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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NICHOLAS SUTTON,	**)**	**No. E2000–00712–SC–DDT–DD**
	)	
Petitioner,	**)**	**Morgan County**
	)	
	)	**Nos. E2018–00877–CCA–R3–PD**
v.	**)**	**and E2019–01062–CCA–R3–ECN**
	)	
STATE OF TENNESSEE,	**)**	**(CAPITAL CASE)**
	)	
Respondent.	**)**	**Execution Set for Feb. 20, 2020**

NICHOLAS SUTTON'S MOTION TO STAY HIS EXECUTION PENDING AN APPEAL OF RIGHT AND A DISCRETIONARY APPEAL REGARDING SHACKING DURING HIS CAPITAL TRIAL

This Court decides whether Nicholas Sutton lives or dies. In wielding this power, the Court has the responsibility of considering matters of life or death with great caution and consideration. Mr. Sutton's life, and the critical questions of whether his rights to due process, an impartial jury, and freedom from cruel and unusual punishment were violated when he was forced to appear before the jury wearing visible shackles and handcuffs arrive at this Court less than two weeks before he is scheduled to be executed. This Court must now decide whether Mr. Sutton's visible shackling was inherently prejudicial, eroded the presumption of innocence, and tipped the scales in favor of conviction and the imposition of a death sentence.

Mr. Sutton moves this Court for a stay of execution while he pursues an appeal of right from denial of his petition for writ of error coram nobis, which was filed with the Court of Criminal Appeals on October 25, 2019,[1] and a discretionary appeal from the dismissal of his post-conviction petition, which was filed in this Court today.[2] Both appeals involve a claim based upon newly available evidence regarding jurors observing Mr. Sutton shackled with heavy chains during his capital trial and sentencing. In addition, the post-conviction appeal involves the retroactive application of new United States Supreme Court law, *Johnson v. United States*, 135 S.Ct. 2551 (2015), which renders unconstitutionally vague the prior violent felony aggravating circumstance upon which Mr. Sutton's death sentence rests. On appeal, Mr. Sutton seeks remand for an evidentiary hearing in the trial court.

This Court zealously guards the right to a fair and impartial tribunal—to protect not only the right of a litigant to a fair trial but also to provide the public with the assurance of a fair and impartial justice system. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013). This right is most imperative in capital cases. *See Smith*, 357 S.W.3d at 346 ("We have on numerous occasions recognized 'the heightened due process applicable in capital cases' and 'the heightened reliability required and the gravity of the

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[1] The Coram Nobis Technical Record is cited herein as CN vol. [#] at [pg #].

[2] The Post-Conviction Technical Record is cited herein as PC vol. [#] at [pg #].

ultimate penalty in capital cases.'").

The capital jurors' observations and consideration of Mr. Sutton shackled in heavy chains during the guilt/innocence and penalty phases of his trial involve a violation of great constitutional magnitude which requires Mr. Sutton's convictions and sentence be vacated. *See Deck v. Missouri*, 544 U.S. 622 (2005); *Mobley v. State*, 397 S.W.3d 70 (Tenn. 2013).

If the merits of his claims are not allowed to be fully litigated, Mr. Sutton will be executed in the electric chair on February 20, 2020. Here, the equities weigh in favor of a stay to allow the Court time to consider Mr. Sutton's claim because it will be impossible to afford him the required relief after February 20. This Court should stay the execution and let the appellate courts address the consequences of Mr. Sutton's visible shackling during his capital trial as well as the invalidation of one of his aggravating circumstances on which his death sentence rests.

PROCEDURAL HISTORY

Nicholas Todd Sutton, TDOC No. 89682, is in custody under a sentence of death at Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee, 37209-1048.

Mr. Sutton was an inmate at Morgan County Regional Correctional Facility (MCRCF) in Morgan County, Tennessee when he and two other inmates were charged with murder for the stabbing death of inmate Carl Estep. *State v. Sutton*, 761 S.W.2d 763, 764–65 (Tenn. 1988). Mr. Sutton and his codefendants were tried together. *Id.* The jury convicted Mr. Sutton of premeditated murder and found the following aggravating circumstances: 1) Mr. Sutton had been previously convicted of one or

more felonies, other than the present charge, which involved the use or threat of violence to the person, Tenn. Code Ann. § 39–2–203(i)(2) (repealed); 2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39–2–203(i)(5) (repealed); and 3) the murder was committed while the defendant was in a place of lawful confinement, Tenn. Code Ann. § 39–2–203(i)(8) (repealed). The jury sentenced Mr. Sutton to death, sentenced one codefendant, Thomas Street, to life, and acquitted the other codefendant, Charles Freeman. *State v. Sutton*, 761 S.W.2d 763, 767 (Tenn. 1988). The jury never heard about Mr. Sutton's horrific childhood, *see Sutton v. Bell*, 645 F.3d 752, 767–768 (6th Cir. 2011) (Martin, J., dissenting), or the abhorrent prison conditions he endured for years prior to the homicide. *See Sutton v. State*, 1999 WL 423005 (Tenn. 1999); *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982).

The conviction and sentence were upheld on direct appeal. *State v. Sutton*, 761 S.W.2d at 763. Post-conviction relief was denied by the state courts. *Sutton v. State*, 1999 WL 423005. The federal courts denied habeas corpus relief. *Sutton v. Bell,* 645 F.3d 752. Despite numerous inmate homicides in Tennessee prisons over the past thirty years, Mr. Sutton is the only person who is currently on Tennessee's death row for the killing of a prison inmate.

On June 8, 2016, Mr. Sutton filed a Motion to Reopen Post-Conviction Proceedings asserting the prior violent felony aggravator which supports his death sentence is void for vagueness in light of new substantive Supreme Court law, as decided in *Johnson v. United States*,

135 S.Ct. 2551 (2015), and held to be retroactive in *Welch v. United States*,136 S.Ct. 1257 (2016). On October 4, 2016, the post-conviction court found that Mr. Sutton had raised a colorable claim and granted his motion. PC vol. I at 105. The court directed Mr. Sutton's counsel to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* at 106. Mr. Sutton filed his amended petition on February 2, 2017. *Id.* at 119. On that same date, Mr. Sutton filed a petition for writ of error coram nobis. Affidavits from four jurors who served on the jury that convicted Mr. Sutton and sentenced him to death and Michael J. Passino, Mr. Sutton's prior post-conviction counsel, accompanied the petition for writ of error coram nobis. CN vol. I at 17–40. The petition and supporting materials detailed how Mr. Sutton was forced to appear before the jury wearing visible shackles and handcuffs, how the jury observed Mr. Sutton forcibly shackled and handcuffed, how it impacted the jury's deliberations, and how prior counsel failed to develop and present evidence of the shackling and handcuffs and its effect on the jury.

On April 11, 2018, the trial court entered an order dismissing Mr. Sutton's post-conviction proceeding without an evidentiary hearing. PC vol. VI at 846–66. On April 10, 2019, Mr. Sutton timely appealed that decision to the Court of Criminal Appeals. On January 31, 2020, the Court of Criminal Appeals affirmed the judgment of the post-conviction court.

On May 17, 2019, the trial court entered an order denying Mr. Sutton's petition for writ of error coram nobis without holding an

evidentiary hearing. CN vol. II at 280–92. On October 25, 2019, Mr. Sutton timely appealed that decision to the Court of Criminal Appeals.

STANDARD FOR GRANTING A STAY

This Court's rules authorize a stay of execution pending resolution of collateral litigation in state court if the person under death sentence "can prove a likelihood of success on the merits of that [collateral] litigation." Tenn. Sup. Ct. R. 12(4)(E). This standard does not require a "significant possibility of success."[3] Instead, a movant proves that he has a likelihood of succeeding on the merits of that litigation by showing "more than a mere possibility of success.'" *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). "However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics*, 119 F.3d at 402 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

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[3] This Court amended the rule, effective July 1, 2015, after rejecting a proposal to change the language to "a significant possibility of success on the merits" in collateral litigation. The Tennessee Bar Association (TBA) opposed imposing the burden of demonstrating a "significant" possibility as a "potential deviation of the long established 'heightened due process standards involved in capital cases,'" citing *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011). Comment of the TBA, filed January 20, 2015, at 2. The TBA urged the Court to continue applying heightened due process standards by exercising "discretion on a case by case basis regarding stays sought pending collateral litigation so as to allow the record to fully develop." *Id.*, at 3.

Moreover, this Court's standard, premised on principles of constitutional adjudication and procedural fairness, is coexistent with the application of heightened due process principles in capital cases. As such, this Court has consistently required that constitutional challenges be considered in light of a fully developed record. *See State v. Stephen Michael West,* No. M1987–00130–SC–DPE–DD (Tenn. Nov. 26, 2014) (Order); *State v. Zagorski*, No. M1996–00110–SC–DPE–DD (Tenn. October 22, 2014) (Order); *State v. Irick*, No. M1987–00131–SC–DPE–DD (Tenn. Sept. 25, 2014) (Order); *Donald Wayne Strouth v. State*, No. E1997–00348–SC–DDT–DD (Tenn. April 8, 2014) (Order); *Stephen Michael West v. Ray,* No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order).

Indeed, in *State v. Workman*, this Court granted a stay of execution pending adjudication of a petition for writ of error coram nobis which had been denied by the lower courts. 41 S.W.3d 100, 103 (Tenn. 2001). And, as this Court emphasized in *Workman*, the condemned man's ability to have substantive constitutional claims adjudicated on the merits outweighed the State's interests in executing the death sentence. *Id.* Likewise, in *State v. West*, this Court explained, "The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges . . . be considered in light of a fully developed record addressing the specific merits of the challenge." No. M1987–00130–SC–DPE–DD (Tenn. Nov. 29, 2010) (Order), at 3. "Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has

been presented, tested, and weighed in an adversarial hearing." *Stephen Michael West v. Ray,* No. M2010–02275–SC–R11–CV (Tenn. Nov. 6, 2010) (Order), at 2. Mr. Sutton has not had the opportunity to fully investigate and present the merits of his constitutional claims because an execution date was set while his claims were still pending in the courts.

I. Mr. Sutton Has Established a Likelihood That He Will Prevail on the Merits of His Shackling Claim.

The claims of constitutional violations and newly available evidence in Mr. Sutton's post-conviction and error coram nobis appeals prove that he has a likelihood of succeeding on the merits of those claims because he has more than a mere possibility of success.

Mr. Sutton's rights to due process, an impartial jury and freedom from cruel and unusual punishment were violated when he was forced to appear before the jury wearing visible shackles and handcuffs. Evidence that his jury saw Mr. Sutton forcibly shackled and handcuffed during his capital trial and sentencing was first discovered in October 2016 when undersigned counsel interviewed several jurors who convicted Appellant and sentenced him to death. The newly discovered evidence that the jury observed Mr. Sutton visibly shackled and handcuffed created an unacceptable risk of impermissible bias influencing the verdict. We now know such an impermissible influence occurred. CN vol. I at 17–32. The newly available evidence was not developed and presented sooner due to limited state funding to develop claims in post-conviction and the failings of trial and prior post-conviction counsel.

The shackling and handcuffing of a defendant is an "unmistakable indication[] of the need to separate a defendant from the community at large." *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986). The Supreme Court has noted that "no person should be tried while shackled and gagged except as a last resort" because "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant" and "the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Illinois v. Allen*, 397 U.S. 337, 344 (1970). "[T]here is a legal presumption against the use of visible restraints in court that flows from due process guarantees to a fair trial." *Mobley v. State*, 397 S.W.3d 70, 100 (Tenn. 2013). "The use of visible restraints undermines the physical indicia of innocence and the related fairness of the fact-finding process." *Id*. Accordingly, when shackles and handcuffs "inadvertently become[s] visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations." *Id*. at 101. In Mr. Sutton's capital trial, the jurors received no such instruction.

The Supreme Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). This is because "shackling undermines the presumption of innocence and the related fairness of the proceeding" and "can interfere with the accused's ability to communicate with his lawyer." *Id*. at 630–31. The use of shackles also "undermine[s]

the[] symbolic yet concrete objectives" of "[t]he courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." *Id.* at 632.

Shackling is equally prejudicial during the penalty phase of a capital trial as during the guilt-innocence phase. The Supreme Court has stated that "shackles at the penalty phase threaten related concerns" as shackles at the guilt-innocence phase because "[a]lthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death," and "[t]hat decision, given the severity and finality of the sanction, is no less important than the decision about guilt." *Id.* (citations and quotations omitted). Shackling is so inherently prejudicial that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation," and instead "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Deck*, 544 U.S. at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).[4] That is a hurdle that is almost insurmountable. These due process requirements were violated throughout Mr. Sutton's trial.

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[4] In discussing the "inherent prejudice" resulting from shackling a defendant, the Supreme Court noted, like the consequences of compelling a defendant to stand trial while medicated, the negative effects that result from shackling "cannot be shown from a trial transcript." *Deck*, 544 U.S. at 635.

The shackling and handcuffing of a defendant "almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck*, 544 U.S. at 633. Here, Mr. Sutton was on trial for murder and his propensity for violence was a critical issue in both the guilt-innocence and penalty phases. The appearance of a defendant in chains implies to a jury, as a matter of common sense, that court authorities consider the defendant a danger to the community and a threat to those in the courtroom, and the defendant possesses the character of someone who would commit the charged offense. As a result, in finding Appellant guilty, the jury likely relied upon the improper inference that Appellant was a violent person as evidenced by the visible shackles and handcuffs.[5]

This error could not be and was not harmless. The presence of shackles and handcuffs in and of themselves connoted dangerousness—a non-statutory aggravating factor—and the trial court did nothing to dispel that. Moreover, when given an opportunity in both Mr. Sutton's reopened post-conviction and error coram nobis proceedings to rebut the presumption of prejudice caused by the visible shackling, the State failed to do so.[6]

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[5] "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

[6] The State made no attempt to rebut prejudice in its Response to the Petition for Writ of Error Coram Nobis that was filed in the lower court, solely asserting that this claim is barred by the statute of limitations. CN vol. I at 41–47.

Not only does the visible shackling of Mr. Sutton support a constitutional claim, it also entitles him to relief under our coram nobis statute. The evidence that Mr. Sutton's jury saw him shackled and handcuffed when he was on trial for his life and the impact that image had on the deliberations is newly available and recently discovered evidence which many have resulted in a different outcome had it been brought forward at the trial level. Tenn. Code Ann. § 40–26–105(b).

The evidence demonstrating that Mr. Sutton was visibly shackled and handcuffed during his capital trial and sentencing, that the jury observed Mr. Sutton forcibly shackled and handcuffed, and its effect on the deliberations is newly discovered evidence because it is: (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. *Nunley,* 552 S.W.3d at 823. Because the evidence at issue here is evidence of impermissible influence of shackling on the capital jury, the evidence by its nature existed at the time of trial. However, this evidence was not discovered at the time. This evidence was not previously developed and presented due to the denial of resources available to Appellant's previous post-conviction counsel and the failings of both trial and prior post-conviction counsel. The facts underlying this claim would have been admissible had they come to light at any time during the trial or on motion for a new trial. These statements are credible in that they are offered in sworn statements under penalty of

perjury and are not in any way self-serving.[7] Had this evidence been presented and litigated on a motion for a new trial or in the initial state post-conviction proceedings, it may have resulted in a different judgment.

First, trial counsel failed to interview the jurors in preparing the motion for new trial. If counsel had done so, he could have proffered evidence of at least four jurors who saw Mr. Sutton shackled in the courtroom and how the shackling undermined the presumption of innocence and the fairness of Mr. Sutton's trial. Had counsel presented this evidence, there is a reasonable probability that the motion for new trial would have been successful. At a minimum, counsel would have preserved the issue for appellate review. *See Virgin Islands v. Forte*, 865 F.2d 59, 62–64 (3d. Cir. 1989) (stating that "had the objection been made [defendant] would have been successful on appeal.").

Second, Mr. Sutton was unable to raise and litigate his shackling claim in the initial state post-conviction proceedings due to the failings of post-conviction counsel and limited state funding to develop claims in post-conviction. Michael J. Passino, Mr. Sutton's then-inexperienced prior post-conviction counsel, failed to interview the jurors and develop and present evidence of shackling in the state post-conviction proceedings. The post-conviction court refused to allocate the necessary

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[7] If there are any questions about the veracity of the statements, this matter should be remanded for an evidentiary hearing to develop the record and allow the lower court to gauge the credibility of the witnesses. *See Harris*, 102 S.W.3d at 593 (Coram nobis claims are "singularly fact-intensive," are not easily resolved on the face of the petition, and often require a hearing).

funds to conduct a proper investigation. As a result, Mr. Passino, who was based in Nashville, was unable to interview the jurors, who were based in East Tennessee, to establish the extent to which they had been aware of the shackles and the effect it had on their deliberations.

As Mr. Passino now admits:

> Although I was still in a small practice, in fact and effect, living at the economic margins, the actions of Judge Wade, the size of the record, the complexity of the legal actions, demanded almost my full attention to the case as well as my investment of my personal funds in various investigative and expert services because Judge Wade denied important requests. Although the records of the Administrative Office of the Tennessee Supreme Court will reflect the substantial time I invested in Mr. Sutton's case during a relative short period, at a reimbursement rate of what I seem to recall being $20.00, the plain fact is that it was impossible for me to conduct an adequate investigation or properly pursue each and every non-frivolous issue as required, if not demanded by the Tennessee Supreme Court's Rules governing the ethical obligations of attorneys and/or the ABA Guidelines on the Appointment and Performance of Counsel in Capital Standards. I say this not to excuse my performance, but to state a fact not subject to principled dispute by reasonable minds having a minimal understanding of a capital attorney's duties coupled with a proper respect for the law. The reality was that I was presented with the circumstance of doing a competent job, in a complex case, with significant legal and factual issues in a short time while simultaneously having to maintain a law practice and support (or contribute to the support of) a family, my wife, and our children.

CN vol. I at 35–36.

Mr. Passino also failed to interview the jurors because:

> I was ignorant of the vital purpose of juror interviews in capital work post-trial and post-conviction and based on this ignorance did not see or realize the important connection between such information and issues I actually presented in the Petition. The decision was not a tactical or strategic one, and I had neither the knowledge nor a factual basis for making it. Compounding the above, while investigation was ongoing, and I was trying to develop and present issues for the hearing, I did not consider amending the Petition to expand or more carefully articulate issues, nor did I give the matter thoughtful consideration when I was researching related issues.

Id. at 36–37. Mr. Passino had no strategic reason for failing to develop and raise the shackling claim despite raising a claim of prejudicial courtroom security. As he concedes:

> while I was focused on courtroom security, which one [post-conviction] witness described as much like an armed fortress, I did not allege the shackling issue in the Petition, did not seek to amend it in, and did not seek to develop testimony on the issue although shackling presented a distinct constitutional fair trial issue, was factually and legally supported, if not compelling, and folded into existing claims bolstering those claims as well as standing on its own bottom. The failure to further investigate and present the shackling issue was not a tactical or strategic decision. In fact, given its relationship to facts that I knew and issues I was investigating, this oversight is one of breathtaking stupidity, at best.
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> With respect to the shackling issue . . . I did not interview these jurors [who provided affidavits for the current coram nobis proceedings], did not present their testimony, did not present a separate [shackling] claim, decisions that were neither strategic nor tactical . . . .

Id. at 37–38.

As a result of Mr. Passino's failure to interview the jurors and raise a shackling claim, in the initial post-conviction proceedings, the lower court erroneously concluded that measures were taken at trial to hide the shackles from the jury when in fact, the jurors did see Mr. Sutton handcuffed and shackled. *Sutton v. State*, 1999 WL 423005, at *8.[8] Post-conviction counsel's failings and the limited funding for investigation denied Mr. Sutton his rights to due process, to present a defense, and to the effective assistance of counsel in the development and presentation of his post-conviction claims. The United States Supreme Court "has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).[9] Had post-conviction counsel been

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[8] This erroneous conclusion was established because the only evidence which can properly prove or disprove the visibility of shackles **must** come through the jurors themselves. No juror, however, was ever presented in the prior post-conviction proceedings.

[9] Characterizing the values undergirding *Gideon* and *Strickland*, the Court in *Ake* noted that "[m]eaningful access to justice has been the theme of these cases." *Id*. at 78. Going further, the Court made clear that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process," acknowledging "that a criminal [proceeding] is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id*. "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system . .

provided the necessary funding for investigation and interviewed the jurors, he could have developed and presented the shackling claim in the initial post-conviction proceedings. Accordingly, Mr. Sutton is without fault in failing to present this newly discovered evidence.

II. Mr. Sutton Has Established a Likelihood That He Will Prevail on the Merits of His *Johnson* Claim.

Additionally, Mr. Sutton has more than a possibility of succeeding in his litigation that Tennessee's prior violent felony aggravating circumstance is unconstitutionally vague. Mr. Sutton's death sentence is invalid because the prior violent felony conviction aggravator upon which his sentence is based is unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551; *Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that *Johnson* is retroactive). The statutory language of the prior violent felony aggravator in effect at the time of Mr. Sutton's crime (Tenn. Code Ann. § 39–2–203(i)(2)) is materially the same as the language of the sentencing statute in *Johnson* that the Supreme Court found to be unconstitutionally vague. *See Johnson*, 135 S.Ct. at 2555–57. Accordingly, the *Johnson* Court's vagueness analysis applies with equal force to the prior violent felony aggravator in Mr. Sutton's case and invalidates it as a basis for his death sentence.

. . .'" *Id.*, quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). "To implement this principle, we have focused on identifying the 'basic tools of an adequate defense or appeal, and we have required that such tools be provided to those defendants who cannot afford to pay for them." *Id.* (citations omitted).

A death sentence which rests, in whole or in part, upon an unconstitutionally vague aggravating factor is inherently invalid. *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980). Mr. Sutton's death sentence, therefore, stands in violation of Article I, §§ 6, 8, 9, 10, 16, 17, and 32 and Article XI, § 16 of the Tennessee Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Indeed, the Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. It follows that the Constitution prohibits vague laws. *Johnson*, 135 S. Ct. 2551. A statute so vague that it fails to give ordinary people fair notice of punishment, or so standardless that it invites arbitrary enforcement, violates the fundamental principles of justice enshrined under due process of law. *Johnson*, 135 S.Ct. at 2556–57; *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). Further, vagueness in the death penalty context violates not only the Fifth and Fourteenth Amendments but also the Eighth Amendment and Article I, §§ 8 and 16 of the Tennessee Constitution. *See Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988).

In *Johnson*, the United States Supreme Court held that when a statute permits increasing a sentence due to a defendant's prior convictions but the requirements for determining what prior convictions justify such an enhancement are vague, the enforcement of that statute violates due process because the statute fails to give a defendant proper notice and invites "arbitrary enforcement" by judges. *Johnson*, 135 S.Ct. at 2557. *Johnson*'s core holding is that when a sentence enhancement is based on a prior conviction, an after-the-fact inquiry into whether the

conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—is unconstitutional. *Id.* at 2563. Looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense "involved" leads to arbitrary results and fails to give ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id*. at 2556–59; *see also Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016) ("It is impermissible for 'a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.'" (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

Now, after *Johnson*, the prior violent felony conviction aggravating circumstance in effect at the time of Mr. Sutton's capital crime is unconstitutionally vague. A sentencing statute is void for vagueness if it fails to give ordinary people fair notice of the conduct it punishes. *Johnson*, 135 S.Ct. at 2556–57. The prior violent felony aggravator in effect at the time of Mr. Sutton's capital offense read: The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person[.] Tenn. Code Ann. 39–13–203(i)(2) (repealed and replaced 1989). Per *Johnson*'s holding, the language of the involves clause is so vague that it cannot pass constitutional muster and is now void for vagueness.

The language of Tennessee's prior violent aggravating circumstance in effect at the time of Mr. Sutton's capital crime operates in the same way that the statutory language invalidated by *Johnson*

operated. The language of both statutes is materially the same. Any minor differences have no impact on the constitutional analysis. *See, e.g., Sessions v. Dimaya*, 138 S.Ct. 1204, 1208 (2018). Both of these statutes contain vague plain language. State courts have repeatedly applied *Johnson* when examining the constitutionality of state sentencing statutes. The Supreme Judicial Court of Massachusetts relied on Johnson in invalidating the residual clause of the state's armed career criminal sentencing statute. *Com. v. Beal*, 52 N.E.3d 998, 1006–07 (Mass. 2016). In *State v. Campbell*, 2018 WL 576762 (Conn. 2018), the Supreme Court of Connecticut applied the *Johnson* holding in determining whether a murder statute was void-for-vagueness. In *State v. Davis*, 2016 WL 1735459 (Del. Super. Ct. 2016) and *State v. Chambers*, 2015 WL 9302840 (Del. Super. Ct. 2015), Delaware courts ultimately decided that the *Johnson* holding did not invalidate a provision in the state's habitual offender statute. However, the courts applied the *Johnson* decision in its analysis to decide the merit of the void-for-vagueness challenge. In *Com. v. Guess*, 2016 WL 1533520 (Pa. Super. Ct. 2016), a Pennsylvania state court applied the *Johnson* holding in deciding the merits of a void-for-vagueness challenge to a state sentencing statute. This continued state court litigation makes clear that the application and extension of Johnson is far from settled law.

The United States Supreme Court has repeatedly emphasized that the death penalty, because of its unquestionably unique severity, finality, and irrevocability, is qualitatively different from any other punishment. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

As a result, Tennessee courts have an overwhelming public interest in insuring that capital punishment in this State comports with the Constitution and "conforms with contemporary standards of decency." *State v. Black*, 815 S.W.2d 166, 189 (Tenn. 1991).

Mr. Sutton has not completed the "standard three-tier appeals process." He is entitled to pursue post-conviction relief and he is currently seeking discretionary review by this Court on matters of critical constitutional proportion. As well, his appeal of right on the trial court's denial of his petition for writ of error coram notice without an evidentiary hearing is currently pending in the Court of Criminal Appeals.

Allowing Mr. Sutton's execution to go forward while his appeal of right and application for permission to appeal are pending would deprive Mr. Sutton of his due process right to meaningful access to the courts, which is guaranteed by the Fourteenth Amendment to the United States Constitution. *See Murray v. Giarratano*, 492 U.S. 1 (1989) (Kennedy, J., concurring) (meaningful access to courts is required); *Bounds v. Smith*, 430 U.S. 817, 23 (1977) (An indigent defendant must be provided with an "'opportunity to present his claims fairly.' . . . 'Meaningful access to the courts is the touchstone." (quoting *Ross v. Moffit*, 477 U.S. 600, 611–12, 615–16 (1974)).

III. Statutory Limits on Collateral Challenges to Relief Violate Due Process if Interpreted to Bar Mr. Sutton From Litigating the Merits of His Constitutional Claims.

Due process[10] requires that Mr. Sutton be allowed to fully litigate his shackling claim on the merits through at least one of the two procedural vehicles he filed. Post-conviction petitioners must be afforded an opportunity to seek relief "at a meaningful time and in a meaningful manner." *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992). This Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution. *Id.* (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)).

In exercising this responsibility to protect the Constitution, this Court has previously found that strict procedural restrictions of the post-conviction statute must be relaxed, where "circumstances beyond a

[10] The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *see Malloy v. Hogan*, 378 U.S. 1 (1964), provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In addition, the Fourteenth Amendment to the U.S. Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." The corresponding provision of the Tennessee Constitution provides, in part, "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8. The "law of the land" provision of Article I, § 8 of the Tennessee Constitution has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965).

petitioner's control" prevented the petitioner from complying with the statutory requirements. *Whitehead v. State*, 402 S.W.3d 615, 622, 625 (Tenn. 2013) (non-capital case tolling the statute of limitations for post-conviction relief due to attorney error). "[T]he General Assembly may not enact laws that conflict with the Constitution of Tennessee or the Constitution of the United States." *Id. See also Seals v. State,* 23 S.W.3d 272 (Tenn. 2000) (non-capital case recognizing the "flexible nature of procedural due process" and tolling the one-year post-conviction statute of limitations due to mental incompetence); *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004) (remanding capital motion to reopen post-conviction case involving intellectual disability as "the petitioner . . .has been confronted with circumstances beyond his control which prevented him from previously challenging his conviction and sentence on constitutional grounds," and thus the petitioner's interests outweighed the State's);[11] *Sample v. State*, 82 S.W.3d 267, 269–75 (Tenn. 2002) (court

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[11] Similarly, in *Howell,* this Court found that the statutory burden of proving the petitioner's motion to reopen claim of intellectual disability by "clear and convincing evidence" violated due process due to the critical constitutional right at issue. 151 S.W.3d at 465 ("[W]ere we to apply the statute's 'clear and convincing' standard in light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional in its application."). The Court applied this standard despite "increas[ing] the burden upon the State in defending against the claim" because "the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* (citing *Cooper v. Oklahoma,* 517 U.S. 348 at 364–65 (1996) (comparing the risk of

was required to reach the merits of petitioner's *Brady* claim in a late and successive post-conviction petition, because others' misconduct prevented him from obtaining the evidence necessary to raise the claim earlier).[12]

The statute of limitations must be weighed against the competing interests identified in the juror bias filings. *See Whitehead*, 402 S.W.3d at 623 (weighing the competing rights at stake in determining whether due process barred strict application of the statute of limitation). The recognized private interest at stake is the "prisoner's opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process." *Id.* (citing *Burford*, 845 S.W.2d at 207). The government's interest, by contrast, is "'in preventing the litigation of stale and groundless claims,' coupled with concerns about 'the costs to the State of continually allowing prisoners to file usually fruitless post-conviction petitions.'" *Id.* These considerations apply equally to: (1) determining whether due process requires the equitable tolling of statutory time limits in collateral proceedings, and (2) fundamental fairness principles.

In capital cases,[13] the interest of the condemned weighs strongly

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incompetent defendant standing trial versus State's risk of incorrect competency determination)).

[12] Therefore, the fact that Sample waited approximately 16 months after discovering the evidence before raising the issue was unremarkable in the Court's view.

[13] Mr. Sutton is entitled to the protection of the Eighth Amendment and article I, § 16 of the Tennessee Constitution. The Eighth Amendment

against any interests of the State given that life, and not merely liberty is at issue.[14] In this case, "the petitioner's interest is even stronger [than the State's]—his interest in protecting his very life." *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004).

Weighed against Mr. Sutton's life, is the State's interest in preventing the litigation of stale and groundless claims and costs to the State of "usually fruitless post-conviction petitions." *Whitehead*, 402 S.W.3d at 623 (citing *Burford*, 845 S.W.2d at 207). Here, the shackling claim is neither groundless nor fruitless—it is a constitutional error, striking at the foundational right of a fair and impartial tribunal. The claim is based on newly discovered evidence of facts that were existing but undiscovered during the 1986 trial. The claim is not stale[15] because

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prohibits infliction of "cruel and unusual punishments" by the government. Article I, § 16 prohibits the same.

[14] Tennessee has a historical practice of fashioning and molding the law to afford remedies for wrongs when necessary to effectuate justice in capital cases. *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001) (finding that despite the unavailability of a statutory procedural vehicle, fundamental fairness required opportunity in this capital case to litigate a constitutional claim pursuant to the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (holding that the issue of petitioner's incompetency to be executed was not cognizable in post-conviction; however, the court exercised its inherent power to adopt appropriate rules to create a procedural mechanism for adjudicating competency) (abrogated on other grounds by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010)).

[15] A claim "that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the

Mr. Sutton had no control over the facts establishing juror knowledge of shackling.

It is only the failings of trial and post-conviction counsel and the court's denial of inadequate funding for investigation in the post-conviction proceedings that prevented Mr. Sutton from raising the claim in the original post-conviction proceedings.

This Court stated in 1826: "The maxim of the law is, that there is no wrong without a remedy . . . ." *Bob, a slave v. The State*, 10 Tenn. 173, 176 (1826). *See also State v. Johnson*, 569 S.W.2d 808, 814 (Tenn. 1978) (relying on *Bob* and applying the same principle). This is particularly true when a life is at stake. "Should error intervene to the prejudice of the person tried, and there be no remedy after judgment, the injury is twofold,—a barbarous example of the execution of a human being . . . or, perhaps some of the thousand accidental errors that are daily committed by higher courts, to whom belongs the administration of this branch of the law." 10 Tenn. at 182. The Tennessee Constitution provides that "all courts shall be open and every man, for an injury done him shall have remedy by due course of law . . . ." Article I, § 17. The open courts provision specifically applies to the right to a fair tribunal. *In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912); *see also State v. Benson*, 973 S.W.2d 202, 205 (Tenn. 1998) ("The right to an impartial judge is also guaranteed by

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truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim is has been abandoned or satisfied." Black's Law Dictionary, Sixth Edition.

Article I, § 17 of the Tennessee Constitution, . . .").

The trial court's findings that Mr. Sutton could not avail himself of either post-conviction or error coram nobis procedure for his constitutional error claim cannot stand because it would mean there is no remedy for a grievous constitutional violation.

This Court has stayed routine capital proceedings to permit a death-sentenced petitioner his full and fair opportunity to pursue a permissive appeal. In *Corinio Allen Pruitt v. State*, a death-sentenced litigant sought to disqualify the post-conviction trial judge, alleging that the judge exhibited bias against him and his attorneys. Case No. W2017–00960–SC–T10B–CO. The trial judge declined to recuse himself, and Pruitt appealed. While the appeal was pending, and before the scheduled post-conviction hearing, Pruitt moved the trial judge to delay the evidentiary hearing until the appellate courts had fully considered his judicial bias claims.

The trial judge denied a continuance of the post-conviction hearing for two primary reasons. First, no harm would come to Pruitt if the trial judge presided over the already scheduled hearing, even if this Court later determined that the trial judge's bias required his removal. The trial court noted that there was an obvious solution if this Court determined that the trial judge should have recused himself—another judge could preside over a second post-conviction hearing. In sum, the trial judge reasoned that if Pruitt prevailed on appeal, he would ultimately suffer no harm because he could receive a do-over.

This Court, however, disagreed with Pruitt's trial judge and stayed the evidentiary hearing.[16] Nick Sutton has no such remedy. Executions are final—there are no do-overs.

IV. Equal Protection and Eighth Amendment Principles Require That Mr. Sutton's Constitutional Claims Be Considered on the Merits.

If Mr. Sutton is not allowed to litigate these claims simply because of when they were discovered, his right to equal protection will be violated, in contravention of Article XI, § 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution. *See Bush v. Gore*, 531 U.S. 98 (2000) (holding that a state court's implementation of voting rights must comport with "the rudimentary requirements of equal treatment and fundamental fairness").

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Respectfully submitted,

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[16] Days before Pruitt's evidentiary hearing was set to begin, the Court of Criminal Appeals denied Pruitt's Rule 10B appeal. On August 3, 2017, Pruitt filed in this Court his emergency motion for a stay of the capital post-conviction hearing, set to commence on August 7, 2017. Pruitt asserted that this Court should have time to properly consider Pruitt's permissive Rule 10B appeal. He argued that the fundamental constitutional due process right to a tribunal which is not only fair, but bears the appearance of impartiality, required the full attention of this Court to effectuate Pruitt's state and federal constitutional rights, citing *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011). On August 4, 2017, this Court granted a stay of proceedings to postpone the scheduled evidentiary hearing. This Court ultimately declined to grant the application for review by order entered October 17, 2017.

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Certificate of Service

I hereby certify that a true and exact copy of this Motion was delivered via email to the following counsel in the Office of the Attorney General: Amy L. Tarkington, Amy.Tarkington@ag.tn.gov

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