten days of appointment unless good cause is shown for later filing;
- If a genuine issue still remains regarding the petitioner's present competency, the trial court shall hold a separate hearing on the record, allowing the introduction of testimony, exhibits and evidence, to determine the petitioner's competency;
- The trial court shall file detailed written findings regarding the court's competency determination;
- Once waived – a petitioner may not reinstate his or her petition.  
(ONE EXCEPTION – CAPITAL LITIGANTS – See Pike v. State 164 S.W.3d 257 (Tenn. 2005) – capital litigants have 30 days from the date of the court's order permitting the inmate to waive post-conviction review to revoke a waiver.)

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### MOTIONS TO REOPEN POST CONVICTON PETITION

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### Tenn. Code Ann. § 40-20-202(c)

- Post-Conviction Procedure Act contemplates the filing of only one petition for post-conviction relief.
- Ordinarily a second or subsequent petition is summarily dismissed.
- HOWEVER, a petitioner may file a motion to reopen a prior post-conviction proceeding under limited circumstances.

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## Tenn. Code Ann. § 40-30-117

### Grounds for Motion to Reopen:

- **New Constitutional Right**
  - claim based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required.
  - Motion must be filed within 1 year of the ruling of the highest court establishing a constitutional right that was not recognized as existing at the time of trial.
- **New Scientific Evidence Establishing Actual Innocence**
  - claim based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which he or she was convicted.
  - This is NOT a mechanism for discovery. The petitioner must delineate in the motion to reopen the new scientific evidence that has already been secured and which will establish his or her actual innocence. Ray v. State, 984 S.W.2d 236 (Tenn. Crim. App. 1997).
- **Previous Enhancing Conviction Held Invalid**
  - claim seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid.
  - Motion must be filed within 1 year of the finality of the ruling holding the previous conviction to be invalid.

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## OTHER POST CONVICTION REMEDIES

- POST CONVICTION DNA ANALYSIS
- STATE HABEAS CORPUS PETITIONS
- WRIT OF ERROR CORAM NOBIS
- COMPETENCY TO BE EXECUTED

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## POST CONVICTION DNA ANALYSIS ACT Tenn. Code Ann. § 40-30-301 et. seq.

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### WHO MAY PETITION?

Tenn. Code Ann. § 40-30-303

A person convicted and sentenced for the commission of:

- First Degree Murder
- Second Degree Murder
- Aggravated Rape
- Rape
- Aggravated Sexual Battery
- Rape of a Child
- the attempted commission of any of these offenses
- any lesser included offense to these offenses
- or with court approval – any other offense

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### WHEN MAY THEY PETITION?

Defendant's may **at any time**, file a petition requesting the forensic DNA analysis . . .

- There is no statute of limitations for filing a petition for DNA analysis under the Act. Enslley v. State, No. M2002-01609-CCA-R3-PC (Tenn. Crim. App. filed April 11, 2003, at Nashville), 2003 Tenn. Crim. App. LEXIS 335
- Additionally, there is no prohibition against simultaneous post-conviction petitions under the Act and direct appellate review – thus, a petitioner may file a Petition under the Act simultaneous to his or her direct appeal. Walters v. State, No. M2002-01712-CCA-R3-CO (Tenn. Crim. App. filed March 11, 2003 at Nashville), 2003 Tenn. Crim. App. LEXIS 216.
- Finally, the statute is currently silent on the issue of successive petitions.

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### What evidence is subject to analysis under the ACT?

*Any evidence that is in the possession or control of the prosecution, law enforcement, laboratory or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.*

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Are Petitioner's Entitled to Counsel?

YES

Pursuant to Tenn. Code Ann. § 40-30-307, the court *may, at any time during the proceedings instituted under this part, appoint counsel for an indigent petitioner.*

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WHEN IS TESTING REQUIRED?

Act separates DNA analysis into two categories:

1. First category mandates testing if certain prima facie showing is made
2. Second category is discretionary and a trial court may allow testing where a certain prima facie showing is made

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When testing is mandated  
Tenn. Code Ann. § 40-30-304

After the prosecution has received notice and an opportunity to respond, the court **SHALL** order DNA analysis if it finds:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA Analysis;
  2. The evidence is still in existence and in such a condition that DNA analysis may be conducted;
  3. The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
  4. The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay in the execution of sentence or administration of justice.
- If the state contests the presence of any qualifying criteria and it is apparent that each prerequisite cannot be established, the trial court, has the authority to dismiss the petition. *William D. Burford v. State, No. M2002-02180-CCA-R3-PC, 2003 (Tenn. Crim. App. filed April 24, 2003); Tenn. Code Ann. § 40-30-309.*

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Tenn. Code Ann. § 40-30-305  
Testing *may* be ordered when . . .

Under section 305 of the statute, the ordering of testing is discretionary. The court may order testing if it finds:

1. A reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
2. The evidence is still in existence and in such a condition that DNA analysis may be conducted;
3. The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
4. The application for analysis is made for the purposes of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

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*Reasonable Probability*

*A 'reasonable probability' of a different results exists when the evidence at issue, in this case potentially favorable DNA results, undermines confidence in the outcome of the prosecution.*

Sedley Alley v. State, No. W2006-01179-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 470, 2006 (Tenn. Crim. App., at Jackson, June 22, 2006), perm. app. denied (Tenn. June 27, 2006); see, e.g. State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002).

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What May the Court Consider

- Trial court may consider all the evidence available, including evidence introduced at trial and/or stipulations of fact by the petitioner or his counsel and the state; and the opinions of appellate courts on either direct appeal of the conviction, post-conviction proceedings or habeas corpus actions. Ensley, 2003 WL 186847, at \*3.
- Additionally, previous incriminating statements by the petitioner, as well as pleas and defenses employed by petitioner are relevant to the trial court's inquiry. Clayton Turner v. State, No. E2002-02895-CCA-R3-PC, (Tenn. Crim. App. filed April 1, 2004 at Knoxville), 2004 WL 735036, \*3; David I. Tucker v. State, M2002-02602-CCA-R3-CD (Tenn. Crim. App. filed January 23, 2004 at Nashville), 2004 WL 115132, \*2.

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Earl David Crawford v. State,  
No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, \*3  
(Tenn. Crim. App. August 4, 2003 at Knoxville)

- Nothing in the case law either suggests or requires the court to accept or even entertain extraneous information or newly propounded theories by either side.
- The statute does not authorize the trial court to order additional samples taken from the victim, nor does the statute allow for any other third party comparisons the petitioner may envision.
- Since states have no obligation to provide for post-conviction relief in any form, including DNA testing, there is no inherent right to a certain type or method of testing when seeking such relief.

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### Not Going Fishin'

Sedley Alley v. State  
W2004-01204-CCA-R3-PD, at \*9-10  
(Tenn. Crim. App. May 26, 2004 at Jackson),  
perm. app. denied (Tenn. October 4, 2004)

*The purpose of the Post Conviction DNA Analysis Act is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a 'phantom defendant.'*

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### COST OF TESTING

Tenn. Code Ann. § 40-30-304  
If an order granting analysis is issued pursuant to this section of the Act, then the court **SHALL** also order payment for the analysis

Tenn. Code Ann. § 40-30-305  
If an order granting analysis is issued, then the court **may require** the petitioner to pay for the analysis.

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**RESULTS OF TESTING**  
**Tenn. Code Ann. § 40-30-308**

- If previous testing was performed by either party, the court may order the parties to turn over the laboratory reports prepared in connection with the DNA testing and any underlying data and laboratory notes.
- If the court orders DNA analysis, it shall also order the production of any laboratory reports prepared in connection with the analysis and may, in its discretion, order the production of the underlying data and laboratory notes.
- If the court orders analysis, it shall select a laboratory that meets the standards adopted pursuant to the DNA Identification Act of 1994. [See 42 U.S.C. § 14131 et. seq.]

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**FINAL ORDER**

Once the court has found the contents of the petition establish a prima facie case and the trial court has determined all statutory prerequisites for testing are present and has ordered DNA analysis, if the results of the analysis are not favorable to the petitioner, the court shall dismiss the petition. If the results are favorable, the court shall order a hearing, and thereafter make such orders as are required.

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**Preservation of Evidence**  
**Tenn. Code Ann. § 40-30-309**

If the petition is not summarily dismissed by the trial court, the court shall order that *all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to DNA analysis must be preserved during the pendency of the proceeding.*

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STATE  
HABEAS CORPUS

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Tennessee Constitution  
Article I, § 15

- Guarantees the privilege of writ of Habeas Corpus
- There is no statute of limitations; but, the grounds upon which relief may be granted are narrow.

Demonbreum v. Bell, No. M2005-01741-SC-R11-HC (Tenn. Filed May 8, 2007, at Nashville), 2007 Tenn. LEXIS 452, Rehearing denied by Demonbreum v. Bell, 2007 Tenn. LEXIS 529 (Tenn., May 25, 2007) citing Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

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Constitutionally Guaranteed  
But  
Statutorily Regulated

Although the writ of habeas corpus is constitutionally guaranteed, it has been regulated by statute for well over a hundred years. Faulkner v. State, No. W2004-02354-SC-R11-HC (Tenn. Filed April 27, 2007 at Jackson, 2007), 2007 Tenn. LEXIS 370 (citing Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656, 657 (Tenn. 1968).

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**Statutory Grounds for Relief**  
**Tenn. Code Ann. § 29-21-101 (2000)**

- The statutory grounds for habeas corpus relief appear to be broad:

*“Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in Tenn. Code Ann. § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.”*

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**Case Law Limits**

- Despite the broad wording of the statute, the courts of this state have long held that the writ of habeas corpus may be granted only when the petitioner has established a lack of jurisdiction for the order of confinement or is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery, 432 S.W.2d at 658; State v. Galloway, 45 Tenn. (5 Cold.) 326, 336-67 (1868).
- When a petitioner must offer proof beyond the record to establish the invalidity of a conviction, the judgment is merely voidable and not void. State v. Richie, 20 S.W.3d 624, 630-31 (Tenn. 2000).

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**State habeas relief different than**  
**Federal habeas relief**

- Unlike the federal writ of habeas corpus, relief is available in this state only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to convict or sentence the petitioner or that the sentence of imprisonment has otherwise expired. Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992); Hoover v. State, 215 S.W.3d 776 (Tenn. 2007).
- Also, unlike a post conviction petition, which might afford a means of relief for constitutional violations such as deprivations of the effective assistance of counsel, the purpose of the state habeas corpus petition is to contest a void, not merely a voidable judgment. State ex rel. Newsom v. Henderson, 221 Tenn., 24, 424 S.W.2d 186, 189 (Tenn. 1968); Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999).

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## PETITION FOR WRIT

- Application of writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.
- PETITION SHALL STATE:
  - ❖ That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and at the place where the petitioner is restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
  - ❖ The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason give for its absence;
  - ❖ That the legality of the restraint has not already been adjudged upon a prior proceedings of the same character, to the best of the applicant's knowledge and behalf; and
  - ❖ That it is the first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be give for the failure to do so.

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## Failure to include copy of legal process by which petitioner is restrained

- The requirement that the petition for writ contain a copy of any legal process by which petitioner is restrained and that such copy be attached to the petition or satisfactory reason be given for its absence is mandatory and the petition may be dismissed for failure to comply with such requirement. State ex rel. Wood v. Johnson, 216 Tenn. 531, 393 S.W.2d 1965 Tenn. LEXIS 662 (1965); Johnson v. Russell, 218 Tenn. 443, 404 S.W.2d 471, 1966 Tenn. LEXIS 581 (1966), questioned, State v. Mixon, 983 S.W.2d 661, 1999 Tenn. LEXIS 33 (Tenn. 1999), and criticized, Teague v. State, 772 S.W.2d 915, 1988 Tenn. Crim. App. LEXIS 765 (Tenn. Crim. App. 1988).

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## Where to File?

- Tenn. Code Ann. § 29-21-105:  
One filing a petition for writ of habeas corpus is required to file such petition with the court or judge nearest him, which would generally mean within the county, unless sufficient reason be given in the petition for not doing SO. State v. ex rel. Leach v. Avery, 215 Tenn., 425, 387 S.W.2d 346, 1965 Tenn. 425, 387 S.W.2d 346, 1965 Tenn. LEXIS 506 (Tenn. Mar. 4, 1965).

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## Appointment of Counsel

- Tenn. Code Ann. § 40-14-204:

*“in all proceedings for the writ of habeas corpus or the writ of error corm nobis, the court having jurisdiction of those matters shall determine the question of indigency and appoint counsel, if necessary.”*

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## SUMMARY DISMISSAL

- There is no requirement that counsel be appointed or that a hearing be granted whenever a pro se habeas corpus petition alleges that an agreed sentence is illegal based on facts not apparent from the facts of the judgment. Summers v. State, 212 S.W.3d (Tenn. 2007).
- Summary dismissal may be proper when the petitioner fails to attach to the habeas petition pertinent documents from the record of the underlying proceedings to support his factual allegations. Id.

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## THE EFFECT OF FEDERAL CUSTODY

Even though a defendant may currently be in federal custody, he/she is not divested of his constitutional entitlement to test the propriety of his state convictions.

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IMPACT OF  
POST CONVICTION STATUTE

- Tenn. Code Ann. § 40-25-105(c) permits the trial court to treat a habeas corpus petition as one filed under the Post Conviction Procedures Act, but does not require him to do so.

a petition for habeas corpus filed in the State courts *may be treated as a petition under the Act when the relief and procedure authorized by the Act appear adequate and appropriate, notwithstanding anything to the contrary in the earlier State habeas corpus statute. See also Porter v. State*, 455 S.W.2d 159, 160 (Tenn. Crim. App.)

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WRIT OF ERROR  
CORAM NOBIS

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ORIGINS

Under the common law of Tennessee, the writ of error coram nobis was available only in civil proceedings:

*The writ was developed by the judiciary in England during the Sixteenth century. Since neither the right to move for a new trial nor the right to appeal were recognized at common law, the writ of error coram nobis was developed as a procedural mechanism to allow courts to provide relief under limited circumstances.*

*Essentially, the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial factual error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced.*

*State v. Mixon*, 983 S.W.2d 661, 666-67 (Tenn. 1999)

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## CODIFICATION

In 1858, the General Assembly enacted a statutory version of the writ of error coram nobis which was confined to civil cases and was limited in scope to *“the correction of a material error of fact, where the applicant has had no notice of the proceedings, or was prevented from making defense by surprise, accident, mistake or fraud, without fault on his part.”* Dinsmore v. Boyd, 74 Tenn. 689, 696 (1881).

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## Extension to Criminal Cases

In 1955 the General Assembly made coram nobis relief available in criminal cases and mandated that such proceedings be *“governed by the same rules applicable to the writ of error coram nobis in civil cases, except in so far as inconsistent with this section.”* State v. ex rel. Carlson v. State, 219 Tenn. 80, 497 S.W.2d 165, 167 (Tenn. 1966).

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## Adoption of Rule 60 of Tennessee Rules of Civil Procedure

In 1971, Rule 60 of the Tennessee Rules of Civil Procedure was enacted and superseded the writ of error coram nobis in civil cases.

### HOWEVER

Because the General Assembly has never repealed the statute, the writ of error coram nobis continues to be a remedy in criminal actions, but the procedure governing the remedy is based upon the civil writ of error coram nobis, which has been abolished for over 30 years. See State v. Vasques, 221 S.W.3d 514, 524-35 (Tenn. 2007).

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So . . .

*the statutes thus give rise to an anomalous situation – an existing remedy that is governed by antiquated procedural rules. Nonetheless, the General Assembly has not resolved this anomaly since it was first pointed out in State v. Mixon, 983 S.W.2d 661, 668 (Tenn. 1999).*

*Harris v. State, 102 S.W.3d 587, 593 n. 7 (Tenn. 2003)*

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### Amendment to the Statute

- In 1978 the legislature amended the statute to its current version found at Tenn. Code Ann. § 40-26-105.
- The statute provides that convicted defendants in criminal cases have available to them a proceeding in the nature of a writ of error coram nobis – *governed by the same rules and procedures applicable to the writ of error coram nobis in civil case, except insofar as inconsistent herewith.* Tenn. Code Ann. § 40-26-105(a).

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### STATUTE OF LIMITATIONS

- The statute imposes a one year statute of limitations for filing claims under a petition for writ of error coram nobis.

Under the statute, a judgment becomes final, and the one year statute of limitations begins to run, thirty days after entry of the judgment in the trial court if no post-trial motion is filed, or upon entry of an order disposing of a timely filed post-trial motions.

State v. Mixon, 983 S.W.2d 661 (Tenn. 1999)

- However, Tennessee Appellate courts have held due process may require tolling of the statute of limitations in such actions.

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## DUE PROCESS CONSIDERATIONS

State v. Workman, 41 S.W.3d 100, 103 (Tenn. 2001)

- Court adopted test from Buford v. State, 845 S.W.2d 204 (Tenn. 1992); and Seals v. State, 23 S.W.3d 272 (Tenn. 2000), to determine whether the statute of limitations for coram nobis should apply to a particular petitioner.
- Before a court may terminate a litigant's procedural rights due process requires that a potential litigant be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.
- The test is whether the time period provides an appellant a reasonable opportunity to have the claimed issue heard and determined.

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## GROUND FOR RELIEF

- Tenn. Code Ann. § 40-26-105(b):
  - ❖ A petitioner may seek relief from errors that were not or could not have been previously litigated;
  - OR
  - ❖ Upon a showing that the petitioner was without fault in failing to present certain evidence at the proper time, a petitioner may seek a writ of error coram nobis based on newly discovered evidence relating to matters which were litigated *at the trial* if the trial judge determines such evidence *may have resulted in a different judgment* had it been presented at trial.
- NOT APPLICABLE TO GUILTY PLEAS  
The coram nobis statute is not available as a procedural mechanism for collaterally attacking a guilty plea. Erazier v. State No. M2014-02374-SC-R11-ECN, 2016 Tenn. LEXIS 406, at \*17 (July 7, 2016) (overturning Wlodarz v. State, 361 S.W.3d 490 (Tenn. 2012))

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## PETITION

- A petition for writ of error coram nobis which seeks relief on the ground of newly discovered evidence, should recite:
  1. the grounds and nature of the newly discovered evidence;
  2. why the admissibility of the newly discovered evidence may have resulted in a different judgment if admitted at trial;
  3. that the petitioner was without fault in failing to present the claims at the appropriate time; and
  4. the relief sought.

Owens v. State, 908 S.W.2d 923 (Tenn. 1995).

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***May have resulted in a different judgment***

A new trial is warranted based upon newly discovered evidence if:

1. The trial court is reasonably well satisfied that the testimony given by the material witness was false and the new testimony is true;
2. The defendant was reasonably diligent in discovering the new evidence, or was surprised by the false testimony, or was unable to know of the falsity of the testimony until after the trial; and,
3. The jury might have reached a different conclusion had the truth been told.

State v. Mixon, 983 S.W.2d 661, 673 n. 17 (Tenn. 1999):

The Court has since expounded upon the third prong of the Mixon standard, and held in order to warrant a new trial, the court must find there is a "probability sufficient to undermine confidence in the verdict." State v. Workman, 111 S.W.3d 10, 17-18 (Tenn. Crim. App. 2002).

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**State v. Vasques, 221 S.W.2d 514 (Tenn. 527)**

- Court held the "may have" standard, if interpreted literally, is too lenient in the common law context of writ of error coram nobis.
- Court found, "if based upon mere "possibility," coram nobis relief would be available to any defendant, who, within one year of his conviction and sentence, discovers new evidence even if only slightly favorable to his defense.
- Thus, Court held:

*in an effort to amplify the standard established in Mixon and confirmed by our decision in Workman, we hold that in a coram nobis proceeding, the trial judge must first consider the newly discovered evidence and be 'reasonably well satisfied' with its veracity. If the defendant is 'without fault' in the sense that the exercise of reasonable diligence would not have led to a timely discovery of the new information, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceedings in order to determine whether the new evidence may have led to a different result.*

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