IN THE CRIMINAL COURT FOR MORGAN COUNTY, TENNESSEE

| | | |
|---|---|---|
| NICHOLAS TODD SUTTON,<br>Petitioner | ) | WRIT OF ERROR CORAM NOBIS |
| VS. | ) | NO. 2017-CR-52 |
| STATE OF TENNESSEE | ) | |

---

ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS

---

## I. INTRODUCTION

This matter is before the Court on the Nicholas Todd Sutton's Petition For Writ of Error Coram Nobis filed on July, 20, 2017. Petitioner claims he is entitled to relief based upon what he asserts is newly discovered "evidence demonstrating that Mr. Sutton was visibly shackled and handcuffed during this capital trial and sentencing." The State filed its response on April 11, 2019, seeking summary dismissal asserting this matter is barred by the applicable statute of limitations.

After a careful review of the pleadings and applicable law and for the reasons stated below, Petitioner Sutton's petition for writ of error coram nobis is summarily DISMISSED.

## II. PROCEDURAL HISTORY

### *Trial*

In 1986, Petitioner was convicted of the January 15, 1985, first degree murder of Carl

Estep. At the time of the offense, Petitioner, his codefendants,[1] and the victim were all inmates at the Morgan County Regional Correctional Facility. Estep was stabbed, in his cell, thirty-eight times in the chest and neck and nine of the wounds were potentially fatal. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988). Two homemade knives were found near his body and a third was found under his lamp. Id. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the murder:

> (1) 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; and
>
> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind.
>
> (3) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

See Tenn. Code Ann. § 39-2-203(i)(2), (5), and (8) (1982).

On appeal, the Tennessee Supreme Court affirmed both his conviction and sentence. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988), cert. denied, 497 U.S.1031 (1990).

### *Post-Conviction*

Petitioner subsequently filed his first petition for post-conviction relief on December 14, 1990, and amended it on January 2, 1992. Following a hearing held from October 9, 1996, to October 14, 1996, the petition was denied by the trial court's order on October 23, 1996.[2] The trial court's denial was affirmed on appeal. Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530

[1] One co-defendant was found not guilty and another was found guilty and received a life sentence.
[2] Judge William Inman was appointed In November of 1994 to hear the petition but granted the Petitioner's motion to recuse in March 1996. Judge Gary R. Wade, then a Court of Criminal Appeals Judge, was appointed to hear the petition. After five days of hearing in October 1996, the post-conviction court denied relief on October 23, 1996.

U.S. 1216 (2000).[3]

*Federal Habeas Corpus Proceedings*

Petitioner filed an unsuccessful petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the trial court's denial of relief was affirmed on appeal. Sutton v. Bell, 645 F.3d 752 (6th Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012).

## III. APPLICABLE LAW AND ANALYSIS

In Payne v. State, 403 S.W.3d 478 (Tenn. 2016), our Tennessee Supreme Court addressed the parameters of a writ of error coram nobis:

> ... Our statute setting forth the parameters for seeking a writ of error coram nobis provides as follows:
>
> > The relief obtainable by this proceeding shall be confined to errors dehors the record and 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. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.
>
> Tenn.Code Ann. § 40–26–105(b). The decision to grant or deny a petition for writ of error coram nobis on its merits rests within the trial court's sound discretion. *Harris v. State,* 301 S.W.3d 141, 144 (Tenn.2010).
>
> Claims under the coram nobis statute are subject to a one-year statute of limitations. Tenn.Code Ann. 27–7–103. "The statute of limitations is computed from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an

[3] Petitioner also filed a Motion to Reopen in June 2016 which was related to this Petition and addressed by separate orders.

order disposing of a timely filed, post-trial motion." *Harris,* 301 S.W.3d at 144 (citing *State v. Mixon,* 983 S.W.2d 661, 670 (Tenn.1999)). The trial court in this proceeding denied the Petitioner relief under the coram nobis statute on the basis that his claim was barred by this statute of limitations.

We have opined that the writ of error coram nobis "is an *extraordinary* procedural remedy ... [that] fills only a slight gap into which few cases fall." *Mixon,* 983 S.W.2d at 672. That slight gap is met only under the following circumstances:

> The ... petition must be in writing and (1) must describe with particularity the nature and substance of the newly discovered evidence and (2) must demonstrate that this evidence qualifies as "newly discovered evidence." In order to be considered "newly discovered evidence," the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. In addition to describing the form and substance of the evidence and demonstrating that it qualifies as "newly discovered evidence," the [petitioner] must also demonstrate with particularity (3) why the newly discovered evidence could not have been discovered in a more timely manner with the exercise of reasonable diligence; and (4) how the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment.

*Harris*, 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result) (footnotes omitted). These prerequisites make clear that the focus of a proper petition for writ of error coram nobis is on the *facts* that should have been made available to the fact-finder *at the time of the trial. See State ex rel. Carlson v. State*, 219 Tenn. 80, 407 S.W.2d 165, 167 (1966) (stating that the purpose of a coram nobis proceeding "is to bring to the attention of the court some *fact* unknown to the court, which if known would have resulted in a different judgment") (emphasis added).

As this Court explained almost twenty years ago, "the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial *factual* error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced." *Mixon,* 983 S.W.2d at 667 (citing John S. Gillig, *Kentucky Post–Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure* 11.42, 83 Ky. L.J. 265, 320 (1994–95)) (emphasis added). This concern with factual error was incorporated into the coram nobis statute:

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were

> litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

*Id.* at 668 (quoting Tenn.Code Ann. § 40–26–105 (1997 Repl.)).

Significantly, the relief being sought via a writ of error coram nobis "is the setting aside of the judgment of conviction and the granting of a new trial." *Harris,* 301 S.W.3d at 150 n. 8 (Koch, J., concurring in part and concurring in result) (citing Tenn.Code Ann. § 40–26–105(c)). As this Court previously has recognized, the writ of error coram nobis may provide a remedy "for those rare instances in which a petitioner may otherwise be wrongfully convicted of a crime." *Wlodarz v. State,* 361 S.W.3d 490, 504 (Tenn.2012). Thus, the goal of the relief afforded under a writ of error coram nobis is a reliable determination of the petitioner's criminal liability for the offense with which he was charged based on all of the evidence that should have been made available to the fact-finder at the initial trial. The goal is *not* a redetermination of the petitioner's criminal liability in the face of changes in the law occurring many years after his trial.

In the realm of coram nobis jurisprudence, "newly discovered evidence" refers to evidence that existed at the time of trial but of which the defendant, through no fault of his own, was unaware. *See* Tenn.Code Ann. § 40–26–105(b); *Harris,* 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result). As the Court of Criminal Appeals has recognized, however, "a narrow exception exists where 'although not newly discovered evidence, in the usual sense of the term, the *availability* of the evidence is newly discovered.' " *Sims v. State,* No. W2014–00166–CCA–R3–PD, 2014 WL 7334202, at *9 (Tenn.Crim.App. Dec. 23, 2014) (quoting *Harris,* 301 S.W.3d at 160–61 (Koch, J., concurring in part and concurring in result) (internal quotation marks omitted)). This narrow exception may be triggered when previously unavailable evidence becomes available following a change in *factual* circumstances. *Id.* Thus, where testimony that was not available at the time of trial later becomes available, the testimony may qualify as "newly discovered" even if the defendant knew about the witnesses at the time of trial. *See, e.g., Taylor v. State,* 180 Tenn. 62, 171 S.W.2d 403, 404–05 (1943) (applying exception in motion for new trial where one witness was hospitalized and one witness was outside the jurisdiction at the time of trial but who later became available to testify); *Brunelle v. State,* No. E2010–00662–CCA–R3–PC, 2011 WL 2436545, at *10 (Tenn.Crim.App. June 16, 2011) (noting that petitioner could have sought coram nobis relief after a Department of Children's Services report, known to the petitioner but sealed at the time of trial, became available), *perm. appeal denied* (Tenn. Oct. 18, 2011). We agree with our Court of Criminal Appeals, however, that this narrow exception is not triggered by post-trial changes in the law. *Sims,* 2014 WL 7334202, at *10. Rather, "[i]ssues regarding whether a change in the law should apply post-trial relate to retroactivity and are more properly addressed in post-conviction proceedings or a motion to reopen post-conviction proceedings." *Id.*

...

> The Petitioner also argues that, even if he is not entitled to relief under the coram nobis *statute,* he is entitled to a hearing under a common law claim of error coram nobis. In this regard, the Petitioner relies on this Court's decision in *Wlodarz,* claiming that we stated there that coram nobis "survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Wlodarz,* 361 S.W.3d at 499.
>
> The Petitioner takes our language in *Wlodarz* out of context. The full quote is as follows:
>
> > In *Mixon,* this Court described the writ of error coram nobis, *as codified in Tennessee Code Annotated section 40–26–105(b),* as an extraordinary procedural remedy which rarely produces results favorable to a petitioner. *See Mixon,* 983 S.W.2d at 673. Nevertheless, *its statutory terms* provide an alternative procedural remedy when all other post-judgment remedies fail. " '[K]nown more for its denial than its approval,' " [*State v.* ] *Vasques,* 221 S.W.3d [514] at 524 [ (Tenn.2007) ] (quoting *Mixon,* 983 S.W.2d at 666), the procedure survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available. *Mixon,* 983 S.W.2d at 672; *see also United States v. Morgan,* 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248 (1954).
>
> *Wlodarz*, 361 S.W.3d at 499 (emphases added). Clearly, we were speaking about the *statutory* writ of error coram nobis, not an undefined common law procedure that guarantees the Petitioner a hearing under any circumstances. We hold that *Wlodarz* does not provide the Petitioner with a common law remedy in coram nobis.
>
> ...
>
> The Petitioner is not entitled to relief on the basis of his proceeding in error coram nobis.

*Id.* at 483-87.

Here, Petitioner asserts his conviction and death sentences should be vacated because he was visibly shackled and handcuffed during his capital trial and sentencing. Specifically he claims:

> Nicholas 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. There was no showing that shackling and handcuffing were justified by an essential state interest, alternatives were not explored, and steps were not taken to minimize the prejudicial effect of the restraints. Petitioner's conviction and death sentence must be vacated because the appearance of Mr. Sutton in chains was inherently prejudicial, undermined his constitutional rights, eroded the presumption of innocence, and tipped the scales in favor of conviction and the imposition of a death sentence.

Petition for Writ of Error Coram Nobis at page 3. Petitioner submitted four October 2016 affidavits of trial jurors as attachments to his petition here, as well as an affidavit from one of his post-trial attorneys, Michael Passino.

On direct appeal from the trial court's denial of post-conviction relief, the Tennessee Court of Criminal Appeals addressed issues related to courtroom security and held as follows:

> Next, the petitioner contends that the post-conviction court erred in concluding that the issue of excessive security in the courtroom was previously determined, waived, or without merit. In his post-conviction petition, the petitioner claimed that the state used the extraordinary courtroom security as a prop, that he was denied a fair trial as a result of the excessive courtroom security, that the trial court failed to regulate the excessive courtroom security, and that defense counsel was ineffective in failing to limit the excessive security, object to its use as a prop, or properly present the issue in the motion for new trial and on direct appeal.
>
> Regarding this issue, Charles E. Jones, now warden at MCRCF, testified that he was in charge of courtroom security during the petitioner's trial. According to Jones, the goal was to provide security during the trial and to ensure that inmates were transported in a timely manner, however, there was no written plan or order. Uniformed officers armed with shotguns were stationed at each corner of the courthouse. Two officers with a hand held metal detector were stationed outside the door to the courtroom. Inside the courtroom, officers were stationed at each door. Three more officers were stationed in the front row directly behind the defendants. One officer was positioned to backup the three officers by the defendants, one was next to the jury, and two were in the balcony. Some of the officers were in uniform, and all the officers were armed with the exception of the three officers directly behind the defendants. One street by the courthouse was blocked off, and the officers used it for parking and unloading inmates.
>
> Judge Eugene Eblen, who presided over the trial, testified that the officers in the courtroom were not overly conspicuous. Considering that there were three inmates on trial and that many of the witnesses were also inmates, Judge Eblen believed that the security was appropriate.

Contrary to this testimony, Fox, counsel for co-defendant Street, testified that the courthouse was an "armed fortress." Charles Burchett, who attended the trial and testified on behalf of the petitioner at the sentencing hearing, testified that he was amazed at the number of armed officers.

On the general issue of courtroom security, the post-conviction court made these findings:

> Even if the issue had not been previously determined or waived, the proof at the evidentiary hearing simply did not establish this as a ground for relief. Obviously courtroom security is necessary when three prison inmates are on trial. All of the key witnesses were inmates as well. The environment at the trial, due to all this, was certainly not ideal. Nonetheless, the trial court took measures to reduce any prejudicial effect. The defendants wore certain clothes, their hands were free, and measures were taken to hide from the jury the shackles on their feet. Moreover, Morgan County, with two state prison facilities in 1986, is more likely than other counties to be desensitized to a possibly coercive atmosphere.

Before introducing the homemade knives into evidence, General Harvey placed them on the defense table so that defense counsel would have an opportunity to examine the knives. This was done even though defense counsel had been instructed to only use felt tip pens, not pencils, so that the defendants could not use the pencils as weapons in taking hostages. Appman testified that he reacted by jerking away from the table because he was afraid of becoming a hostage. According to Appman, it was a tense moment in the courtroom. Being startled, Appman did not make a motion for a mistrial or raise the issue at that time.

Judge Eblen testified that it is common practice for lawyers to approach opposing counsel and present an exhibit before it is introduced into evidence. When the prosecutor placed the homemade knives on the defense table, Judge Eblen saw Appman jump, and he heard an officer pull a gun, although he did not see any guns drawn. According to Judge Eblen, the courtroom quickly quieted down, and the jury seemed to get a "smile" out of the incident. Judge Eblen believed that he told the prosecutor not to do it again.

The post-conviction court accredited the testimony of Judge Eblen on this issue:
Moreover, Judge Eblen testified that this was really "not a big event in Morgan County" and that the "officers were not overly conspicuous." While Judge Eblen expressed some concern about the incident wherein an assistant district attorney general placed several knives at the table occupied by the defendants and their counsel, John Appman reacted with some surprise. The record demonstrates, however, that there were curative instructions. It was Judge Eblen's opinion that

the incident did not affect the results of the trial. This court accredits that account.

Regarding the placing of knives on defense table, the post-conviction court properly held that the issue has been previously determined. T.C.A. § 40-30-112(a) (1990). In fact, Jones was called to testify about the courtroom security at the hearing on the motions for new trial. Jones, who was in charge of courtroom security, testified that there were ten to fourteen guards in the courtroom, some of whom were in civilian clothes. While some of the guards had pistols, no one in the courtroom had a shotgun. When the knives were placed on the table, the officers in the courtroom reached for their guns, however, no pistols were drawn. On direct appeal, the Supreme Court ruled:

> The defendant also alleges prosecutorial misconduct by the Assistant District Attorney General. A knife, identified by State's witness James Worthington as a weapon found in Estep's cell after the murder, was placed on the defense table for inspection by counsel before passing it to the jury. Seeing the knife within reach of the defendants, a number of the correctional officers in the courtroom responded by reaching for their weapons. Defendant insists that the reactions by the guards prejudiced him and deprived him of the "physical indicia of innocence." After the incident, the court instructed the State to have defense counsel examine the weapons at the State's table. The jury knew that the defendants were inmates and it probably came as no surprise to the jurors that they would be closely watched and guarded. The record reflects that only one such incident occurred. We do not find that this incident could have so prejudiced the defendant as to deny him a fair trial. We find no reversible error.

*State v. Sutton,* 761 S.W.2d 763, 769.

Furthermore, as held by the post-conviction court, all other claims regarding excessive security in the courtroom were waived by the petitioner's failure to raise them previously. T.C.A. § 40-30-112(b)(1) (1990). Finally, the petitioner has failed to meet his burden to show ineffective assistance of counsel regarding this issue. As stated earlier, on appeal from the denial of post-conviction relief, the findings of fact and conclusions of law made by the trial court are given the weight of a jury verdict, and this Court is bound by those findings unless the evidence contained in the record preponderates otherwise. *Butler v. State,* 789 S.W.2d 898, 899. Questions concerning the credibility of witnesses and weight and value to be given their testimony are for resolution by the trial court. *Black v. State,* 794 S.W.2d 752, 755.

In the present case, the post-conviction court accredited the testimony of Judge Eblen regarding whether the security was excessive or prejudicial at the

> petitioner's trial. Having reviewed the record, we do not find that the evidence preponderates against this finding, and thus, the petitioner has failed to establish prejudice. *Strickland v. Washington,* 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674. This issue is without merit.

Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000). See also Sutton v. Bell, 645 F.3d 752, 756-57 (6th Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012). This Court previously ruled this issue was previously available to post-conviction counsel and was properly deemed to have been previously determined and/or waived and was not appropriate to address through a motion to reopen proceeding.

Here, the record reflects that the trial in this matter started on February 24, 1986, and the jury returned its verdict on March 4, 1986. Petitioner's conviction and death sentence became final on June 28, 1990, when the United States Supreme Court denied his writ of certiorari. Petitioner filed his petition for writ of error coram nobis on February 2, 2017, which was approximately 27 years after his conviction and death sentence became final. Therefore, on its face, the petition was not timely filed within the one-year statute of limitations set forth in Tenn. Code Ann. § 27-7-103. Although the petition was not timely filed and is subject to being summarily dismissed without an evidentiary hearing, this Court will determine if there were specific facts in the petition showing why Petitioner would be entitled to equitable tolling of the statute of limitations.

Petitioner asserts his conviction and death sentence should be vacated because of newly discovered evidence that he was shackled and handcuffed during his capital trial and sentencing. To support this claim, Petitioner relies on affidavits from four trial jurors, dated in October of 2016, as well as an affidavit from one of his post-trial attorneys, Michael Passino. Four of the

jurors indicated that they saw Petitioner in either shackles or heavy chains, and one of the four said he saw Petitioner in handcuffs. There is no mention in the record that Petitioner or any of his co-defendants were wearing handcuffs. Although the jurors stated in their affidavits that the defendants were in shackles, they appeared to be more interested in the intensified courtroom security and the incident involving the placing of homemade knives on the defense table.

As noted above, the issue regarding security in the courtroom has been previously litigated and the courts have found the security was neither excessive nor prejudicial. At the time of the trial, Petitioner was serving a life sentence after being convicted for the first-degree murder of his grandmother. Petitioner and his two co-defendants, who were also incarcerated, were on trial for the first degree murder of a fellow inmate. Several witnesses who testified at the trial were also incarcerated. Therefore, the jury knew that Petitioner and his co-defendants were inmates and they were on trial for a violent first degree murder which took place in a prison. It should have come to no surprise to the jurors that given these circumstances, there would be heightened security in the courtroom, which may include the wearing of shackles.

The issue of Petitioner wearing shackles during the trial and sentencing is not newly discovered evidence. Both Petitioner and his trial counsel were aware that he was wearing shackles and possibly handcuffs during the trial and sentencing. Judge Eblen had approved the wearing of the shackles and other courtroom security measures prior to the start of the trial. The post-conviction court found that efforts were made to conceal the shackles from the jury. Although efforts were made to hide the shackles, they apparently were not successful with at least four of the jurors.

Petitioner's current counsel did not obtain the affidavits from the jurors until October of 2016, almost 30 years after the trial. The petition did not provide a plausible explanation to this

court as to why it took so long to obtain these affidavits and why they could not have been obtained within the one-year statute of limitations had Petitioner's prior trial and post-trial counsel exercised reasonable due diligence.

This Court will also note the Petitioner filed his first petition for post-conviction relief on December 14, 1990, and filed an amended petition for post-conviction relief on January 2, 1992. The hearing on post-conviction relief was not conducted until October 9-14, 1996, and the petition was denied by an order dated October 23, 1996. One of the issues addressed in the post-conviction proceeding was whether the security in the courtroom was excessive and prejudicial. There was a time period of six years from the filing of the first post-conviction petition in 1990, until the hearing in 1996. This court finds that there was ample time for post-conviction counsel to contact the trial jurors regarding whether or not they had observed Petitioner in either shackles or handcuffs during the trial and sentencing. If they had done so, this issue could have been incorporated in their post-conviction petition along with their concerns over the heightened courtroom security. Further, since Petitioner is claiming that his constitutional rights were violated by being forced to wear shackles during the trial and sentencing phase, this issue should have been addressed in a petition for post-conviction relief, and not through his petition for writ of error coram nobis.

## IV. CONCLUSION

On its face, the petition for writ of error coram nobis was not filed within the one-year statute of limitations and is therefore, untimely. Further, the petition does not contain sufficient specific facts to support a basis for holding that Petitioner is entitled to equitable tolling of the statute of limitations. In addition, the issue of Petitioner wearing shackles and possibly handcuffs

during his trial and sentencing is not newly discovered evidence. Therefore, Petitioner Sutton's petition for writ of error coram nobis is summarily DISMISSED.

IT IS SO ORDERED this the 15th day of May, 2019.

Jeffery H. Wicks
Criminal Court Judge

CERTIFICATE OF SERVICE

I, Marla Hines, Clerk, hereby certify that I have mailed a true and exact copy of same to Deborah Drew and Andrew Harris of the Office of the Post-Conviction Defender, 404 James Robertson Parkway Suite 1100, Nashville, TN 37219, and counsel of record for the State, Assistant District Attorney Pro Tem Kevin J. Allen, P.O. Box 1468, 400 Main Street, Suite 168, Knoxville, TN 37901-1468.

This the 21st day of May, 2019.

Marla Hines B.C.
Clerk