



# POST-CONVICTION RELIEF

What to do when you get that  
“packet” from  
WEST TENNESSEE HIGH

Presentation by  
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# What post-conviction is

- Method for defendant to attack constitutional violations that occurred during his trial/guilty plea.
- Must show a violation and prejudice resulting from the violation.

# Why Post-Conviction

- Traditional Habeas Corpus relief very limited.
  - Only can be used when sentence is void or;
  - Defendant has been incarcerated beyond the term of sentence.

# Why Post-Conviction

- Petitioner can raise constitutional claims that render conviction void or *voidable*.
- Will not address non-constitutional complaints.
- Not a substitute for appeal.

# Creature of Statute

- T.C.A. §40-30-101 *et seq.*
- Not constitutionally required.
- If it is not in the statute, it doesn't exist.
- Must satisfy Due Process.

# Rules of Post-Conviction Procedure

- Supreme Court Rule 28 governs Post-Conviction procedure.
- No longer a debate whether civil or criminal rules apply.
- Sets out discovery rules and time limits.



# SUPREME COURT

## RULE 28

- Rule 28 of the Rules of the Tennessee Supreme Court set out the rules of procedure to be used in post-conviction. Rule 28 also restates that discovery is governed by Rule 16, Tennessee Rules of Criminal Procedure.

# Procedural Time Frame

- Preliminary order from Court - 30 days.
- If not dismissed, amended petition – 30 days.
- States response – 30 days.
- Court order to proceed –30 days.
- Evidentiary hearing set within 4 months.
- Final disposition must be within 1 year of filing of original petition.

# Procedural Time Frame

- Looks good on paper.
- Courts have found ways to render this part of statute meaningless.
- Extension of time for good cause shown will not be overturned unless abuse of discretion.

# Initial Filing by Petitioner

- Must at least spell out some kind of constitutional violation.
- Must be within the one year statute of limitations.
- Just saying “ineffective assistance of counsel” usually enough.

# Statute of Limitations

- T.C.A. §40-30-102
- Within one year of final action by highest State appellate court.
- Within one year of guilty plea.
- Usually strictly construed
  - Due process exception
  - When mailed from prison.
  - Incompetent petitioner

# PRELIMINARY ORDER

T.C.A §40-30-107

- Judge reviews the petition and determines if it states a cause of action and was timely filed.
- Appoint counsel if petitioner indigent.
- Order any amendment must be filed within 30 days.

# PREMININARY ORDER

- If not timely filed the court should spell out the reason the petition should be dismissed. If the court feels the petition was timely filed but the filing date is outside the statute of limitations, the court must state why the statute has been satisfied.

- Some reasons that would allow a petition to be deemed timely filed.
- Pro-se look at notary date.
- Mail date on envelope - Mail-box rule.
- Delay that is attributed to forces outside the control of the petitioner.



# Discovery

- Old statute had no discovery provision.
- Statute was strictly construed, State had no obligation to provide discovery to petitioner.
- DA file could be inspected through Public Records Act.

# Discovery

- §40-30-109(b) establishes discovery in post-conviction as provided in Rule 16 of the Rules of Criminal Procedure.
- Petitioners can no longer seek to inspect the District Attorney's file under "open records".
- Once petition is filed the original case file is no longer a closed file.

# Waller v. Bryan, 16 S.W.3d 770 (Tenn.Crim.App. 1999)

- If this Court were to adopt Appellant's argument, we would by judicial action amend T.C.A. § 40-30-209(b) so as to delete that provision of the **Post Conviction** Act that "**discovery** is not available in a proceeding under this section except as provided under Rule 16 of the Tennessee Rules of Criminal Procedure." If this amendment is to be made, it should be made by the Legislature and not this Court.

# Prosecutor Responsibility

- File response.
- Obtain record if case was tried.
- Have transcript prepared if guilty plea.

# Obtaining the Record

- Responsibility of State to obtain record for court.
- File motion with CCA or Supreme Court to borrow transcript and evidence.
- Order will only allow withdrawal of record for a short time.
- Court can not assess counsel's performance without trial record.

# Evidentiary Hearing

- Burden is on the petitioner.
- Must show a violation of constitutional magnitude and
- Must establish prejudice.

# Most Common Areas of Attack

- Ineffective Assistance of Counsel
  - Failure to investigate and/or present mental issues
  - Failure to investigate state case.
  - Failure to develop defense “theory”.
  - Failure to raise issues on appeal.
  - Failure to object/submit lesser included offenses.

# Prejudice

- Must show that if the complained of conduct had been done, “there is a reasonable probability that but for the counsel’s unprofessional errors, the result of the proceedings would have been different”.



*BAXTER v. ROSE*  
523 S.W.2d 930 (Tenn. 1975)

*STRICKLAND v. WASHINGTON*

466 U.S. 668 (1984)

# Proving Prejudice

- Post-Conviction counsel will often try to interview jurors to see if a change in theory would affect their decision.
- Rule 606(b), Tennessee Rules of Evidence prohibits jurors from testifying about their deliberations unless there are allegations of outside influence on the jury.

# Jurors as Witnesses

- *Workman v. State*, 111 S.W.3d 10 (Tenn.Crim.App. 2002) holds that the petitioner can not call a juror and attempt to prove prejudice by getting the juror to change his/her mind about the verdict. The rule also prohibits the filing of affidavits to get into the record the juror's opinion about the case.

# Trial Counsel

- There is no attorney-client privilege when ineffective assistance of counsel claimed and the attorney-client relationship is being called into question.
- Court will not second guess a reasonable trial strategy if trial counsel was well prepared for trial.

# Hearing

- Petitioner goes first and has the burden.
- Make petitioner specifically submit his issues.
- Can not rely on hearsay.
- Petitioner does have to testify if he raises significant issues that he was party too.
- Nothing prevents petitioner from being called by the state.

# Hearing

- It have become the fashion for the petitioner to call trial counsel as a witness.
  - Trial counsel can testify about statements that were made by the petitioner that relate to trial preparation and the defense theory to establish the reasonableness of trial strategy.

# Motion to Reopen

- 40-30-117
  - Petitioner may file a Motion to reopen a prior petition for post-conviction relief.
  - Grounds to allow the motion are set out and the court must find that the petitioner has met each requirement.



# Requirements

- (1) The claim in the motion 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. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or

# Requirements

- **(2)** The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

# Requirements

- (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the 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, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

# Requirements

- 4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

# Requirements

- **(b)** The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.

# Appeal of Denial

- If the motion is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. The state shall have ten (10) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion.

# DNA Testing

T.C.A. §40-30-301 *et seq*

T.C.A. §40-30-304 sets out requirements for relief to be established by petitioner.

Not every case eligible.

Burden on petitioner.

# DNA Testing

- Petition must establish:
  - **(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



# DNA Testing

- The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

# DNA Testing

- Why would any DA refuse to conduct DNA testing?
  - Material not preserved in such a way as to eliminate possible “false positive” results.
  - Evidence is not of such character to establish innocence of the defendant.
  - Third party may have had consensual sex with victim that is not subject to testing.

# Mental Health Issues

- Often post-conviction counsel attempts to offer proof that the defendant was suffering from some mental illness that was not investigated by defense counsel.
  - Intellectual Disability
  - Drug abuse
  - Serious mental disease

# Mental Health Issues

- Petitioner would have to submit proof that he or she suffers from the alleged mental health issue. This would require expert testimony of some kind or medical records.
- Would have to prove that the mental issue, if pursued would have changed the outcome.

# Mental Health Issues

- Per Supreme Court Rule 13§5 the trial court cannot appoint experts in post-conviction cases except in capital cases where the petitioner is indigent.

# HABEAS CORPUS

## Article 1§15

- That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great. And the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.

# HABEAS CORPUS

T.C.A. §29-21-101

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

# ARCHER v. STATE

851 S.W.2d 157,164

- Habeas corpus relief is available in Tennessee only when “it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered” that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant’s sentence of imprisonment or other restraint has expired.



# T.C.A. §29-21-101

- (b) Persons restrained of their liberty pursuant to a guilty plea and negotiated sentence are not entitled to the benefits of this writ on any claim that:
  - 
  - (1) The petitioner received concurrent sentencing where there was a statutory requirement for consecutive sentencing;
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  - (2) The petitioner's sentence included a release eligibility percentage where the petitioner was not entitled to any early release; or
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  - (3) The petitioner's sentence included a lower release eligibility percentage than the petitioner was entitled to under statutory requirements.

# WHO CAN ISSUE

T.C.A §29-11-103

- The writ may be granted by any judge of the circuit or criminal courts, or by any chancellor in cases of equitable cognizance.

# WHERE

T.C.A. §29-21-105

- The application should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge.

# INFERIOR COURTS

T.C.A §29-21-106

Municipal and General Session have statutory jurisdiction to hear habeas corpus petitions where the petitioner is housed in a municipal jail .

The applicant does not have to comply with T.C.A. §29-21-101.

# CONTENTS OF PETITION

- (a) Application for the 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.

# CONTENTS

- (b) The petition shall state:
  - (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
  - (2) 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 given for its absence;
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# CONTENTS

- (3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and
- (4) That it is 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 given for the failure so to do.

# PENALTY

T.C.A. §29-21-108

- (a) It is the duty of the court or judge to act upon such applications instanter.
- (b) A wrongful and willful refusal to grant the writ, when properly applied for, is a misdemeanor in office, besides subjecting the judge to damages at the suit of the party aggrieved.



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