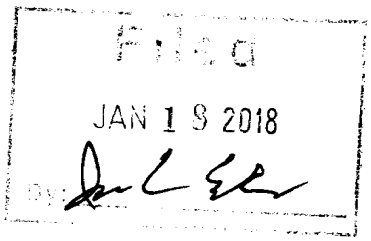
IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE
DIVISION I



CALVIN BRYANT
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

Case No. 2008-B-1478

ORDER

This matter came before the Court on December 15, 2017, for a hearing on the Petitioner's "Verified Petition for Sentencing Relief." The Petitioner is currently serving a seventeen (17) year sentence for his two convictions of sale of a controlled substance in a drug-free school zone. The Petitioner now requests the Court grant him relief on the bases detailed below. At the conclusion of the hearing on the matter, the Court took the matter under advisement, and now issues this Order regarding the instant petition.

Background

The Petitioner was originally indicted for three (3) counts of sale of a controlled substance in a school zone (Counts 1, 2, and 4), and two counts of delivery of a controlled substance in a school zone (Counts 3 and 5). Following a jury trial, the Petitioner was convicted of two counts of sale of a Schedule I controlled substance in a school zone on Counts 2 and 4, and two counts of delivery of a controlled substance in a school zone on Counts 3 and 5. The jury found the Petitioner not guilty of Count 1. The Court found that Counts 2 and 3 merged, and Counts 4 and 5 merged, as each pair of offenses involved the same incidents. Following a sentencing hearing on the matter, the Court sentenced the Petitioner to seventeen (17) years on each count, to be served concurrently, and imposed the mandatory $2,000 fine as to each count.

Pursuant to Tennessee Code Annotated § 39-17-432, commonly known as the Drug-Free School Zone Act (henceforth referred to as "the Act"), the sentences were ordered to be served at one-hundred (100) percent release eligibility. The Petitioner's direct appeal of his conviction was denied by the Tennessee Court of Criminal Appeals. See State v. Bryant, No. M2009-01718-CCA-R3-CD, 2010 WL 4324287 (Tenn. Crim. App., Nov. 1, 2010). The Petitioner subsequently timely filed a post-conviction petition, and following an evidentiary hearing on that matter, on June 15, 2012, this Court denied that petition. The Petitioner appealed that ruling, but his appeal was denied first by the Court of Criminal Appeals, and subsequently by the Tennessee Supreme Court. See Bryant v. State, No. M2012-01560-CCA-R3-PC, 2013 WL 4401166 (Tenn. Crim. App., Aug. 16, 2013), Bryant v. State, 460 S.W.3d 513 (Tenn. 2015).

The instant matter comes before the Court by way of what the Petitioner has styled a "Verified Petition for Sentencing Relief," filed by and through his attorney, Mr. Daniel Horowitz, on November 20, 2017. In that petition, the Petitioner contends that his sentence, particularly the requirement that it be served at one-hundred (100) percent release eligibility pursuant to the Act, is unconstitutional as applied to him in that it violates the Eighth Amendment of the United States Constitution and Article I, § 16 of the Tennessee Constitution. Further, the Petitioner claimed that even if the Court were not to find that his sentence is unconstitutional such that his convictions should be vacated, the Court should at least postpone the execution of the balance of his sentence pending his application to the governor for clemency. The Petitioner cited Tennessee Code Annotated § 40-30-101 (Post-Conviction Procedure Act), Tennessee Code Annotated § 40-22-101 (judicial clemency), Tennessee Code Annotated § 29-21-101 (writ of habeas corpus), and Tennessee Code Annotated § 40-26-105 (writ of error coram nobis) as avenues through which the Court could entertain his petition. The

Petitioner's original filing included numerous affidavits in support of the Petitioner's position, several articles detailing the changing public opinion surrounding the Act, a list of all defendants convicted under the Act in Tennessee, and the local criminal records of every individual convicted under the Act in Davidson County. Additionally, on December 5, 2017, the Petitioner filed an affidavit from Mr. Patrick Mulvaney, an attorney with the Southern Center for Human Rights in Atlanta, Georgia, supporting the Petitioner's request and detailing that his office had assisted in successful applications for sentencing relief in over a dozen cases in Georgia where defendants had been sentenced under the Georgia analogue to the Act. Subsequently, on December 14, 2017, the Petitioner also filed a "Supplemental Memorandum in Support of This Court's Jurisdiction to Adjudicate His Claims for Relief," in which he presented in greater detail the legal bases on which he claims the Court has jurisdiction to grant his petition.

On December 15, 2017, the Court heard arguments from the Petitioner, by and through Mr. Horowitz, and from the State, by and through Davidson County District Attorney General Glenn Funk. While the Petitioner did not call any witnesses and primarily relied on his written filings, he entered a letter from twelve Metro Nashville Councilmembers entreating the Court to grant the instant petition as an exhibit to the hearing. At the conclusion of the hearing, the Court took the matter under advisement. In light of a contention on rebuttal argument by the Petitioner that the State was waiving its objection to any jurisdictional issues, the State filed a "Clarification of State's Position" later on December 15, 2017, after the hearing. In that filing, the State clarified that it was of the opinion the question of jurisdiction should be left to the Court to decide, and thus that it did not waive any objection to the issue of jurisdiction.

Finally, while the Court had the matter under advisement, the Petitioner also filed a "Supplemental Authority in Support of Prosecutorial Discretion" on January 2, 2018, in which

he argued that the Court had jurisdiction to address the petition on the merits pursuant to the Holloway doctrine. See United States v. Holloway, 68 F.Supp.3d 310 (E.D.N.Y. 2014).

Analysis

While the above background generally summarizes the various filings in the case, the Court feels compelled to note the extraordinarily detailed nature of the filings in support of this petition. Clearly, Mr. Horowitz, acting on the Petitioner's behalf, has put a tremendous amount of work into this case, and his representation of the Petitioner has been nothing short of exemplary. However, in spite of the unusual circumstances of the Petitioner's case and the materials submitted on the Petitioner's behalf, the Court must first determine whether it even has legal authority to grant the Petitioner relief. Accordingly, the Court's analysis of the case will begin with the issue of jurisdiction.

Tennessee Code Annotated § 40-35-319 provides that where a criminal defendant is sentenced to the Department of Correction, the trial court "shall have no jurisdiction or authority to change the sentence in any manner" once the judgment becomes final, absent two circumstances. Tenn. Code Ann. § 40-35-319. First, pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure, "[t]he trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed." Tenn. R. Crim. P. 35(a). Second, the trial court also retains "full jurisdiction over a defendant sentenced to the [D]epartment [of Correction] during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department." Tenn. Code Ann. § 40-35-212(d). The Tennessee Court of Criminal Appeals has held that this issue of jurisdiction to modify a final judgment cannot be waived. See State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991)).

In the matter at hand, it is clear that the Court does not have jurisdiction to simply modify the Petitioner's sentence at this time. The instant judgment has long been final, the Petitioner is housed at the Department of Correction, and none of the aforementioned exceptions apply. The Petitioner points to the Holloway doctrine[1] to apparently argue that in spite of these jurisdictional concerns, the Court has the authority to grant the Petitioner relief because the State did not oppose the relief sought by the Petitioner. The Court disagrees with the Petitioner's contention on two grounds. First, although the Petitioner is correct in observing that the State indicated its non-objection to the underlying merits of the Petitioner's request, the State, both at the hearing on the matter and in its subsequent motion to clarify, has maintained that it leaves the question of jurisdiction to the Court to decide. Additionally, even if the Court were to look solely at the State's non-opposition to the merits of the instant petition and to find that the State's position was identical to the position of the United States in Holloway, the fact remains the Holloway doctrine is solely a persuasive authority on this Court, whereas the aforementioned statute and Tennessee jurisprudence, which make clear the Court does not have general jurisdiction to modify the judgment in this case, are binding precedent on this Court. Accordingly, the Court does not have jurisdiction to simply modify the Petitioner's sentence at this time.

However, even where the Court does not have jurisdiction to modify a convicted defendant's sentence, the Court may still entertain certain petitions after a judgment becomes final, mainly in the form of collateral attacks that have the potential to effectively lead to the

[1] In the titular case of United States v. Holloway, a United States District Court Judge for the Eastern District of New York vacated two convictions on a petitioner's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) after the United States, by and through the Assistant United States Attorney who was handling the case, agreed that the petitioner could be granted relief. See United States v. Holloway, 68 F.Supp.3d 310 (E.D.N.Y. 2014); Fed. R. Civ. P. 60(b) (allowing for relief "from a final judgment, order, or proceeding" for several reasons, including mistake, newly discovered evidence, fraud, a void judgment, a satisfied judgment, or "any other reason that justifies relief").

Petitioner's desired relief. In light of this, the Petitioner contends that the Court has jurisdiction to entertain his petition through one (or more) of the four following avenues:

1. Petition for post-conviction relief (T.C.A. § 40-35-101, *et seq.*);
2. Petition for writ of habeas corpus (T.C.A. § 29-21-101);
3. Petition for writ of error coram nobis (T.C.A. § 40-26-105); and
4. Petition for suspension of sentence pending application for clemency (T.C.A. § 40-22-101).

The Court will consider each of these forms of recourse below in specificity.

However, first, for the purposes of clarity, the Court notes that it is of the opinion that the State has not waived the various jurisdictional limitations found in these various avenues. As noted above, the State has maintained throughout the pendency of this petition that it leaves the question of jurisdiction to the Court to decide, which necessarily includes questions regarding the Petitioner's right to reopen a post-conviction petition or the Court's jurisdiction to entertain a petition for writ of habeas corpus. Thus, the Court must analyze whether the Court has jurisdiction to entertain the Petitioner's request for relief under each of these mechanisms as well.

Petition for Post-Conviction Relief

First, the Petitioner avers the Court should grant his petition under the Post-Conviction Procedure Act. See Tenn. Code Ann. § 40-30-101, *et. seq.* The Post-Conviction Procedure Act provides an avenue through which a convicted criminal may collaterally challenge his conviction whenever his sentence is "void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. However, the Post-Conviction Procedure Act also provides several procedural

limitations that are to be "construed as strictly as possible." See Whitehead v. State, 402 S.W.3d 615, 632 (Tenn. 2013). Thus, Tennessee Code Annotated § 40-30-102 provides the following two primary limitations: (1) No trial court is to entertain a non-DNA post-conviction petition after a limitations period of one year from "the date of the final action taken of the highest state appellate court to which an appeal is taken," or one year from the date the judgment becomes final if no appeal is taken; and (2) a petitioner is only entitled to attack his conviction under the Post-Conviction Procedure Act one time. See Tenn. Code Ann. § 40-30-102(a)-(b) (providing statute of limitations), § 40-30-102(c) (noting absent certain exceptions, "[i]f a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed"). However, both statutes provide that a late-filed or second or subsequent petition under the Post-Conviction Procedure Act may still be heard if one of the following exceptions applies:

1. "The claim in the petition 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;"[2]
2. "The claim in the petition 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
3. "The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction [where] the previous conviction

[2] Even this exception is limited, as the otherwise barred petition must still 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." Tenn. Code Ann. § 40-30-102(b)(1).

has subsequently been held to be invalid," so long as the conviction being challenged was not a guilty plea with an agreed sentence.[3]

Id. § 40-30-102(b), see § 40-30-117(a)(1)-(3) (providing same exceptions).

Statutory Authority to Reopen

In the matter at hand, the Petitioner claims he is entitled to reopen his prior post-conviction petition based on the what he contends is a new constitutional rule set forth that was not recognized at trial and that requires retrospective application. The Petitioner relies heavily on the recent Tennessee Supreme Court case of State v. Gibson in support of this position. See id., 506 S.W.3d 450 (Tenn. 2016). In Gibson, the Tennessee Supreme Court looked at the language of the Act and found that the Act's very wording stated that it applied "only to a violation of, or a conspiracy to violate, Tennessee Code Annotated § 39-17-417." Id. at 456. In light of this language, the Court held that a conviction for facilitation of sale of a controlled substance is not subject to enhancement under the Act. See id. at 457.

The Petitioner has asserted, and the State has not disagreed, that during plea negotiations before the Petitioner's trial, the State offered for the Petitioner to plead guilty to the lesser charge of facilitation on each count, with the sentences to be served concurrently for a total effective sentence length of eight years. However, the Petitioner rejected that offer because the Petitioner's trial counsel, Ms. Joy Kimbrough, advised him that the Act's enhancement would still apply such that the sentences would be served at one-hundred (100) percent release eligibility. Thus, the Petitioner now contends that in light of the recent holding in Gibson, he is

[3] Again, for a petition to qualify under this exception, it must be filed "within one (1) year of the finality of the ruling holding the previous conviction to be invalid." Tenn. Code Ann. § 40-30-102(b)(3).

entitled to relief on the grounds that Ms. Kimbrough's advice regarding the percentage of the sentence he would have to serve constituted ineffective assistance of counsel.[4]

The Court is of the opinion that the Petitioner's contention that the Gibson decision provides him with statutory authority to reopen his post-conviction is incorrect. The instant situation is very similar to the situation the Tennessee Supreme Court addressed in Keen v. State. See id., 398 S.W.3d 594, 608–09 (Tenn. 2012). In Keen, the Court held that the petitioner was not entitled to reopen his post-conviction petition based on a new case[5] interpreting a statute that defined intellectual disability in the context of the death penalty. See id. The Court held that the new case only interpreted a statute that implicated the constitutional prohibition against executing intellectually disabled inmates, whereas the rule itself had been set forth in different case[6] ten years prior to petition. See id.

The Court is of the opinion that the instant case is very similar to Keen. The Gibson decision certainly provided clarity to the scope of the application of the Act. However, while this purportedly new interpretation could certainly implicate the constitutional right to effective assistance of counsel, it does not establish a new constitutional right. Accordingly, the Petitioner is not entitled to reopen his prior post-conviction petition under Tennessee Code Annotated § 40-30-117(a)(1), nor to late-file this petition under Tennessee Code Annotated § 40-30-102(b)(1).

Due Process Tolling

However, in spite of the general statutory prohibition against post-conviction petitions filed beyond the statute of limitations and against second and subsequent petitions, these

[4] It should be noted that in ruling on the appeal of the Petitioner's prior post-conviction petition, the Tennessee Supreme Court held that "given the evidence presented at trial, reasonable minds could not have accepted the existence of facilitation, and a conviction for facilitation would not have been supported by legally sufficient evidence." Bryant v. State, 460 S.W.3d 513, 525 (Tenn. 2015). Accordingly, the Court has some questions about whether it could even have accepted such a plea, as the Court is required to "determine that there is a factual basis for the plea" before accepting a guilty plea. See Tenn. R. Crim. P. 11(b)(3).

[5] See Coleman v. State, 341 S.W.3d 221 (Tenn. 2011).

[6] See Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001).

limitations must be tolled in certain circumstances to protect a petitioner's due process rights.[7] See Whitehead, 402 S.W.3d at 622–23. In the context of post-conviction petitions, due process guarantees that "prisoners must be afforded an opportunity to seek this relief 'at a meaningful time and in a meaningful manner.' " Id. at 623 (quoting Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992)). The Tennessee Supreme Court has recognized three circumstances in which due process requires the tolling of the statutory limitations: (1) claims that do not arise until after the limitations are in effect; (2) periods of mental incompetence that prevents a prisoner from timely filing a petition; and (3) attorney misconduct that prevents a prisoner from being heard on the substance of his petition. See Whitehead, 402 S.W.3d at 623–24. While Tennessee courts have recognized that these circumstances can give rise to due process tolling, the Tennessee Supreme Court has noted that this relief "must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Id. at 631–32 (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)). Accordingly, the threshold to trigger due process tolling is "very high, lest the exceptions swallow the rule," particularly given the General Assembly's "clear intention that the post-conviction filing deadline be construed as strictly as possible. Whitehead, 402 S.W.3d at 632 (quoting United States v. Marcello 212 F.3d 1005, 1010 (7th Cir. 2000)).

The Petitioner contends that due process requires the tolling of the statutory limitations on his claim because his claim was "later-arising." As the Petitioner asserts, the idea behind this exception is that absent due process tolling, it is impossible for a petitioner to raise an issue

[7] Although most of the cases on the matter the Court has reviewed only deal with issues with the statute of limitations, the Court is of the opinion that the prohibition against second and subsequent petitions must also yield to appropriate due process claims. See Woodard v. State, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641, at *11 (Tenn. Crim. App., Sept. 15, 2014) (remanding late-filed second post-conviction petition and petition for writ of error coram nobis for evidentiary hearing on ground that due process tolling applied).

within the statutory limitations period where that issue does not arise until after the limitations period has expired. See Whitehead, 402 S.W.3d at 623–24. In order to determine whether a claim qualifies as later-arising under this exception, courts utilize the following 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.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995), see also Woodard, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641, at *9 (adopting same criteria). In light of these guidelines, the Petitioner contends that he is entitled to such tolling on the basis of the Tennessee Supreme Court's decision in Gibson. He argues that the Gibson decision provides him with a later-arising claim of ineffective assistance of counsel, in light of trial counsel's advice that a plea to facilitation of the charged offenses would still be required to be served at one-hundred (100) percent release eligibility pursuant to the Act.

The Court again disagrees with the Petitioner's contention. It is clear that the Gibson opinion was not issued until after the limitations period in this case expired. Further, the Court recognizes that there was apparently a significant amount of confusion prior to Gibson regarding whether a facilitation conviction could be enhanced under Act. See, e.g., State v. Faulkner, No.E2006-02094-CCA-R3-CD, 2008 WL 2242531, at *16 (Tenn. Crim. App., June 2, 2008) (noting in dicta that the Act can apply to a facilitation conviction). However, in spite of this confusion, the Court is not of the opinion that the Gibson decision gave rise to a later-arising

claim such that due process requires the tolling of the statutory limitations. First, as previously discussed, Gibson did not give rise to some "new" rule of law, but only interpreted the applicability of the Act. The operative language of the statute interpreted by the Tennessee Supreme Court in Gibson was the same language in effect at the time the Petitioner apparently rejected the State's plea offer.[8] The Tennessee Supreme Court has observed that the operative "language of the Drug-Free School Zone Act is clear and unambiguous." Gibson, 506 S.W.3d at 456 (citing Dycus, 456 S.W.3d at 928). Further, the Tennessee Supreme Court's analysis in interpreting the Act's applicability to convictions for facilitation was straightforward, as the Court solely looked at the plain meaning of the statute and did not apply any complex canons of statutory interpretation. See Gibson, 506 S.W.3d at 456–57. Most importantly, as the Court in Gibson noted, the Tennessee Supreme Court observed in 2001, albeit in dicta, that the Act did not apply to convictions for facilitation. See State v. Fields, 40 S.W.3d 435, 439–40 (Tenn. 2001) (rejecting State's argument that the presumption in favor of alternative sentencing did not apply to an individual convicted of facilitation of delivery of crack cocaine, which was not charged under the Act, but took place within 1,000 feet of a school, in part because the Act did not apply to convictions for facilitation).[9] In fact, in its opinion on the Petitioner's direct appeal in 2010, the Court of Criminal Appeals took note of the Fields decision. See State v. Bryant, No. M2009-01718-CCA-R3-CD, 2010 WL 4324287 (Tenn. Crim. App., Nov. 1, 2010) ("In fact, the defendant conviction for facilitation of the sale of cocaine [in Fields] did not fall under the

[8] Although Tenn. Code Ann. § 39-17-432 has been amended twice since the Petitioner's conviction, the operative language, which is determinative of the issue regarding the applicability of the Act to a conviction for facilitation, remains unchanged. See Tenn. Code Ann. § 39-17-432 ("A violation of § 39-17-417, or a conspiracy to violate the section, . . . [shall be punished under the Act]."

[9] Although not directly on point, it is also worth noting that the Tennessee Court of Criminal Appeals even held in 2000 that the Act did not create a new offense, but only provided for enhanced penalties "for violations of Tenn. Code Ann. § 39-17-417 occurring inside the [school] zones." State v. Smith, 48 S.W.3d 159, 167–68 (Tenn. Crim. App. 2000). This holding is significant because in Gibson, one of the State's primary arguments in support of its position that the Act applied to convictions for facilitation was that the Act established "a separate criminal offense." Gibson, 506 S.W.3d at 457. In light of Smith, that argument is clearly erroneous.

purview of the Act."). Thus, for all of these reasons, the Court is of the opinion that the Petitioner was not denied "a reasonable opportunity to present [the instant] claim." Sands, 903 S.W.2d at 301. Accordingly, the Court is of the opinion that the Petitioner's claim regarding the issue of facilitation is not later-arising such that his due process rights require that the statutory bars on the instant post-conviction petition be tolled.[10]

Eighth Amendment Claim

In addition to the Petitioner's claims regarding the Gibson decision and his right to effective assistance of counsel, the Petitioner also claims that he is entitled to reopen his prior post-conviction petition, on either statutory or due process grounds, because the recent evolution of statewide standards of decency regarding the Act renders his sentence excessive in violation of the Eighth Amendment of the Constitution of the United States and Article I, § 16 of the Constitution of Tennessee.

The Eighth Amendment of the Constitution of the United States prohibits the imposition of "cruel and unusual punishments." U.S. CONST. amend. VIII. Included within this ban is a prohibition on "sentences that are disproportionate to the crime committed." See Ewing v. California, 538 U.S. 11, 22 (2003) (quoting Solem v. Helm, 463 U.S. 277, 284 (1983)). Proportionality is to be measured by reference to "the evolving standards of decency" as found at the time the claim is raised, not at the initial time of sentencing. See Kennedy v. Louisiana, 554 U.S. 407, 419 (2008). When considering a challenge of a "term-of-years" sentence, courts are to

[10] While the Court stands by its ruling on this issue, the Court also feels it should note that even assuming, *arguendo*, that the Petitioner's claim was later-arising such that due process mandated the tolling of the statutory limitations on this issue, it would be virtually impossible for the Petitioner to prevail on a claim of ineffective assistance of counsel. A finding that the claim was later-arising for due process tolling purposes is also essentially a finding that the inapplicability of the Act to a conviction for facilitation was not established until after the Gibson decision. However, if 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, Ms. Kimbrough 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, Ms. Kimbrough's representation was not deficient, and the Petitioner would not be entitled to relief for ineffective assistance of counsel. See Strickland v. Washington. See id. 466 U.S. 668 (1984).

evaluate the challenge in light of "all the circumstances in [the] particular case." Graham v. Florida, 560 U.S. 48, 59 (2010). In light of this, a court considering a proportionality challenge under the Eighth Amendment is to be "guided by objective criteria, including (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.

Additionally, the Petitioner contends that the excessive nature of his sentence also violates Article I, § 16 of the Tennessee Constitution, which is the state analogue to the Eighth Amendment. See TENN. CONST. art. I, § 16 (prohibiting "cruel and unusual punishments"). While the language in Article I, § 16 of the Tennessee Constitution "is virtually identical to that of the Eighth Amendment," the Tennessee Supreme Court has held that that language is to be interpreted more expansively than the Eighth Amendment. State v. Harris, 844 S.W.2d 601, 602–03 (Tenn. 1992). Thus, the Tennessee Supreme Court has adopted a slightly different test to evaluate a proportionality challenge under the Tennessee Constitution than the test set forth in Solem. See Harris, 844 S.W.2d at 603 (adopting the test set forth by Justice Kennedy's concurrence in Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part)). Under the Harris test, "the sentence imposed is initially compared with the crime committed." Harris, 844 S.W.2d at 603. If this initial comparison "leads to an inference of gross disproportionality," courts are then to proceed to the second and third criteria set forth in Solem: "the sentences imposed on other criminals in the same jurisdiction, and [] the sentences imposed for commission of the same crime in other jurisdictions." Harris, 844 S.W.2d at 603, Solem, 463 U.S. at 292. However, where the initial comparison does not lead to an inference of gross disproportionality, "the inquiry ends" without consideration of the other factors. Harris, 844

S.W.2d at 603. The Tennessee Court of Criminal Appeals has provided additional guidance on the test, noting that in determining whether there is an inference of gross disproportionality, courts should compare "the gravity of the offense and the harshness of the penalty." State v. Smith, 48 S.W.3d 159, 171 (Tenn. Crim. App. 2000) (citing Solem, 463 U.S. at 292). Relevant factors to the issue of the gravity of the offense include the following:

> (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.

Smith, 48 S.W.3d at 171. Further, in evaluating the harshness of the penalty, courts are to consider factors including "the type of penalty imposed, and, if a term of imprisonment, the length of the term and availability of parole or other forms of early release." Id. It is important to note that "[t]he mandatory nature of a penalty will not alone raise an inference of gross disproportionality or render the penalty unconstitutional." Id. Finally, the Tennessee Supreme Court has also counseled that "because reviewing courts should grant substantial deference to the broad authority legislatures possess in determining punishments for particular crimes, '[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare.' " Harris, 844 S.W.2d at 602 (quoting Solem, 463 U.S. at 289–90 (emphasis in original)).

Turning to the matter at hand, just as with the facilitation issue discussed above, before considering the merits of the Petitioner's argument, the Court must first determine whether the

Petitioner may late-file and reopen his prior post-conviction petition either under the statutory grounds or on the basis of due process tolling.

To that end, the Court first finds the Petitioner is not entitled to reopen his petition on any of the statutory grounds. While the Act has been examined more critically in recent years, there has been no hallmark case that would fall under subsection (a)(1) of Tennessee Code Annotated § 40-30-117 that even suggests that the Act might constitute cruel and unusual punishment. As previously discussed, the Court in Gibson did not set forth a new constitutional rule, but merely interpreted language in the Act consistent with a prior observation by the Tennessee Supreme Court. Similarly, the Tennessee Supreme Court in State v. Dycus did not set forth a new constitutional rule regarding the Act, but interpreted the judicial diversion statute to find that the mandatory minimum service requirement of the Act did not render offenses under the Act ineligible for judicial diversion. See id. 456 S.W.3d 918, 928 (Tenn. 2015) (finding grant of judicial diversion for conviction of violation of the Act did not prevent judicial diversion because granting judicial diversion constituted a deferral of sentencing, thus not running afoul of the Act's requirement that those sentenced under the Act serve a mandatory minimum portion of their sentence). Accordingly, as there has been no new constitutional rule that would allow the Petitioner to reopen his prior post-conviction petition under Tennessee Code Annotated § 40-30-117(a)(1), the Petitioner is statutorily barred from reopening his petition.

The Petitioner also contends that his excessive sentence claim is "later arising" due to recent developments and "evolving standards of decency." In support of this position, the Petitioner points to the recent decisions of the Tennessee Supreme Court in Gibson and Dycus, which he contends "significantly reformed" the Act. See "Petitioner's Verified Petition for Sentencing Relief," ¶ 3. Further, the Petitioner points to the recent change in the enforcement of

the Act by the Davidson County District Attorney's Office. See id., Ex. 18 (noting that since District Attorney General Funk was elected, his office only seeks enhanced punishment under the Act where a child is actually endangered). The Petitioner has also submitted a memorandum, which was apparently provided to the Tennessee Senate Judiciary Committee, examining the sentences of inmates serving sentences enhanced under the Act who had no prior felony convictions. See id., Ex. 17. In light of this evidence and changing public opinion regarding the Act, the Petitioner argues that his excessive sentence claim is later-arising such that due process requires that the statutory limitations on his ability to reopen his petition be tolled.

Again, the Court must disagree with the Petitioner's contention on this matter. First and foremost, the Court notes that the facts most critical to the Petitioner's excessive sentence claim have remained unchanged since the time he was sentenced. He did not have a prior criminal record at the time of sentencing. The length of his sentence and the one-hundred (100) percent release eligibility have remained unchanged. The majority of his personal background, including much of his commendable community involvement, the community's support of him, and his athletic record were all settled and known at the time of sentencing. All of this evidence could have been brought to bear in challenging the constitutionality of the Petitioner's sentence either on direct appeal or in his initial post-conviction petition.

Additionally, the Court is not persuaded by the Petitioner's contention that the "standards of decency" at issue in his claim have evolved so much that due process requires he be allowed to reopen his petition. Judicially, as discussed previously, there has been no hallmark Tennessee appellate court decision suggesting that enhanced sentences under the Act are unconstitutional in any situation. In fact, Tennessee appellate courts have consistently rejected other "as applied" challenges arguing an enhanced sentence under the Act is constitutionally excessive. See, e.g.,

State v. Hall, No. E2015-02173-CCA-R3-CD, 2017 WL 1828357, at *6 (Tenn. Crim. App., May 4, 2017) (rejecting grossly disproportionate challenge to thirty-year sentence at one-hundred (100) percent under the Act for Class B felony conviction, where defendant was career offender but had never been sentenced to more than split confinement), State v. Peters, No. E2014-02322-CCA-R3-CD, 2015 WL 6768615, at *11 (Tenn. Crim. App., Jan. 7, 2014) (finding fifteen year sentence enhanced sentence under the Act for Class A felony conviction did not give rise to inference of gross disproportionality). Further, while the Petitioner submitted the aforementioned memorandum that was provided to the Tennessee Senate Judiciary Committee, there has been no legislative reform of the Act in Tennessee that indicates an evolving standard of decency. See Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."). While a handful of other states have enacted some measure of reform to their analogue to the Act, the fact remains that every state and the District of Columbia "apply some form of enhanced penalties" to drug-free school zone offenses. See Nicole Porter & Tyler Clemens, Drug-Free Zone Laws: An Overview of State Policies, 1 (2013). The Petitioner also points to the voluntary reforms in the enforcement of the Act by the Davidson County District Attorney's Office as indicative of evolving standards of decency. The Court respects the voluntary change the District Attorney's Office has undertaken and recognizes that it may be indicative of the changing public perception surrounding the Act here in Davidson County. However, the Court is of the opinion that it would be inappropriate to find that the changing public perception regarding the Act in one county dictates a finding that the standards of decency of society as a whole have evolved. See, e.g., State v. Van Tran, 66

S.W.3d 790, 805 (Tenn. 2001) (looking to national and state societal opinions in evaluating the "evolving standard of decency" in context of death penalty for mentally disabled defendants).

Ultimately, the Court recognizes that the enhanced penalties under the Act are subject to more scrutiny and questions today than they have ever been, particularly within Davidson County. However, the Court is of the opinion that there has not been such a shift in societal consensus regarding the enhanced penalties of the Act so as to show an evolving standard of decency that would require due process tolling of the statutory limitations.[11] Accordingly, the Court does not have authority to entertain the Petitioner's excessive sentence claims in a post-conviction petition.

However, even assuming, *arguendo*, that the Court had jurisdiction to address the merits of the Petitioner's claim on this matter, the Court is not of the opinion that the Petitioner would be entitled to relief. Because the protection against "cruel and unusual punishment" provided by the Tennessee Constitution is "more expansive" than that afforded by the Eighth Amendment, the Court will analyze the Petitioner's claim under the test the Tennessee Supreme Court set forth in Harris. See Harris, 844 S.W.2d at 602–03. Accordingly, the Court's threshold determination is whether a comparison of the sentence imposed with the gravity of the offense leads to an inference of gross disproportionality. See id. at 603. The Court finds that it does not. The Tennessee Court of Criminal Appeals has held that a violation of the Act constituted "one of the more serious offenses in our society," even where the defendant was sitting in car in a parking lot of a public housing development within a drug-free school zone and only had a small amount of crack cocaine to sell. See Smith, 48 S.W.3d at 172. Further, appellate courts have

[11] If the changes the Petitioner points to are truly indicative of a statewide movement, then those interested in the Petitioner's case may be able to effectuate change through the Tennessee legislature both by eliminating the mandatory enhanced sentences required under the Act and by providing legal authority for trial courts to alter sentences after the fact like the one at issue in the Petitioner's case.

repeatedly given deference to the Tennessee legislature's judgment that the sale of controlled substances near a school or other protected zone merits an enhanced penalty. See, e.g., Smith v. Howerton, 509 Fed.Appx. 476, 482 (6th Cir. 2012) (noting the "primacy of the legislature in determining the length of sentences"), Smith, 48 S.W.3d at 172. While the Petitioner has pointed to the fact that he was not attempting to sell narcotics to children as indicative of the undue harshness of the sentence, the Tennessee Court of Criminal Appeals has noted that the purpose of the Act is not restricted solely to preventing the sale of drugs to children. See State v. Jenkins, 15 S.W.3d 914, 919–20 (Tenn. Crim. App. 1999), State v. Reed, No. E2010-01138-CCA-R3-CD, 2011 WL 2766766, at *6 (Tenn. Crim. App., July 18, 2011). Accordingly, while the Court recognizes the Petitioner's contention that his sentence is severe, the Court is of the opinion that the sentence is not so unjust as to give rise to an inference of gross disproportionality. Thus, the Court must find the Petitioner's sentence is constitutional.[12]

Writ of Habeas Corpus

The Petitioner also contends that the Court could entertain his petition as a petition for writ of habeas corpus. In conjunction with a post-conviction petition, the petition for writ of habeas corpus constitutes the second of the "two primary procedural avenues in Tennessee to collaterally attack a conviction and sentence which have become final." See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The right to seek habeas corpus is guaranteed by the Constitution of Tennessee. See TENN. CONST. art. I, § 15. Further, Tennessee Code Annotated § 29-21-101, *et*

[12] While this determination ends the Court's inquiry, the Court also feels it is appropriate to take note of one particular fact regarding the Petitioner's sentence as compared to other defendants' sentences under the Act. The instant petition makes a point of the fact that the Petitioner had no prior adult criminal record when sentenced and that he is the only defendant in Davidson County who was subjected to the enhanced sentence under the Act who did not have a prior record. See, e.g., "Petitioner's Verified Petitioner for Sentencing Relief," ¶ 130. While this is true, it must also be noted that according to another exhibit the Petitioner submitted, the Petitioner's position in this regard does not appear as unique when the entire state is considered. See id. Ex. 17. As noted in the memorandum provided to the Tennessee Senate Judiciary Committee, as of March 22, 2017, of the four-hundred-thirty-six (436) individuals in Tennessee incarcerated under the Act, one-hundred-forty-six (146) had no prior felony convictions. See id.

seq., codifies the procedures for a petition for the writ. See Tenn. Code Ann. § 29-21-101 *et seq.* From the statutory provision alone, "the wording of [the] statute initially appears to offer wide-ranging relief to imprisoned individuals." See Archer v. State, 851 S.W.2d 157, 160–61 (Tenn. 1993) (citing Tenn. Code Ann. § 29-21-101) ("Any person imprisoned or restrained of liberty, under any pretense whatsoever [except under limited circumstances] may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint."). However, in actuality, the grounds upon which a petition for writ of habeas corpus may be granted under state law "are very narrow." Taylor, 995 S.W.2d at 83. This is because in Tennessee, habeas corpus relief is only available 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." Archer, 851 S.W.2d at 164 (quoting State v. Galloway, 45 Tenn. (5 Cold.) 326, 336–37 (1868)). Accordingly, while a post-conviction petition is available to challenge a conviction or sentence that is *either* void or voidable, a writ of habeas corpus is "may only be utilized to successfully contest void, as opposed to voidable, judgments." Taylor, 995 S.W.2d at 83.

A judgment is void where "the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired. See id. (citing Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998), Archer, 851 S.W.2d at 161–64). In contrast, a conviction or sentence is voidable where it is "facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity." See Taylor, 995 S.W.2d at 83 (citing Dykes, 978 S.W.2d at 529, Archer, 851 S.W.2d at 161–64). The burden is on the petitioner to "demonstrate by a preponderance of the evidence that the

judgment entered against him or her is void, not merely voidable." See Smith v. Lewis, 202 S.W.3d 124, 127 (Tenn. 2006) (internal quotation marks omitted).

In spite of this limitation, the writ of habeas corpus can be the proper avenue to "correct the denial of fundamental constitutional rights." State ex rel. Newsom v. Henderson, 424 S.W.2d 186, 188 (Tenn. 1968). The writ can be used to challenge "convictions imposed under unconstitutional statutes, because an unconstitutional law is void and can, therefore, create no offense." Archer, 851 S.W.2d at 160. However, it is also clear that "not every violation of a constitutional provision or denial of a fundamental right during the course of a judicial proceeding constitutes grounds for habeas corpus," but only those that "render the whole proceeding void." State ex rel. Anglin v. Mitchell, 575 S.W.2d 284, 288 (Tenn. 1979) (disagreed with on other grounds by Archer, 851 S.W.2d).

Turning to the instant petition, the Court is of the opinion that the writ of habeas corpus is not an appropriate remedy for the Petitioner's challenge in this case. As the Petitioner, by and through Mr. Horowitz, conceded at the hearing on the matter, the Petitioner is not challenging that the Act is unconstitutional on its face.[13] Instead, the Petitioner challenges that the Act is unconstitutional as it is applied to him in particular. However, by conceding that he is not challenging the facial constitutionality of the Act, the Petitioner effectively admits that at worst, his sentence is voidable rather than void. In order to establish that the Act is unconstitutional as applied to him, the Petitioner would have to submit additional evidence not available simply from the judgment and record in this case. See Taylor, 995 S.W.2d at 83 (explaining where

[13] As noted previously, Tennessee appellate courts have repeatedly upheld challenges, including facial challenges, to the constitutionality of the Drug-Free School Zone Act. See, e.g., State v. Smith, 48 S.W.3d 159 (Tenn. Crim. App. 2000) (rejecting facial constitutional challenge that the Act was void for vagueness and as-applied challenge that sentence enhanced under the Act was unconstitutional excessive), State v. Jenkins, 15 S.W.3d 914 (rejecting facial constitutional challenges that the Act was void for vagueness and that sentence enhancement of the Act violated Eighth Amendment).

challenge to legality of sentence requires proof beyond judgment or record, sentence is at most voidable, not void). Accordingly, because the writ of habeas corpus may only be used to challenge void convictions or sentences, the Court is compelled to find that the Petitioner is not entitled to relief through the writ.

Writ of Error Coram Nobis

The Petitioner also avers that the Court could entertain his request for relief by treating his petition as a petition for writ of error coram nobis. A writ of error coram nobis is a very limited remedy which allows a petitioner the opportunity to present newly discovered evidence "which may have resulted in a different verdict if heard by the jury at trial." State v. Workman, 41 S.W.3d 100, 103 (Tenn. 2001), see also State v. Mixon, 983 S.W.2d 661 (Tenn. 1999), Song v. State, No. M2015-02317-CCA-R3-ECN, 2017 WL 2192083, at *6 (Tenn. Crim. App., May 17, 2017). The writ of error coram nobis "is limited 'to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding.' " Song, 2017 WL 2192083, at *6 (quoting Tenn. Code Ann. § 40–26–105(b)). Additionally, "a petition for writ of error coram nobis must be dismissed as untimely unless it is filed within one year of the date on which the judgment of conviction became final in the trial court." Mixon, 983 S.W.2d at 670, see also Tenn. Code Ann. § 27-7-103. However, due process may require the tolling of the statute of limitations in certain situations. State v. Workman, 41 S.W.3d at 103. Specifically, "when a petitioner seeks a writ of error coram nobis based on newly discovered evidence of actual innocence, due process considerations may require tolling of the statute of limitations." Harris v. State, 301 S.W.3d 141, 145 (Tenn. 2010).

Turning to the matter at hand, the Court is of the opinion that the Petitioner is not entitled to relief on a petition for writ of error coram nobis. First, the Court would incorporate its prior analysis regarding the statutory limitations on post-conviction petitions to find that the instant petition is late-filed and that the Petitioner is not entitled to due process tolling. However, even if the petition had been timely filed and the Court accepted every contention raised in the petition and accompanying exhibits as true, the Petitioner would still not be entitled to relief. The supposed "newly discovered evidence" regarding the applicability of the Act to convictions for facilitation was neither newly discovered, as discussed previously, nor does it constitute evidence that could have had a bearing on the jury's verdict. [14] See State v. Castleman, No. W2009-01661-CCA-R3-CD, 2010 WL 2219543, at *4 (Tenn. Crim. App., May 27, 2010) (claim of newly discovered legal implications of conviction did not have any bearing on "actual guilt or innocence"). Accordingly, the Petitioner is not entitled to relief through the writ of error coram nobis.

Petition for Suspension of Sentence Pending Application for Clemency

Finally, in addition to the previously discussed collateral attacks on the Petitioner's sentence, the Petitioner also avers the Court could grant him relief by suspending his sentence and recommending clemency pursuant to Tennessee Code Annotated § 40-22-101. The Tennessee Constitution provides "the governor exclusive authority to issue 'reprieves and pardons.' " See Benjamin K. Raybin, *Pardon Me: How Executive Clemency Works in Tennessee (and How It Doesn't)*, 52-Aug. TENN. BAR J. 12, 13 (2016) (quoting TENN. CONST. art. III, § 6). This authority has also been recognized and codified by the Tennessee legislature. See Tenn.

[14] In fact, it is doubtful whether the applicability of the Act to facilitation has any bearing on the Petitioner's case outside the context of the plea bargain offer. The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court both found that this was not a case of facilitation, given the fact that the Petitioner directly sold the controlled substances to the informant. See Bryant v. State, No. M2012-01560-CCA-R3-PC, 2013 WL 4401166, at *21 (Tenn. Crim. App., Aug. 16, 2013), Bryant v. State, 460 S.W.3d 513, 526 (Tenn. 2015).

Code Ann. § 40-27-101. However, while the Tennessee judiciary is not given authority to grant clemency itself, Tennessee Code Annotated § 40-22-101 and § 40-22-102 provide a basis for a "judicial recommendation of clemency." See Saeger v. State, 592 S.W.2d 909, 909 (Tenn. Crim. App. 1979). As the importance of clemency as an avenue for relief from "harsh sentences or injustices" has declined over the past century with the rise of greater appellate review and the parole system, the statutes allowing for a judicial recommendation of clemency have fallen into disuse. See Raybin, *Pardon Me* at 15. However, in spite of the lack of use of the statutes, they continue to be in effect.

The statutes appear to provide for a judicial recommendation of clemency and the accompanying relief in two different situations.[15] First, Tennessee Code Annotated § 40-22-101 provides that "in case of conviction and sentence of a defendant to imprisonment, the presiding judge may . . . postpone the execution of the sentence" for a period of time to allow the defendant to apply to the governor for clemency. Tenn. Code Ann. § 40-22-101. In contrast, Tennessee Code Annotated § 40-22-102 provides that "[w]henever a plea of guilty is entered by the defendant" and the presiding judge finds that there are unique circumstances or certain mitigating factors, "the execution of sentence and judgment may . . . be suspended" to allow the defendant to apply to the governor for clemency. Tenn. Code Ann. § 40-22-102. In either case, the ultimate decision as to clemency is left to the governor. See Tenn. Code Ann. § 40-22-106.

Turning to the Petitioner's request, in light of the aforementioned statutory scheme surrounding judicial recommendations of clemency, the Court is of the opinion that it does not have statutory authority to suspend the Petitioner's sentence at this time. In contrast to Tennessee Code Annotated § 40-22-101, which allows the presiding judge to postpone a defendant's

[15] The disuse of these statutes is also evidenced by the lack of case law on the statutes, as Westlaw only has record of one case citing to each of these statutes. Accordingly, in the absence of guidance by appellate courts, the Court relies solely on the statutory language.

sentence in any case involving a conviction, Tennessee Code Annotated § 40-22-102 only allows for suspension of a sentence upon a plea of guilty. The Petitioner contends that irrespective of these distinctions, the Court may still suspend the Petitioner's sentence pending an application for clemency. The Court again must disagree. The "rule against surplusage" is a well-established canon of statutory interpretation that provides that "[e]ach part and every word of a statute is presumed to have meaning and purpose and should not be construed as superfluous or as surplusage." State v. Black, 815 S.W.2d 166, 197 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part) (citing Tidwell v. Collins, 522 S.W.2d 674, 676–77 (Tenn. 1975), Marsh v. Henderson, 424 S.W.2d 193, 196 (Tenn. 1968)). Accordingly, the Court is of the opinion that the legislature has created two distinct situations in which relief pending an application for clemency may arise, including the limitation that a sentence may only be suspended pending an application for clemency where the defendant has pled guilty. Unfortunately, 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. Thus, the Court is not able to grant the Petitioner relief under this avenue.

Conclusion

In light of the foregoing analysis, the Court feels constrained to find that it does not have authority to grant the Petitioner relief. However, while the Court is of the opinion that it does not have legal authority to grant the Petitioner relief, the Court also feels it necessary to note that in spite of this finding, the Court agrees with the basic argument of his petition—that his sentence can be viewed as harsh. While not ignoring the important policy rationale that led the Tennessee legislature to pass the Act, the fact remains that in certain situations, such as with the Petitioner, a strict interpretation and enforcement of the Act can lead to sentences that courts and some

members of the community would be hard-pressed to describe as fair. This is especially true in Davidson County, where much of the county, and especially those areas with a higher concentration of minority populations, falls within the ambit of the Act. To that end, while this Court clearly has no input in the decisions regarding prosecutorial discretion made by the Davidson County District Attorney's Office, the Court understands the reforms recently undertaken by the District Attorney's Office.

However, regardless of the Court's opinion regarding such matters, the fact remains that this Court's duty is to apply the law. The Court does not have discretion in the level of charges brought before it from a grand jury, nor does it have the legal authority to pick and choose which laws will be enforced upon conviction, so long as a conviction has a legal basis. The system of checks and balances that gives distinct powers and roles to the legislative, executive, and judicial branches is one of the hallmarks of our democratic government. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–58 (1982) ("To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct."). Accordingly, in light of this system, even the Tennessee Supreme Court has repeatedly refused to act as a lawmaking body, but has instead invited the legislature to act. See, e.g., In re C.K.G., 173 S.W.3d 714, 730 n.9 (Tenn. 2005) (deferring to the Tennessee legislature to create new law and citing numerous cases where the Tennessee Supreme Court similarly deferred to the legislature to act), Taylor v. Beard, 104 S.W.3d 507, 511 (Tenn. 2003) ("This Court has long recognized that it has a limited role in declaring public policy and has consistently stated that '[t]he determination of public policy is primarily a function of the legislature' . . . .") (quoting Alcazar v. Hayes, 982 S.W.2d 845, 851 (Tenn. 1998)), State v.

Goodman, 90 S.W.3d 557, 565 (Tenn. 2002) ("The General Assembly, not this Court, is empowered to amend the criminal statutes [on especially aggravated kidnapping] at issue in this case."). As detailed by the Tennessee Supreme Court, in a recent case applying the "so-called three strikes" law, Special Trial Judge and former Senior Judge Walter Kurtz "noted that mandatory sentencing laws have been criticized as unwise public policy and commented that the criticism may be well-taken." State v. Patterson, No. M2015-02375-SC-R11-CD, 2017 WL 5898397, at *2 (Tenn., Nov. 30, 2017). In spite of recognizing that criticism though, Judge Kurtz applied the law because it was still "on the books." Id. Similarly, regardless of this Court's personal opinion regarding the prudence of the Act, this Court will follow the laws that are "on the books" and not usurp legislative power for itself. Therefore, the Court does not feel it appropriate to act outside the bounds of the limited avenues for post-conviction relief that the Tennessee legislature has set forth at this time.

Finally, the Court notes that it always appreciates individuals who take the time to invest in their communities and the laws which affect those communities. This case has garnered the attention of a number of such individuals, ranging from the Petitioner's family and friends who wrote letters in support of the Petitioner's release and who appeared at the instant hearing on this matter to support him, to the attorneys and Metro Councilmembers who have expressed support of the instant petition. The Court hopes that these individuals, should they desire to do so, would continue to take an interest in the Petitioner's case, whether by supporting an application for clemency to the governor or working with the legislature to provide an avenue for this Court, and other courts dealing with similar situations, to exercise judicial discretion in handling such petitions. As the Court observed at the hearing, the Court is not opposed to seeing the Petitioner receive relief, so long as there is legal authority for that relief.

However, as the Court is without such authority at this time, in light of the foregoing analysis, the Court finds that it does not have authority to grant the Petitioner relief. Thus, the instant petition must be denied.

Entered this 18th of January, 2018.

Steve R. Dozier, Judge
Criminal Court, Division I

cc: Honorable Glenn Funk,
District Attorney General;
Honorable Daniel Horowitz,
Attorney for the Petitioner.