No. 20-8239

IN THE SUPREME COURT OF THE UNITED STATES

Jeffrey S. Whitaker – Petitioner

VS.

Shawn Phillips, Warden
and State of Tennessee, – Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When the opposing party breaches the terms of the plea agreement under the law of contracts, does the one-year statute of limitations begin to run when one party demonstrates a clear intention not to be bound by the contract or demonstrates a clear . . . repudiation of the (plea agreement) contract, must the State court, district court, and the Sixth Circuit Court of Appeals nevertheless ignore the existence of supporting evidence and well establish law that allowed the Petitioner to be bound by a harsher sentence than before that he did not agree upon denying him due process of law under the Fourteenth Amendment.

a. Review is warranted because the State court's, district court's, and the Sixth Circuit Court of Appeal's decision conflicts with the opinions of this Court and significantly undermines this Court's well established controlling law concerning contract law in relation to when the one-year statute of limitations begin to run when one party breaches a contract (plea agreement) violates substantive due process under the Fourteenth Amendment.

II. When Whitaker obtained newly discovered evidence, does the one-year statute of limitations begin to run from the date the evidence was discovered to raise his claims for relief, must the district court, and the Sixth Circuit Court of Appeals nevertheless ignore this Court's well established controlling law denying him substantive due process of law under the Fourteenth Amendment.

a. Review is warranted because the district court's, and the Sixth Circuit Court of Appeal's decision conflicts with the opinions of this Court and significantly undermines this Court's well established controlling law concerning the one-year statute of limitations to raise his claims for relief in relation to newly discovered evidence denying him substantive due process of law under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Jeffrey S. Whitaker an inmate confined in a State prison in the State of Tennessee.

The respondents in this case the Shawn Phillips[9], Warden and the State of Tennessee.

[9] The Warden is now Mike Parris.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Whitaker respectfully prays that the writ of certiorari issue to review the judgments below.

OPINIONS BELOW

For cases from the **Federal Courts:**

The opinion of the United States Court of Appeals for the Sixth Circuit at Cincinnati appears at ***Appendix A*** to the petition and is unpublished unreported cited as: *Whitaker v. Parris*, Case No. 20-5872 December 16, 2020.

The opinion of the United States District Court for the Eastern District of Tennessee at Knoxville appears at ***Appendix B*** to the petition and is unpublished cited as: *Whitaker v. Phillips*, 2020 WL 3578355 (E.D. Tenn. July 1, 2020).

For cases from the **State Courts:**

The opinion of the Tennessee Court of Criminal Appeals to review the merits appears at ***Appendix C*** to the petition and is unpublished cited as *Whitaker v. State*, 2016 WL 97608 (Tenn.Crim.App. January 7, 2016), application for permission to appeal Denied by the Tennessee Supreme Court June 23, 2016.

JURISDICTION

For cases from the **Federal Courts:**

The date on which the United States Court of Appeals for the Sixth Circuit decided my case on December 16, 2020.

A timely petition for rehearing and rehearing en banc was denied by the United States Court of Appeals for the Sixth Circuit on February 19, 2021 and on March 8, 2021, and copies of the Order denying rehearing and rehearing en banc appears at ***Appendix D*** and ***Appendix E***.

The jurisdiction of this Court is invoked under *28 U.S.C. § 1254(1).*

For cases from the **State Courts:**

The date on which the Tennessee Court of Criminal Appeals decided my case was on January 7, 2016, application for permission to appeal Denied by the Tennessee Supreme Court June 23, 2016. A copy of that decision appears at ***Appendix C***. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under *28 U.S.C. § 1257(a).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE AND FACTS

On November 10, 1994, Whitaker entered into an agreement with the State in which he would plead guilty to eight (8) counts of rape of a child, (Counts 1, 2, 3, 11, 16, 7, 18, and 23), in exchange for the following conditions:

1. That the State will recommend a 45-year sentence (a cap);
2. That the court will decide the sentence a later hearing;
3. *That Whitaker be sentenced as a (Range I, Standard) Offender;*[10]
4. Counts 4-10; 12-15; 19-22; and 24-26 of the indictment are dismissed.

(See Exhibit "1"). According to the terms of the plea agreement, ADA Frank Harvey offered and Whitaker agreed to a sentence with corresponding release eligibility after serving 30% of his sentence. On May 6, 2004, Whitaker filed for State habeas corpus relief on the grounds that he agreed to an illegal 30% sentence in direct contravention of *T.C.A. § 39-13-523.* The TCCA ultimately remanded the case back to the trial court to correct the judgments to reflect 100%. *Whitaker v. Morgan,* 2009 WL 454256 (Tenn.Crim.App. 2009)

After new judgments were entered, on July 27, 2009, Whitaker filed a second petition for post conviction relief first alleging that the State breached its promise that he would receive a sentence with 30% release eligibility pursuant to the written plea agreement and then denied that promise when new judgments were entered substantially changing Whitaker's sentences to reflect 100% day-for-day service of the sentences as a result of challenging an illegal sentence in a prior State habeas corpus petition. See *Whitaker,* 2009 WL 454256 (affirmed the habeas court's denial of relief and remanded back to the convicting court to enter new judgments to reflect 100% but did not address or determine whether the 30% sentence was in fact an bargained for element of the plea agreement). More importantly however, when the judgments were "corrected" that added

[10] Under Tennessee law, Range I. Standard offender classification at the time of the offenses is defined as: "release eligibility for each defendant sentenced as a 'Range I, Standard offender' shall occur after service of thirty percent (30%) of the actual sentence imposed . . ." T.C.A. § 40-35-501(c)(1993).

an additional sentence of Community supervision for life (*T.C.A. § 39-13-524*), it actually increased the length of Whitaker's sentence that was not agreed upon in the written plea agreement. **(See Exhibit "2")**.

Also raised as grounds for relief was that his plea agreement was breached when he was sentenced to three consecutive 15-year sentences where the record shows that the State agreed *"as part of the plea agreement, the court is to determine the total sentence in the appropriate range and whether it is to be concurrent or consecutive to the Anderson County sentence"* not to determine whether to impose concurrent or consecutive sentences within the eight counts agreed upon with the State. **(See Exhibit "3")**.

On April 6, 2011, Whitaker filed for post conviction relief alleging that his plea agreement with the State was breached. On December 16, 2011, the court appointed counsel to represent Whitaker in his post conviction petition. On April 9, 2012, Whitaker amended his petition to include additional grounds for relief where the imposition of the sentence pursuant to an agreed upon "sentencing cap" is in direct contravention of Art. I § 25 of the Tennessee Constitution.

On May 30, 2014, counsel filed for certification in representing Whitaker in this case. On March 3, 2014, Whitaker motioned the trial court to set the case for a hearing on the pleading and stated the specific reasons thereof. On June 10, 2014, the State filed its response requesting that the petition be dismissed with the exception of the lifetime supervision. On June 24, 2014, Whitaker filed a Reply In Opposition to the State's Response to Petition for Post Conviction and a Motion to Enforce Plea Agreement.

In the underlying post conviction proceedings, the trial court was required to determine whether, **(1)** the statute of limitations should be tolled based on later arising claims and discovery rule; **(2)** there should be a remedy irrespective of any statute of limitations; **(3)** the sentence with 30% release eligibility was a material element plea

agreement; **(4)** the State breached the agreement; and **(5)** the imposition of consecutive sentences breached the plea agreement.

After a lengthy delay of over three years, on June 30, 2014, a hearing was held where counsel on both sides argued their positions in the case. At the conclusion of oral argument, the trial court denied the petition and on November 7, 2014 entered an order denying impart and granted impart *nunc pro tunc* June 30, 2014. On July 14, 2014, Whitaker filed notice of appeal to the Tennessee Court of Criminal Appeals (TCCA hereafter) from the denial of his post conviction petition.

On January 7, 2016, the TCCA entered its opinion affirming the post conviction court's denial of Whitaker's petition on the basis that Whitaker did not file his post-conviction petition within the statute of limitations by labeling the entry of new judgments as merely correcting a "clerical error" on the judgments that does not re-trigger the statutory period for filing a petition for post conviction. The TCCA does not address clear well established contract law and "discovery rule", which dictates that the statute of limitations for a breach of (plea agreement) contract commences to run as of the date of the actual breach or when one party announces its intention not to perform. *See Burns v. California*, 2009 WL 2381423 at *3 (C.D.Cal. 2009) (limitations period began running on the date of the breach); *Crenshaw v. Tilton*, 2008 WL 878887 *6 (S.D.Cal. 2008) (limitations period begins running on date prisoner knew or should have known there had been a breach); *Singleton v. Curry*, 2007 WL 1068227 *2 (N.D. Cal. 2007) (limitations period for breach of plea bargain claim is determined under section 2244(d) (1) (D)); *Daniels v. Kane*, 2006 WL 1305209 *1 (N.D.Cal. 2006) (statute of limitations begins to run on "the date a petitioner knew or should have known that a breach occurred"); *Murphy v. Espinoza*, 401 F.Supp.2d 1048, 1052 (C.D.Cal. 2005) (statute of limitations begins to run on the date petitioner became aware, or should have become aware, that the plea agreement had been

breached). Further *see Bradford O. Bryant v. Ben Curry, Warden*, 2010 WL 3168385 * 4 (N.D. Cal. August 10, 2010) (Petitioner sentenced on April 24, 1980. In short, no later than February 21, 1990, Petitioner knew or should have known that the purported plea agreement that he would be paroled after ten years had been breached. The one-year limitation period thus ran out no later than February 21, 1991. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (adopting "anniversary method" for calculating *§ 2254* limitations period; absent tolling, expiration date of limitation period expires on same date as triggering event but in following year)). See also, because plea agreements are contracts, the statute of limitations for a breach of a contract commences to run as of the date of the breach. *World Healthcare Systems, Inc. v. SSI Surgical Services, Inc.*, 2011 WL 2199979 at *7 (E.D. Tenn.2011) (So finding and citing Tennessee contract law); *Ricketts v. Adamson*, 107 S.Ct. 2680, 2689 (1987); *U.S. v. Robinson*, 924 F.2d 612, 613 (6th Cir. 1991); *U.S. v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011); *U.S. v. Moncivais*, 492 F.3d 652, 662 (6th Cir. 2007); *State v. Howington*, 907 S.W.2d 403, 406 (Tenn.1995); *State v. Mellon*, 118 S.W.3d 340, 346 (Tenn. 2003); *Whitaker v. State*, 2016 WL 97608 (Tenn.Crim.App. January 7, 2016).

In the TCCA's decision regarding tolling of the statute of limitations as like the federal counterpart further held, among other things that the correcting of the judgments were merely to correct a clerical that did not require the tolling of the statute of limitations. *Whitaker v. State*, 2016 WL 97608 at *8-9 (Tenn.Crim.App. January 7, 2016).[11] After the TCCA's erroneous determination that the judgments notation of 30% release eligibility was merely a clerical error and calculation that Whitaker filed his post conviction petition more that eleven year past statute of limitations expired, erroneously concluded that:

[11] Note that the Whitaker's name is not mentioned as acknowledging the sentence is to be at 100% and although true that *T.C.A. § 39-13-523* mandates the sentence is supposed to be served at 100%, this was not agreed upon in the written plea agreement.

> Even if we conclude that entry of the corrected judgments tolled the statute of limitations on due process grounds, the petitioner filed his second post-conviction petition nearly a year after the statute of limitations expired. Although the Petitioner asks this court to toll the statute of limitations until January 2011, the time he claims he first became aware of the corrected judgments, it is clear that the petitioner was aware of the correction of his judgments long before then. First, this court filed its opinion in the habeas corpus case on February 24, 2009, at a time when the Petitioner was still represented by counsel. Second, and most importantly, the Petitioner filed his pro se petition for rehearing approximately two weeks later on March 9, 2009, which this court promptly denied. This filing of this court's opinion in the habeas corpus case and the filing of this pro se petition for rehearing belies the petitioner's claim that he did not know the outcome of his habeas corpus case or the fact that his case was remanded for corrected judgments until January 2011.[12] Even if we adopt the Petitioner's erroneous interpretation regarding when the statute of limitations began to run, which we decline to do, the Petitioner did not diligently pursue his rights under the first prong of the test outlined in *Whitehead*. Given the "General Assembly's clear preference that the post-conviction statute be strictly construed," we conclude that this case does not require tolling of the Statute of limitations under the later-arising claims doctrine or the discovery rule. *Bush*, 428 S.W.3d at 23.

Whitaker, 2016 WL 97608 at *9. Whitaker filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on June 23, 2016. **(Appendix "C").**

On April 17, 2017, Whitaker filed for federal writ of habeas corpus relief in the United States District Court for the Eastern of Tennessee on the grounds that the State of Tennessee breached the terms of the plea agreement with Mr. Whitaker when his judgments were amended to reflect and impose a new more punitive sentence. Specifically, Whitaker allege(s) that (1) the State breached its promise of a sentence with 30% release eligibility; (2) the imposition of consecutive sentences within the eight Counts in Roane County violated the terms of the plea agreement; and (3) judicial estoppel precludes the State from changing it position from a prior proceeding. On May 12, 2017, Whitaker amended his habeas petition adding an addition ground for relief where he is now required to serve an additional sentence of community supervision for life that was not part of the

[12] The TCCA is erroneously suggesting that Whitaker somehow knew of or should have known when the trial court was going to enter corrected judgments and somehow knew of or should have known when the State was going to breach or renege the terms of the plea agreement. In other words, the TCCA suggest that Whitaker should guess when the trial court will enter corrected judgments in order to file his claim for relief. Furthermore, nowhere in Whitaker's pleading does he argue or state that he did not know the outcome of his habeas corpus case or the fact that his case was remanded for corrected judgments until January 2011 to support his tolling of the statute of limitations.

terms of the plea agreement nor was there such a law at the time of the commission of the offenses in violation of the *ex post facto* clause, and that it impose a new more punitive sentence than before.

On October 10, 2017, the district court issued an Order directing the State to file the record and answer or respond to the petition. On October 12, 2017, the State filed a motion to transfer to this case to this Court because the habeas petition was a second or successive petition. On October 20, 2017, Whitaker filed a reply arguing that the district court should not transfer the case because his habeas petition was not a second or successive, however, the district court issued an order on June 6, 2018 transferring the habeas petition to this Court for consideration. On September 27, 2018, Whitaker filed his motion for leave to file second or successive habeas petition arguing among other things that the district court error in abused its discretion in determining that his current habeas petition was a second or successive habeas petition. On February 25, 2019, the Sixth Circuit Court of Appeals held that Whitaker's 2017 habeas corpus filed in 2017 did not constitute a second or successive because his amended judgments in 2009 altered his sentence in effect receive a new worse-than-before sentence and remanded this case back to the district court for consideration of Whitaker's habeas corpus petition. **(See Appendix "F").**

On April 4, 2019, the district court issued an Order directing State to answer of other response to the petition and that the respondent should specifically address whether the petition was timely filed and whether Petitioner exhausted available State court remedies. **(R, Doc. 16).** On May 2, 2019, the respondent filed it response to Whitaker's habeas corpus petition as the district court ordered. The respondent raised two responses to the habeas petition, (1) that the petition should be dismiss as untimely because the Petitioner failed to file his petition within the one year statute of limitations and failed to show justification for equitable tolling to excuse the delay; and (2) that the State court's rejection of Petitioner's due process claims were neither contrary to, or an unreasonable

application of, clearly established Supreme Court precedent, or involve an unreasonable determination of the facts. After several extensions of time, on July 18, 2019, Whitaker filed a reply in opposition of the respondent's answer to the habeas petition rebutting the two responses raised in its responsive pleadings.

On March 9, 2020, Whitaker filed for leave to file a second amended petition for habeas corpus relief adding two additional grounds for relief based on newly discovered evidence, the State withheld exculpatory statements of the alleged victims (Brady violation) and actual innocence and newly discovered evidence of actual innocence that renders his guilty pleas involuntary, unknowingly and unintelligently entered, where the exculpatory statements withheld by the state shows that Whitaker is actually innocent of the convicted offenses of rape of a child;[5] aggravated rape and, incest.[6] On February 28, 2020, the respondent filed a response in opposition to Petitioner's motion for leave to amend his petition for habeas corpus relief. The respondent argued that the court should deny the motion to amend simply because the amendments do not relate back to the claims in the original petition and that the interests of justice do not require allowing Petitioner to amend his petition. The respondent ignores the fact that the amended additional grounds for relief does in fact relate back to the judgments he is attacking and the interest of justice does require allowing such amendment seeing the magnitude of the misconduct of the prosecutor withholding exculpatory evidence of the victims' statements that show Whitaker is actually innocent of the crime in which he is convicted would require in the interest of justice allowing such amendment. See *King v. Morgan*, 807 F.3d 154, 158 (6th Cir. 2015)(where this Court held that some claims within a habeas application will apply to the underlying conviction *and* the new sentence). This would mean that Whitaker's three

[5] Offenses that allegedly occurred in Roane County Case No. 10920.

additional claims based on new evidence can be amended to his current habeas corpus petition.

On July 1, 2020, the district court denied and dismissed the habeas corpus petition based on the statute of limitations as being untimely and did not reach the merits of Whitaker's grounds for relief including the grounds raised in his second amended petition. In its analysis of the AEDPA one-year statute of limitations the district court findings were merely that of the TCCA's. See *Whitaker v. Phillips*, 2020 WL 3578355 at *4 (E.D. Tenn. July 1, 2020). In the district court's analysis of the TCCA decision not tolling the post conviction statute of limitations, the district court held without any further explanation that state-court-post-conviction petition was not timely and thus not "properly filed" under Tennessee law. Furthermore, that petition was filed after the ADEPA statute of limitations had already expired. See *Vroman v. Brigano*, 346 F.3d 598, 602-03 (6th Cir. 2003). *Id.* at *4.

The district court's review of the TCCA's decision at this point failed to properly address the facts in which the TCCA denied to apply due process tolling of the statute of limitations specifically the TCCA's failure to apply well established contract law applicable to breach of plea agreements. Furthermore, the district court's analysis does not review that actual reasons the TCCA declined to toll the post conviction's statute of limitations that was based on the State's argument that the TCCA has consistently held that the correction of a clerical error on a judgment of conviction "does not re-trigger the statutory period for filing a petition for post-conviction relief.

In its analysis whether Whitaker is entitled to equitable tolling of his habeas petition, amended petition and second amended petition is summed up in one paragraph. See *Whitaker v. Phillips*, 2020 WL 3578355 at *4 (E.D. Tenn. July 1, 2020).[7] The district

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[6] Offenses that allegedly occurred in Anderson County Case No. 94CR0112.

[7] See footnote 5.

court concluded that because his habeas petition was filed after the expiration of the limitations period, and because the limitations period was not tolled, the petition is untimely. The district court denied and dismissed the habeas petition and held that because the habeas petition is untimely, Whitaker's second amended petition based on newly discovered evidence that was filed within one year from obtaining this evidence was likewise denied as futile.

At the same time, Whitaker moved the Sixth Circuit Court of Appeals again for an Order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. *In Re: Jeffrey S. Whitaker*, Case No. 20-5410 (6th Cir. July 24, 2020). The Sixth Circuit Court of Appeals ultimately held that his *§ 2244* motion is unnecessary because Whitaker has never filed a habeas petition challenging his Anderson County convictions and because of Sixth Circuit Court of Appeals previous order, on February 25, 2019, Whitaker does not need authorization to challenge his Roane and Anderson County convictions either to raise his second amended claims of a Brady violations; actual innocence; and the new evidence of actual innocence renders his pleas involuntary and unknowing. *Id.* at page 3.

On September 30, 2020, Whitaker filed for petition for issuance of certificate of appealability to the Sixth Circuit Court of Appeals from the denial the district court's denial of his petition for writ of habeas corpus. On December 16, 2020, the Sixth Circuit Court of Appeals denied Whitaker's issuance of COA. As like the district court, the Sixth Circuit, in its decision denying COA, essentially adopted the district court's reasoning or rationale for denying relief in reaching its conclusion that: (1) reasonable jurists could not debate the district court's conclusion that Whitaker's habeas petition filed on April 21, 2017, was untimely; and (2) reasonable jurists could not debate the district court's conclusion that Whitaker was not entitled to equitable tolling pursuant to *Holland v. Florida*, 560 U.S. 631, 645 (2010) and *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Although the Court of

Appeals acknowledges Whitaker asserting that the State did not announce its intent to no longer honor the plea agreement's thirty percent release eligibility until October 9, 2013, the Sixth Circuit ignored well established contract law and claimed that Whitaker failed to explain the significance of this date, which the record shows to the contrary. **(See Appendix "A")**.

On December 30, 2020, Whitaker filed for petition for rehearing and rehearing en banc alleging that: (1) The Court Panel decision has misapprehended and overlooked important material points of facts and conflicts with controlling U.S. Supreme Court law regarding well established contract law, and due process equitable tolling in its decision; and (2) the Court Panel decision likewise has misapprehended and overlooked Whitaker's additional grounds for relief, Brady Violation; Actual Innocence; and that his Plea was involuntary, unknowingly, and unintelligently entered based on newly discovered evidence was timely filed/not time barred in it decision conflicts with controlling U.S. Supreme Court law. **(See Appendix "D"** and **"E")**. The district and court of appeals did not reach the merits of Whitaker's claims for relief, but was denied solely based on the one-year statute of limitations.

Whitaker now respectfully petitions this Court to **GRANT** review of the lower federal court's and State court decisions that is inconsistent, squarely in conflict with well established law and the Due Process Clause of the Fourteenth Amendment held by this Court, and involves issues of exceptional importance relating to the statute of limitations of breach of (contract) plea agreement and actual innocence based on newly discovered evidence. Furthermore, if the lower court's decisions were permitted to stand, irreparable harm would result to criminal defendants/petitioners allowing the government to breach the terms of a plea agreement contract at any time (even years later) without and recourse under the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

(a). THE LOWER COURTS DECISION THAT THE STATUTE OF LIMITATIONS REGARDING BREACH OF A PLEA AGREEMENT CONTRACT WAS UNTIMELY IS INCONSISTENT AND SQUARELY IN CONFLICT WITH WELL ESTABLISHED PRINCIPLES OF CONTRACT LAW DECISIONS FROM ITS OWN PANEL AND FROM THIS COURT WHICH HELD THAT BECAUSE PLEA AGREEMENTS ARE CONTRACTS, THE STATUTE OF LIMITATIONS FOR A BREACH OF A CONTRACT COMMENCES TO RUN AS OF THE DATE OF THE BREACH AND/OR UNDER THE DOCTRINE OF ANTICIPATORY REPUDIATION.

(b). THE LOWER COURTS DECISION OVERLOOKS THIS COURT DECISIONS AND WELL ESTABLISHED PRINCIPLES OF CONTRACT LAW IN DETERMINING WHEN A CAUSE OF ACTION COMMENCES TO RUN FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

(c). THE DECISIONS FROM THE LOWER COURTS, IF PERMITTED TO STAND, WILL LIKELY RESULT IN IRREPARABLE HARM TO CRIMINAL DEFENDANTS/PETITIONERS BY ALLOWING THE GOVERNMENT TO BREACH THE TERMS OF A PLEA AGREEMENT CONTRACT AT ANY TIME (EVEN YEARS LATER) WITHOUT AND RECOURSE VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. When the opposing party breaches the terms of the plea agreement under the law of contracts, does the one-year statute of limitations begin to run when one party demonstrates a clear intention not to be bound by the contract or demonstrates a clear . . . repudiation of the (plea agreement) contract, must the State court, district court, and the Sixth Circuit Court of Appeals nevertheless ignore the existence of supporting evidence and well establish law that allowed the Petitioner to be bound by a harsher sentence than before that he did not agree upon denying him due process of law under the Fourteenth Amendment.

(a). The Lower Courts Decision That The Statute Of Limitations Regarding Breach Of A Plea Agreement Contract Was Untimely Is Inconsistent And Squarely In Conflict With Well Established Principles Of Contract Law Decisions From Its Own Panel And From This Court Which Held That Because Plea Agreements Are Contracts, The Statute Of Limitations For A Breach Of A Contract Commences To Run As Of The Date Of The Breach And/Or Under The Doctrine Of Anticipatory Repudiation.

(b). The Lower Courts Decision Overlooks This Court Decisions And Well Established Principles Of Contract Law In Determining When A Cause Of Action Commences To Run For Purposes Of The Statute Of Limitations.

When the opposing party breaches the terms of the plea agreement under the law of contracts, does the one-year statute of limitations begin to run when one party demonstrates a clear intention not to be bound by the contract or demonstrates a clear . . . repudiation of the (plea agreement) contract; and must the State court, district court, and the Sixth Circuit Court of Appeals nevertheless ignore the existence of supporting evidence and well establish law that allowed the Petitioner to be bound by a harsher sentence than before that he did not agree upon denying him due process of law under the Fourteenth Amendment to the U.S. Constitution.

Therefore, review is warranted because the State court's, district court's, and the Sixth Circuit Court of Appeal's decision conflicts with the opinions of this Court and significantly undermines this Court's well established controlling law concerning contract law in relation to when the one-year statute of limitations begin to run when one party

breaches a contract (plea agreement) violates substantive due process under the Fourteenth Amendment to the U.S. Constitution.

When the State of Tennessee entered into a negotiated plea agreement with Whitaker, its rights and duties are governed and controlled by contract law to determine not only the interpretation of the agreement, but when the one-year statute of limitations commences to run for a cause of action as a result of a breach of that agreement for purposes of the State post conviction and AEDPA federal habeas corpus.

In *Ricketts v. Adamson*, 483 U.S. 1 (1987), this Court indicates that plea agreements are essentially contracts under well established contract law and is applied to determine when the one-year statute of limitations commences to run for a cause of action for a breach of a plea agreement. *Id.* at 16-21. *See Burns v. California*, 2009 WL 2381423 at *3 (C.D.Cal. 2009) (limitations period began running on the date of the breach); *Crenshaw v. Tilton*, 2008 WL 878887 *6 (S.D.Cal. 2008) (limitations period begins running on date prisoner knew or should have known there had been a breach); *Singleton v. Curry*, 2007 WL 1068227 *2 (N.D. Cal. 2007) (limitations period for breach of plea bargain claim is determined under section 2244(d) (1) (D)); *Daniels v. Kane*, 2006 WL 1305209 *1 (N.D.Cal. 2006) (statute of limitations begins to run on "the date a petitioner knew or should have known that a breach occurred"); *Murphy v. Espinoza*, 401 F.Supp.2d 1048, 1052 (C.D.Cal. 2005) (statute of limitations begins to run on the date petitioner became aware, or should have become aware, that the plea agreement had been breached). Further *see Bradford O. Bryant v. Ben Curry, Warden*, 2010 WL 3168385 * 4 (N.D. Cal. August 10, 2010) (Petitioner sentenced on April 24, 1980. In short, no later than February 21, 1990, Petitioner knew or should have known that the purported plea agreement that he would be paroled after ten years had been breached. The one-year limitation period thus ran out no later than February 21, 1991. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (adopting "anniversary method" for calculating § 2254 limitations period; absent tolling, expiration

date of limitation period expires on same date as triggering event but in following year)). See also, because plea agreements are contracts, the statute of limitations for a breach of a contract commences to run as of the date of the breach. *World Healthcare Systems, Inc. v. SSI Surgical Services, Inc.*, 2011 WL 2199979 at *7 (E.D. Tenn.2011) (So finding and citing Tennessee contract law); *Ricketts v. Adamson*, 107 S.Ct. 2680, 2689 (1987); *U.S. v. Robinson*, 924 F.2d 612, 613 (6th Cir. 1991); *U.S. v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011); *U.S. v. Moncivais*, 492 F.3d 652, 662 (6th Cir. 2007); *State v. Howington*, 907 S.W.2d 403, 406 (Tenn.1995); *State v. Mellon*, 118 S.W.3d 340, 346 (Tenn. 2003).

When the government enters into plea agreement contract relations with a defendant, its rights and duties therein are governed generally by law applicable to contracts between private individuals. Under applicable principles of general contract law, whether Whitaker's breach of his plea agreement claim was filed within one year after it first accrued or when new judgments were filed depends upon when the State breached the written plea agreement, which occurred on October 9, 2013. See *Franconia Associate v. U.S.*, 536 U.S. 129, 141 (2002), citing *Mobil Oil Exploration & Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 607 (2000); *Priebe & Sons, Inc. v. U.S.*, 332 U.S. 407, 411 (1947); see also *1 C. Coeman, Limitations of Actions § 7.2.1,* p. 482 (1991)(The cause of action for a breach of contract accrues, and the statute of limitations begins to run, at the time of the breach); *18 W. Jaeger, Williston on Contracts § 2021A*, p. 697 (3d ed. 1978)(same).

Whitaker first contends that the Tennessee Court of Criminal Appeals (TCCA) failed to recognize relevant contract law vigorously argued and supported by its own case law that clearly held under Tennessee and federal law, the law in which plea agreements originated from, the statute of limitations for a breach of (plea agreement) contract commences to run as of the date of the actual breach or when one party announces its intention not to perform. In other words, a cause of action for a breach accrues on the date of the breach or when one party demonstrates a clear intention not to be bound by the

contract. Therefore, the statute of limitations begins to run when the contracting parties "demonstrates a clear . . . repudiation of the (plea agreement) contract." *Taylor v. Metropolitan Government of Nashville and Davidson County,* 2008 WL 5330502 at *7 (Tenn.Ct.App. 2008) citing *Goot v. Metro Gov't of Nashville and Davidson County,* 2005 WL 3031638 at *11 (Tenn.Ct.App. 2005); *McCroskey v. Bryant Air Conditioning Co.,* 524 S.W.2d 487, 490 (Tenn. 1975); *Teeters v. Currey,* 518 S.W.2 512, 515 (Tenn. 1974); *Foster v. Harris,* 633 S.W.2d 304, 305 (Tenn. 1982).

Instead, the TCCA erroneously held in its decision, *Whitaker v. State,* 2016 WL 97608 at *8-9 (Tenn.Crim.App. January 7, 2016), regarding the correcting of the judgments as a clerical error in relation the tolling of the statute of limitations, Whitaker, 2016 WL 97608 at *9[8], that the judgments notation of 30% release eligibility was merely a clerical error and calculation that Whitaker filed his post conviction petition more that eleven year past statute of limitations expired was a erroneous conclusion. See *Whitaker,* 2016 WL 97608 at *9.[9] **(See also Exhibit "2").** Whitaker filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on June 23, 2016. **(See Appendix "C").**

Whitaker argued that although new judgments were entered on July 27, 2009, under the applicable contract law mentioned above, the statute of limitations did not begin to run until sometime on or after October 9, 2013 (rather than January 18, 2011 as first thought)

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[8] Note that the Whitaker's name is not mentioned as acknowledging the sentence is to be at 100% and although true that *T.C.A. § 39-13-523* mandates the sentence is supposed to be served at 100%, this was not agreement between the parties in the written plea agreement.

[9] The TCCA is erroneously suggested that Whitaker somehow knew of or should have known when the trial court was going to enter corrected judgments and somehow knew of or should have known when the State was going to breach or renege the terms of the plea agreement. In other words, the TCCA suggest that Whitaker should guess when the trial court will enter corrected judgments in order to file his claim for relief. Furthermore, nowhere in Whitaker's pleading does he argue or state that he did not know the outcome of his habeas corpus case or the fact that his case was remanded for corrected judgments until January 2011 to support his tolling of the statute of limitations. However, what Whitaker knew regarding the entry of the new judgments is irrelevant when determining the accrual of the statute of limitations under contract law.

when the agreed upon 30% release eligibility sentence was no longer being honored by the State, thus announcing its intention not to perform and has demonstrated a clear repudiation of the plea agreement contract or a clear intention not to be bound by the contract. At that point, statute of limitations begins running as of the date of the breach regardless of whether or not Whitaker knew that new judgments were entered on July 27, 2009 as suggested by the TCCA and respondent.

Whitaker further argued that under the law of contracts, the Tennessee courts have applied the "discovery rule" to a breach of contract and should also apply to this case for a breach of the plea agreement claim where normally the cause of action or claim for a breach of contract/plea agreement accrues immediately upon the happing of the breach or where the statute of limitations begins as of the date of the breach. However, the Tennessee Court of Appeals held under due process that certain situations exist in which the discovery rule would apply to toll accrual of the cause of action.

The rationale underlying the discovery rule is that the injured parties should not be placed in the anomalous situation of being required to file an action before they know they have been injured. The rule alleviates the intolerable result of barring a cause of action by holding that it accrued before the plaintiff/petitioner discovered the injury of the wrong. Under this well-settled rule law that "the discovery rule is an exception that tolls the running the statute of limitations until the petitioner knows, or in the exercise of reasonable care and diligence, should know that the injury has been sustained," and is deemed to have discovered the right of action when the petitioner "becomes aware of the facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of the defendant's/respondent's wrongful conduct," and is not required that the petitioner actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a "right of action." See *Doe v. Rausch*, 382 F.Supp.3d 783, 790 (E.D. Tenn. 2019); *Koshani v. Barton*, 374 F.Supp.3d 695, 702-703 (E.D.

Tenn. 2019). In this case, Whitaker could not have discovered the right of action until he became aware of the new judgments being entered and mot importantly, when the State announced its intention not to perform and has demonstrated a clear repudiation of the plea agreement contract or a clear intention not to be bound by the written plea agreement contract.

Here, the TCCA failed to follow its own case law, as described above, that clearly states that "plea agreements are essentially contracts or contractual in nature" and sets out when the statute of limitations begins to run. *Taylor,* 2008 WL 5330502 at *7 citing *Goot,* 2005 WL 3031638 at *11; *McCroskey,* 524 S.W.2d at 490 ; *Teeters,* 518 S.W.2 at, 515 ; *Foster,* 633 S.W.2d at, 305. Furthermore, the TCCA has clearly held that "the State's breaching of the plea agreement after the expiration of the statute of limitations requires due process tolling of the statute of limitations." *Martin v. State,* 2014 WL 1396678 at *3 (Tenn.Crim.App. April 9, 2014) citing *Boyd v. State,* 2002 WL 31289175, at *2 (Tenn.Crim.App. October 10, 2002). In this case, the record clearly reveals that Whitaker was denied the required due process tolling of the statute of limitations. In order for the TCCA to conclude that Whitaker's case does not require relief or due process tolling, the TCCA ignored review under the applicable well established contract law and determined that the sentence with 30% release eligibility aspect of the written plea agreement was simply a clerical error without reviewing the written plea agreement itself to determine whether the sentence with 30% release eligibility is a bargained-for element of the written plea agreement for the purpose of getting around due process tolling of the statute of limitations.

Here, the TCCA's decision is clearly inconsistent and in conflict with the principles of contract law, as described above, held by this Court in, *Franconia Associate v. U.S.,* 536 U.S. 129, 141 (2002), citing *Mobil Oil Exploration & Producing Southeast, Inc.,* 530 U.S. at 607; *Priebe & Sons, Inc.,* 332 U.S. 407, 411 (1947); see also *1 C. Coeman, Limitations of Actions §*

7.2.1, p. 482 (1991)(The cause of action for a breach of contract accrues, and the statute of limitations begins to run, at the time of the breach); *18 W. Jaeger, Williston on Contracts § 2021A*, p. 697 (3d ed. 1978)(same); and further overlooks countless other decisions in the TCCA and federal court's around the Circuits including this Court that requires further review.

On July 1, 2020, the district court denied and dismissed the habeas corpus petition on the statute of limitations as being untimely and did not reach the merits of Whitaker's grounds for relief including the grounds raised in his second amended petition. In its analysis of the AEDPA one-year statute of limitations the district failed to follow well established law. See *Whitaker v. Phillips*, 2020 WL 3578355 at *4 (E.D. Tenn. July 1, 2020). The district court's review of the TCCA's decision at this point failed to properly address the facts in which the TCCA denied to apply due process tolling of the statute of limitations specifically the TCCA's failure to apply well established contract law applicable to breach of plea agreements. Furthermore, the district court's analysis does not review that actual reasons the TCCA declined to toll the post conviction's statute of limitations, which was based on the State's argument that the TCCA has consistently held that the correction of a clerical error on a judgment of conviction "does not re-trigger the statutory period for filing a petition for post-conviction relief.

In its analysis whether Whitaker is entitled to equitable tolling of his habeas petition, amended petition and second amended petition is summed up in one paragraph. See *Whitaker v. Phillips*, 2020 WL 3578355 at *4[10] (E.D. Tenn. July 1, 2020). The district court erroneously concluded that because his habeas petition was filed after the expiration of the limitations period simply because "he did not know of the corrected judgments until 2011;" "its opinion remanding for entry of the judgments and Petitioner's subsequent

[10] See footnote 5.

motion for rehear;" "waited six years after he supposedly learned of the corrected judgments—and nearly four years after he claims the State ceased honoring the thirty percent release eligibility—to file his federal petition;" that "the timeliness of the State court's decision with respect to his post conviction petition had no bearing on the Petitioner's ability to file his federal petition;" and because the limitations period was not tolled, the petition is untimely. The district court denied and dismissed the habeas petition and held that because the habeas petition is untimely, Whitaker's second amended petition based on newly discovered evidence that was filed within one year from obtaining this evidence was likewise denied as futile.[11]

Whitaker moved the Sixth Circuit Court of Appeals for a COA and on December 16, 2020, the court issued an Order denying the COA. See *Whitaker v. Parris*, No. 20-5872 at p. 3 (6th Cir. Dec. 16, 2020)**(See Appendix "A")**. In its Order of the district court's review, the Sixth Circuit simply adopts the district court's erroneous conclusion without considering whether the district court's conclusion that the State post conviction petition was untimely was contrary to, or unreasonable application of, clearly established Federal law, as determined by this Court and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *28 U.S.C. § 2254(d)(1)* and *(2)*.

The Sixth Circuit failed to consider the district court's failure to consider the law of contracts essential to determining when a cause of action commences to run for purposes of the statute of limitations as well as the discovery rule, doctrine of "ripeness," and the

[11] At the same time, Whitaker moved the Sixth Circuit Court of Appeals for an Order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. In Re: Jeffrey S. Whitaker, Case No. 20-5410 (6th Cir. July 24, 2020). Sixth Circuit ultimately held that his *§ 2244* motion is unnecessary because Whitaker has never filed a habeas petition challenging his Roane and Anderson County convictions and because of this Court's previous order, on February 25, 2019, Whitaker does not need authorization to challenge his Roane County conviction either to raise his second amended claims of a Brady violations; actual innocence; and the new evidence of actual innocence renders his pleas involuntary and unknowing. Id. at page 3.

doctrine of anticipatory repudiation that is set forth in the *Restatement (Second) of Contracts § 250 ("Restatement") (1980).* See also *Mobil*, 530 U.S., 608 and arguments below. The Sixth Circuit further failed to consider the district court's failure to properly review the State court (TCCA) decision that the State post-conviction was time-barred and otherwise not "properly filed," and the TCCA's failure to consider the law of contracts, discovery rule, doctrine of "ripeness," and the doctrine of anticipatory repudiation in addition to the facts surrounding the delay in filing his State post-conviction in its review that would have otherwise required the TCCA to find that Whitaker's State post-conviction was timely and properly filed. Furthermore, had the district court and Sixth Circuit applied the law of contracts, discovery rule, doctrine of "ripeness," and the doctrine of anticipatory repudiation in addition to the facts surrounding the delay in filing his State post-conviction, to its analysis, it would have determined that Whitaker's State post-conviction was [statutorily tolled] timely and properly filed. Therefore, the Sixth Circuit should have found debatable the district court's finding that Whitaker's State post-conviction petition was [not statutorily tolled] time-barred and otherwise not "properly filed."

Next, the Sixth Circuit held that no reasonable jurists could find debatable the district court's conclusion that Whitaker was not entitled to equitable tolling of his federal habeas corpus petition. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Pace*, 544 U.S. at 418; *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 462 (6th Cir. 2012) quoting *Ata v. Scutt*, 662 F.3d 736, 741(6th Cir. 2011). The Sixth Circuit's conclusion for denying COA stated in pertinent part that:

> Whitaker asserted that he was not served with copies of the corrected judgments when they were entered on July 9, 2009, and did not learn of their entry until he requested copies of his judgments on December 27, 2010. Whitaker was aware of the decision of the Tennessee Court of Criminal Appeals remanding for correction of the judgments given that he filed a

> pro se petition for rehearing of that decision two weeks later, on March 9, 2009.[12] Yet Whitaker did not inquire about the corrected judgments until more than a year and half later.[13] Whitaker also asserted that the State did not announce its intent to no longer honor the plea agreement's thirty percent release eligibility until October 9, 2013. Whitaker failed to explain the significance of this date.[14] In any event, the State consistently maintained throughout Whitaker's case that he was required to serve the entirety of his sentence under Tennessee Code Annotated § 39-13-523.[15] Whitaker failed to demonstrate that he pursued his right diligently or that an extraordinary circumstance stood in the way.

(See *Appendix E*). In this case, the record undisputedly demonstrates that the State and lower federal court's decisions not only fails, but overlooks well established contract law held by this Court in determining when a cause of action commences to run for purposes of the statute of limitations ignoring the relevant principles of contract law summarized by this Court in the decisions cited above that would appear obvious. The State and lower federal court's decisions denied Whitaker due process by denying him a full review and analysis of all the relevant law, specifically contract law, to the timeliness of the statute of limitations. Instead, these court's rested entirely on equitable tolling analysis held in *Holland* and *Pace v. DiGuglielmo,* and ignores application of the aforementioned law of contracts to determine the timeliness to the statute of limitations.

Whitaker contends that the State and lower federal court's decisions are inconsistent and squarely in conflict with this Court's decisions in *Holland* and *Pace v.*

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[12] Whitaker being aware of the TCCA's decision and rehearing it is irrelevant in determining when the trial court actually entered the new judgments in relation to the one-year statute of limitations of the State post conviction.

[13] The Sixth Circuit's notion that Whitaker waited a year and a half to inquire about the new judgments is simply a "rubber stamp" on the district court' s same conclusion. The Sixth Circuit failed to acknowledge that Whitaker received no actual or reasonable notice from the court clerk or his appointed attorney or otherwise, when the new judgments were actually entered and cannot expect a reasonable person to file a cause of action pursuant to the entry of a new judgment after an unknown date. Because Whitaker was still scheduled for a parole hearing as late as October 9, 2013, he no reason to believe that new judgments were entered at that point.

[14] Contrary to the Sixth Circuit's conclusion that Whitaker failed to explain the significance of October 9, 2013, Whitaker clearly set out in his pleadings the significance of October 9, 2013 where this is the date that the State of Tennessee announces its intention or demonstrated a clear . . . repudiation of the (plea agreement) contract, thus the statute of limitations for a breach of a contract commences to run as of the date of the breach. This clearly shows that the Sixth Circuit panel failed to familiarize theirselves with all Whitaker's pleadings.

[15] The requirement to serve the entire sentence pursuant to *T.C.A. § 39-13-523* has no relevance in determining whether Whitaker's State and federal petitions were timely filed.

DiGuglielmo, regarding equitable tolling of the statute of limitations. Whitaker argued regarding equitable tolling, stated in pertinent part that:

> Mr. Whitaker submits that there are situations like his in which the federal courts have found that equitable principles are applicable under extraordinary circumstances where: **(1)** the respondent has actively misled the petitioner, **(2)** the petitioner has in some extraordinary way been prevented from asserting his rights, **(3)** the petitioner has timely asserted his rights mistakenly in the wrong forum, *see Jones v. Morton*, 195 F.3d 153, 159 (3rd Cir. 2005), or **(4)** the Court has misled a party regarding the steps the party needs to take to preserve the claim. *Brinson v. Vaughn*, 398 F.3d 225, 230 (3rd Cir. 2005); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("referring to situation in which "the court has led the plaintiff to believe that she has done everything required of her").
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> In *Pace v. DiGulielmo*, 544 U.S. 408, 418 (2005), the Supreme Court stated that a petitioner seeking equitable tolling generally bears the burden of establishing that (1) he has been pursuing his rights diligently; and (2) "some extraordinary circumstances stood in his way") (citing *Irwin v. Dept of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *Gibson v. Klinger*, 232 F.3d 799, 800 (10th Cir. 2000).
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> In the second prong regarding the *Pace v. DiGulielmo* test for this Court to consider, Whitaker contends that, (in addition to the reasons set forth on pages 42-48 of his memorandum of law), that the following circumstances that stood in his way from timely filing his State post conviction petition and federal habeas corpus applies in this case because: **(1)** the State failed to serve Whitaker copies of the new judgments when they were entered on July 27, 2009; **(2)** the court clerk failed to forward him copies of the newly entered judgments; **(3)** the State and TDOC knew existence of the new judgments, but deliberately waited over four years before announcing its intention to longer perform the 30% aspect of the plea agreement by continuing to honor the 30% release eligibility until October 9, 2013 despite the trial court entering new judgments preventing the breach of his plea agreement claim from being ripe for adjudication; and that under Tennessee law, the statute of limitations does not begin until the date of the breach allowing the one-year statute of limitations to expire on August 27, 2010 in order to gain a legal advantage over Whitaker;[16] **(4)** the post conviction court sat on Whitaker's post conviction petition for over three years before he was appointed counsel and received a hearing on his claims; **(5)** there was a clear fraudulent concealment of the fact that new judgments were entered perpetrated by the clerk's office, former attorney, district attorney's office; and by failing to cause the forwarding copies of said judgments so that Whitaker can timely challenge the substantial change in his sentence; and **(6)** Whitaker was continuing to receive 30% release eligibility during the period of July 27, 2009 through October 9, 2013 and beyond rather than January of 2011.

(See Reply in Opposition to the Respondents Answer to Petition for Habeas Coprpus). Here, Whitaker has more that satisfied the showing that he diligently pursued his rights under § 2254 and showed circumstances above that stood in the way, specifically and more

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[16] TDOC notified the District Attorney's Office sometime before October 9, 2013 to provide information for the parole board in preparation for the up coming June 2014 parole hearing. **(See Exhibit "4").**

importantly, that the State prosecutor stood in the way by continuing to honor the 30% release eligibility for nearly four years after the new judgments were entered. The district court's erroneous analysis and finding that Whitaker is not entitled to equitable tolling that is partially adopted from the TCCA, rests on only three of the many reasons raised to support equitable tolling in his federal habeas corpus petition where the district court failed to consider in its analysis. Whitaker's reasons above moreover, the district court's conclusion that "the timeliness of the state court's decision with respect to his post conviction petition had no bearing on the Petitioner's ability to file his federal petition" ignores *§ 2254(b)(1)(A)* that requires petitioners to first exhaust the remedies available in the State courts, which in this case would be Tennessee's post conviction proceedings in *T.C.A. § 40-30-101.* Here, the district court is inferring that Whitaker should have filed his federal habeas corpus petition long before he exhausted his State post conviction remedy. Such a practice is inconsistent with both State and Federal law of the exhaustion requirements that would make *§ 2254(b)(1)(A)* ineffective.

The State and lower federal court's decisions are further inconsistent and squarely in conflict with this Court's decisions regarding legal analysis of which is indispensable to the analysis here is that relative to Ripeness. Under Tennessee law, ripeness requires a court to answer the question of "whether the dispute has matured to the point that warrants a judicial decision. *West v. Schofield*, 468 S.W.3d 482, 490-491 (Tenn.2015); *B & B Enters. Of Wilson County, LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010) (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974).

Ripeness is peculiarly a question of timing. *Id.* at 490 citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 140. Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements .... *Id.* at 490 citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105,

97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all. *Id.* at 491; *B & B Enters*, 318 S.W.3d at 848, citing *Lewis v. Cont'l Bank Corp.* 494 U.S. 472, 479-480 (1990).

In determining whether a particular case is ripe, courts typically engage in a two-part analysis, evaluating (1) the fitness of the issues for judicial decisions; and (2) the hardship to the parties of withholding court consideration. *Abbott Labs*, 387 U.S. at 149; *B & B Enters*, 318 S.W.3d at 848; *Warshak v. U.S.*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc) (describing the two-part inquiry as: "[I]s the claim fit for judicial decision in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? [A]nd what is the hardship to the parties of withholding court consideration?).

To be clear, in this case, not only does the record show in the post-conviction proceedings wherein the prosecution utilized to its advantage the fact that Mr. Whitaker received a thirty percent sentencing deal, but further, as far ahead as the beginning of 2014, the Tennessee Department of Corrections was under the understanding and thus informing Mr. Whitaker that he was still under a thirty percent sentence and would be going up for parole again in June of 2014. **(See Exhibit "4")**.

Although the new judgments were entered on July 27, 2009, under the applicable aforementioned contract law above, the statute of limitations did not begin to run until sometime on or after October 9, 2013 when the agreed upon 30% release eligibility sentence was no longer being honored by the State, thus announcing its intention not to perform the same and demonstrating a clear repudiation of the plea agreement contract or a clear intention not to be bound by the contract. At that point, the statute of limitations begins running as of the date of the breach regardless of whether or not Whitaker knew that new judgments were entered July 27, 2009, as suggested by the TCCA decision and respondent.

In meeting the first prong of the test, being fitness for decision, the lower federal court's are required to determine whether Whitaker's 14th Amendment claim-that the State of Tennessee deliberately breached the bargained-for material element of the plea agreement-was ripe and fit for decision for purposes of the running of the statute of limitations on August 27, 2009, the date the new judgments became final, or October 9, 2013, the presumed date when the State ceased honoring the written plea agreement pursuant to contract law. **(See Exhibit "2").**

Whitaker's contention is clear under well-established traditional principles of contract law of which establish that such breach cannot occur until one of the contingencies actually occurs, that is, as of the date of the breach as well as when one of the contracting parties demonstrates a clear repudiation or actual breach of the agreement. In other words, Whitaker's Fourteenth Amendment due process claims could not be exercised or ripe until a future time; therefore, Whitaker's claims were not fit for judicial decision until at the earliest, being October 9, 2013.

Furthermore, here, there can be absolutely no issue of hardship to the respondent, as the hardship and difficulties were actually suffered by Mr. Whitaker. Not only has the respondent placed spins on nearly every challenge Mr. Whitaker has ever made in nearly all of his past pleadings, but it has also utilized to its advantage the fact that Whitaker was given a 30 percent plea in defeating his ineffective assistance of counsel claims **[Respondent's 2001 Post-Conviction No. 1 Reply, Addendum Ex 9 Section 3]** and then when he essentially raises an issue relative the breach, they position the 30 percent as an after the fact mistake or clerical error. **[Respondent's 2 Post-Conviction Number 2 Argument Ex 27 pp. 4-12].**

Although the new judgments were entered on July 27, 2009, under the applicable aforementioned contract law mentioned above, the statute of limitations did not begin to run until sometime on or after October 9, 2013 when the agreed upon 30% release

eligibility sentence was no longer being honored by the State, thus announcing its intention not to perform the same and demonstrating a clear repudiation of the plea agreement contract or a clear intention not to be bound by the contract. At that point, the statute of limitations begins running as of the date of the breach regardless of whether or not Whitaker knew that new judgments were entered July 27, 2009, as suggested by the TCCA, respondent, and more importantly the district court which completely ignored these undisputed facts established in the record.

Based on the undisputed supporting facts, State and Federal law provided above, the record in this case, and contrary to the lower federal court's findings, Whitaker has clearly demonstrated that not only did he diligently pursued his rights, but demonstrated extraordinary circumstances not of his own conduct or fault that prevented him from timely filing his federal habeas petition, thus, entitling Whitaker to equitable tolling of both State and his federal habeas petition statute of limitations.

Although Mr. Whitaker continued to rely upon his initial pleadings filed herein, he again quotes the pertinent language of the Respondent's 2001 response. See **[Respondent's 2001 Post-Conviction No. 1 Reply, Addendum Ex 9 Section 3].** At the second post-conviction hearing in 2015, the Respondent argued, with regard to concept of equitable, that the sentence with 30% release eligibility was a mistake and merely a clerical error rather that a bargain-for element of the plea agreement. See **[Respondent's 2 Post-Conviction Number 2 Argument; Ex 27 pp. 10-11].**

In summary, Mr. Whitaker simply should not have to run around the world chasing the Respondent's ideas and theories as to what his plea is and thus be forced to try and challenge any and everything that pops up. *Rule 11 (1)(b)(1)(K)(2)*, of the *Tennessee Rules of Criminal Procedure*, says that the Court must inform the defendant that "it will embody in the judgment and sentence the disposition provided for in the plea agreement." In Mr.

Whitaker's case, that means his standard range one sentence, as pronounced by the Court, and that of course no where mentions one hundred percent. **[Ex. 25 Section 5, at p. 225].**

If the respondent was not sure, certainly the Petitioner cannot be found to be. Thus any ambiguities in the agreement must be construed against the State and not Mr. Whitaker. *Housler v. State*, 2013 WL 5232344, *32 (Tenn.Crim.App. 2013) (citing *State v. Howington*, 907 S.W.2d 403, 410 (Tenn.1995)). *Housler* also recognizes that "what constitutes a breach of the agreement is governed by the agreement itself." *Id.* at 32.

Finally, and of even further significant, is the fact that Mr. Whitaker had a separate plea and sentencing hearing and it was noted that the later sentencing hearing itself would be to determine whether or not Mr. Whitaker's sentence in Roane County would run consecutive to the sentence in Anderson County. Instead, the later sentencing hearing ordered consecutive sentencing of the sentences in the same County. In that vein, how can Whitaker fight such a play on the 14th Amendment Rights of a petitioner such as Mr. Whitaker? In this context, the petition should respectfully be found timely and/or sufficient excuse within which to find equitable tolling proper.

The basic principle of contract law that is also relevant to this case, involves the doctrine of anticipatory repudiation that is set forth in the *Restatement (Second) of Contracts § 250 ("Restatement") (1980).* See *Mobil*, 530 U.S., 608. The Restatement defines a repudiation as a: "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach. *Contracts § 250.* An anticipatory repudiation occurs when one party to a contract impairs the other party's expectation of performance before the time for performance arrives. *Id.* at 271. Such a statement of prospective non-performance can consist of either a statement by the obligor of its intent not to perform under any circumstances or a statement of intention not to perform except on the conditions going beyond the contract. *Restatement § 250, cmt. b; Murray, § 109(C).*

The fact that an action amounts to a repudiation rather than a breach has important consequences for the statute of limitations. In response to an anticipatory repudiation, the obligee may either sue immediately or await the time that the obligor's performance under the contract comes due. *Williston, § 1337;* ***Roehm v. Horst***, 178 U.S. 1, 10 (1900)(finding it "reasonable to allow an option to the injured party, either to sue immediately, or wait till the time when the act was to be done"). If the obligee elects to wait, the statute of limitations on a claim for a breach does not commence to run until the time for performance arrives and the obligor actually fails to perform. *Franconia*, 536 U.S. at 144; *1 C. Coeman, Limitations of Actions § 7.2.1,* p. 482 (1991).

By granting the non-repudiating party these options, the doctrine serves an important interest that allows the obligee to defer cause of action until the time for performance arrives provides the obligor an opportunity to retract its wrongful repudiation and perform as promised, thereby eliminating the need for a cause of action. See *Murray, §* 109(E)(5); *Williston, §* 2027B; Professor Corbin explanation in § 989.

This Court held in *Franconia* that the time of accrual depends on whether the injured party chooses to treat the repudiation as a present breach. Citing *1 C. Coeman, Limitations of Actions § 7.2.1,* p. 488 (1991). This Court further held that if a party elects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from the time of performance to the date of such election. *Id.* at 488-489. But if the injured party instead opts to await performance, "the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation". *Id.* at 488; *Franconia*, 536 U.S. at 144.

In this case, as like in *Franconia*, record and the pleadings demonstrated that under the doctrine of anticipatory repudiation, Whitaker clearly elected to wait for the performance of the parole hearing under the plea agreement or an indication of its

intention (by the State of Tennessee) that it will commit a breach of the plea agreement. It turns out that the State of Tennessee commit the breach of the plea agreement before performance of the parole hearing that would of itself certainly gives Whitaker a claim for damages for total breach. Here, the State of Tennessee did not give any notice of its intention that it will breach the plea agreement, therefore, when Whitaker became aware of the breach, (that being on or after October 9, 2013), Whitaker treated it as a "voluntary affirmative act" indicating that State of Tennessee has intentionally breached the plea agreement. *Franconia*, 536 U.S. at 143 citing ***Roehm v. Horst***, 178 U.S. at 13(such a repudiation ripens into a breach prior to the time for performance only if the promisee "elects to treat it as such).

Here, the lower courts decisions are inconsistent and squarely in conflict with the principles of the doctrine of anticipatory repudiation and its application to this case, and overlooks this Court's long standing law regarding contracts in *Franconia*, 536 U.S. at 143, citing ***Roehm v. Horst***, 178 U.S. at 13(repudiation gives the premisee the right of electing to either to . . . wait till the time for the promisor's performance has arrived, or to act upon the renunciation and treat it as a final assertion by the promisor that he is no longer bound by the contract). Viewed in this light, the State of Tennessee effected a repudiation of the written plea agreement, not an immediate breach. The written plea agreement announced that Whitaker would receive a sentence with parole release eligibility after serving 30% percent of his sentence and periodically thereafter should the parole board deny parole release for a fixed time set by the board, and an oral agreement at sentencing that the trial court was to determine concurrent or consecutive sentences to his Anderson County sentence rather than within the eight counts of the Roane County convictions.

In this case however, the State of Tennessee provided no notice whatsoever of its intention to no longer honor the 30% terms of the plea agreement. It's obvious that the State of Tennessee has taken steps to avoid the application of contract law that would apply

to the statute of limitations, which would allow the timely filing of Whitaker's State post-conviction and federal habeas corpus petitions. Based on the foregoing, certiorari should be GRANTED.

II. When Whitaker Obtained Newly Discovered Evidence, Does The One-Year Statute Of Limitations Begin To Run From The Date The Evidence Was Discovered To Raise His Claims For Relief, Must The District Court, And The Sixth Circuit Court Of Appeals Nevertheless Ignored This Court's Well Established Controlling Law Denying Him Substantive Due Process Of Law Under The Fourteenth Amendment?

(a). Review Is Warranted Because The District Court's, And The Sixth Circuit Court Of Appeal's Decision Conflicts With The Opinions Of This Court And Significantly Undermines This Court's Well Established Controlling Law Concerning The One-Year Statute Of Limitations To Raise His Claims For Relief In Relation To Newly Discovered Evidence Denying Him Substantive Due Process Of Law Under The Fourteenth Amendment.

On April 12, 2019, at the conclusion of Whitaker's motion to correct an illegal sentence, Whitaker received the exculpatory evidence from his attorney Tracy V. Williams relating to his current conviction. **(Exhibit "5" Affidavit of Tracy Vought Williams)**. On March 9, 2020, Whitaker filed a second amended habeas petition raising three part additional grounds for relief, a Brady violation, actual innocence, and that his plea was involuntary, unknowingly, and unintelligently entered based on newly discovered evidence.

In an initial matter, Whitaker points out that he would have brought this claim directly into state court, however, there is absolutely no State remedy by which he can raise this claim under Tennessee law as Tennessee governing post-convictions has a one petition rule barring any subsequent petitions outside of a motion to reopen or DNA post-conviction of which these claims do not qualify. See *T.C.A. § 40-30-117* and *§ 40-30-301* to *313*. As it relates to error coram nobis filings, Tennessee law prohibits challenges relative to new evidence and/or constitutional issues if there was a guilty plea entered in the case.

See *Frazier v. State*, 495 S.W.3d 246, 248 (Tenn. 2016)(held that a guilty pleas may not be collaterally attacked pursuant to the error coram nobis statute *T.C.A. § 40-26-105*).

Whitaker submits, however, that federal courts are permitted to hear such constitutional claims and as this Court has set forth, even when the issue of a statute of limitations is at play, new evidence of actual innocence may be used to excuse such limitations period or procedural default relative thereto of a constitutional claim. *McQuiggins v. Perkins*, 569 U.S. 383, 391-393 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).

Whitaker contends that his three additional grounds for relief relating to newly discovered evidence was timely filed pursuant to *28 § 2244(d)(1)(D)* that requires a habeas petitioner to file such claim within one-year of obtaining the newly discovered evidence. See also *McQuiggin v. Perkins*, 569 U.S. 383, 398-399 (2013); *Taylor v. Winn*, 2020 WL 4334125 at *2 (6th Cir. 2020); *Townsend v. Lafler*, 99 Fed.Appx. 606, 608 (6th Cir. 2004).

Whitaker contends that in its Order, the lower federal court's concluded that Whitaker's amended petition that raises three additional grounds for relief relating to newly discovered evidence is futile because the original and first amended habeas petition itself is untimely filed. The lower federal court's conclusion is inconsistent and squarely in conflict with this Court's controlling decisions by failing to recognized that Whitaker's amended petition that raises three additional grounds for relief relating to newly discovered evidence was timely filed pursuant to *28 § 2244(d)(1)(D)* that requires a habeas petitioner to file such claim within one-year of the time in which the new evidence could have been discovered through the exercise of due diligence. *McQuiggin*, 569 U.S. at 398-399; *Taylor*, 2020 WL 4334125 at *2 (held that a state prisoner must file his habeas petition within one-year of the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence); *Townsend*, 99 Fed.Appx. at 608 (held that the one-year period begins to run when the inmate could have discovered the factual predicate of his claim through the exercise of due diligence). The

lower federal court's did not find that Whitaker failed to discover his claims through the exercising of due diligence.

The facts in this case reveal that on September 28, 2018, former counsel, Tracey V. Williams, for Whitaker in another legal matter, filed for discovery. The State did not file an objection to the filing of this motion and allowed access and copying at the conclusion of the 36.1 motion proceedings. On April 9, 2019, counsel was given open access to the State's file in this matter and to her knowledge from reviewing the State's file; there was no evidence of any discovery specifically requesting these exculpatory statements ever been previously prepared. And finally and more importantly, on April 11, 2019, Whitaker was provided copies of documents that counsel had personally copied from the State's file that consisted of among other things, correspondence, clinic notes, transcripts for what appears to be interviews, judgments, and notes that gave rise to the newly discovered evidence. **(See Exhibit "5" Affidavit from Counsel)**. On March 9, 2020, Whitaker filed a motion for leave to file a second amended petition along with the second amended memorandum of law raising the additional grounds for relief after obtaining the newly discovered evidence well before the one-year limitations period ended. The district court did not deny the initial filing of the request for leave to amend and memorandum of law nor did district court find that Whitaker failed to show how he exercised due diligence in obtaining the new evidence, among other things, the victims statements that does not support the essential element of penetration regarding the convicted offenses. Moreover, on April 10, 2020, Whitaker filed a *§ 2244* motion for authorization to file these newly discovered evidence claims in the Sixth Circuit Court of Appeals. On July 24, 2020, the Court of Appeals for the Sixth Circuit held that authorization was unnecessary because he never filed a habeas corpus petition challenging his Anderson County and Roane County convictions as well as because of this Court's prior Order issued on February 25, 2019. See *In re: Whitaker*, Case No. 20-5410 (6th Cir. July 24, 2020). **(See Appendix "F")**.

Whitaker contends that this evidence could not have been previously discovered through the exercise of due diligence at any time prior to April 11, 2019 because it is the State District Attorney's office policy, practice, and custom to withhold access and copying of documents from the State's file while a case is actively litigating, which Whitaker has been litigating his case steadily for the past twenty years. Furthermore, Whitaker had no knowledge that these exculpatory statements existed in the State's file for the past 25 years including the prosecutor's letter to defense counsel which mentioned the alleged victim's statement of allegations that was made against Mr. Whitaker. The State District Attorney's office would not allow access to its files for 25 years until former counsel, Tracey V. Williams was finally given open access to the State's file on April 9, 2019, which revealed the alleged victim's statement of allegations and this is only because the District Attorney's office consist of all new assistant prosecutor's that replaced the ones that were denying Whitaker access to its files for 25 years.

Whitaker further submits, however, the federal courts are permitted to hear such constitutional claims and as this Court has set forth, even when the issue of a statute of limitations is at play, new evidence of actual innocence may be used to excuse such limitations period or procedural default relative thereto of a constitutional claim. *McQuiggin*, 569 U.S. at 391-393.

Whitaker contends that the lower federal court's decisions are inconsistent and squarely in conflict with this Court's decisions in *McQuiggin*, 569 U.S. at 398-399 and *28 § 2244(d)(1)(D)*, that requires a habeas petitioner to file such claim within one-year of obtaining the newly discovered evidence. In this case, Whitaker clearly demonstrated and proved that he obtained the newly discovered evidence on April 11, 2019 and filed his claims by amending his current §2254 federal habeas corpus adding three claims of Brady violation, actual innocence, and that his plea was involuntary, unknowingly, and unintelligently entered on March 9, 2020, well within the one-year of the time in which the

new evidence could have been discovered through the exercise of due diligence set out in *28 § 2244(d)(1)(D).*

The respondent filed a response in opposition to Petitioner's motion for leave to amend his petition for habeas corpus relief arguing that the court should deny the motion to amend simply because the amendments do not relate back to the claims in the original petition and that the interests of justice do not require allowing Petitioner to amend his petition. The respondent did not object to the merits or allegations of the claims nor does that respondent deny that the additional claims were filed within one-year of the time in which the new evidence was obtained and could have been discovered through the exercise of due diligence set out in *28 § 2244(d)(1)(D),* but ignores the fact that the amended additional grounds for relief does in fact relate back to the judgments he is attacking and the interest of justice does require allowing such amendment seeing the magnitude of the misconduct of the prosecutor withholding exculpatory evidence of the victims' statements that show Whitaker is actually innocent of the crime in which he is convicted would require in the interest of justice allowing such amendment. See *King v. Morgan*, 807 F.3d 154, 158 (6th Cir. 2015)(where this Court held that some claims within a habeas application will apply to the underlying conviction *and* the new sentence). This would mean that Whitaker's three additional claims based on new evidence can be amended to his current habeas corpus petition.

The State and lower federal court's decisions are further inconsistent and squarely in conflict with this Court's decisions regarding the miscarriage of justice exception. The lower federal court's likewise failed to address as to whether the Whitaker's second amendment to his habeas petition, raising three more claims for relief regarding newly discovered evidence, was filed within one-year of the time in which the new evidence could have been discovered, and whether Whitaker exercised of due diligence in discovering the

new evidence with the exception to the actual innocence which does not require the exercise of due diligence.

However, this Court's precedents have long recognized and have allowed the miscarriage of justice exception to serve as a gateway for habeas petitions that would otherwise be barred on procedural grounds. See *McQuiggin v, Perkins*, 569 U.S. 383, 402-404 (2013); *Herrera v. Collins*, 506 U.S. 390, 404 (1993). That exception has long been defined in the case law and should have been familiar with the lower federal court's that further failed to determine whether the miscarriage of justice exception completely overcomes the one-year limitations provision of the AEDPA and have been applied to a State prisoner's claims that were defaulted in State court under State timeliness rules. *Calderon v. Thompson*, 523 U,S, 538, 559 (1998) quoting *McCleskey v. Zant*, 499 U.S. 467, 496 (1991). It is grounded in the equitable discretion of the habeas court to see that federal constitutional errors do not result in the incarceration of the innocent persons. *Herrera*, 506 U.S. at, 404.

Under the exception, the lower federal court's were required to consider whether Whitaker shown, regarding the new evidence claims of actual innocence, Brady violation, and that his plea was involuntary, unknowingly, and unintelligently entered, that it was likely that not that no reasonable juror would have convicted him in light of the new evidence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Murray v. Carrier*, 477 U.S. 478496 (1986)(finding exception applies where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)(finding that the exception applies for "a colorable claim of actual innocence") This showing sufficed, "standing alone," to permit review of constitutional claims even if Whitaker had not been diligent.

The lower federal court's simply failed to apply and extend this exception to the AEDPA's statute of limitations in this case and effectively accorded greater force to a

federal filing deadline that to a similar designed State deadline. As Justice Ginsburg said, "it would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States." In short, Whitaker's second amended habeas petition based on this Court's well established law was timely filed and the lower court's should have reviewed his three claims for relief on its merits and erred in not doing so. Therefore, the decisions of the lower court's regarding newly discovered evidence is clearly contrary to this Court's controlling precedents and due process of the Fourteenth Amendment to the U.S. Constitution requiring this Court to grant review to prevent a miscarriage of justice.

(c). THE DECISIONS FROM THE LOWER COURTS, IF PERMITTED TO STAND, WILL LIKELY RESULT IN IRREPARABLE HARM TO CRIMINAL DEFENDANTS/PETITIONERS BY ALLOWING THE GOVERNMENT TO BREACH THE TERMS OF A PLEA AGREEMENT CONTRACT AT ANY TIME (EVEN YEARS LATER) WITHOUT AND RECOURSE VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Whitaker contends that review must be granted because if the State and lower federal court's decisions in this case are permitted to stand, it will set dangerous precedent in the Sixth Federal Judicial Circuit along with the other circuits resulting in irreparable harm to Whitaker and others by allowing the State of Tennessee to breach the terms of the plea agreement at any time without any recourse to challenge such breach effectively denying Whitaker due process of law. Furthermore, if the State and lower federal court's decisions in this case are allowed to stand, it will undermine years of controlling precedent held by this Court that Whitaker has demonstrated above that contradicts the State and lower federal court's decisions.

Whitaker further contends that review must be granted because the State and lower federal court's decisions and conclusions have not only departed from this Court's well established law as demonstrated above, but squarely conflicts with this Courts decisions

regarding the statute of limitations commences to run when the State prosecutor breaches the written plea agreement it made with the defendant. Every court of appeals that has addressed a breach of contract/plea agreement claim, even the Sixth Circuit in other cases, has concluded that because plea agreements are contracts, the statute of limitations for a breach of a contract commences to run as of the date of the breach. **See page 17 above.** Furthermore, if the State and lower federal court's decisions in this case are permitted to stand, Whitaker be severely prejudiced in that it would substantially change his sentence requiring him to serve a worse-than-before sentence that he did not agree upon in the written plea agreement.[17]

In such circumstances, under this Court's decisions regarding the statute of limitations for a breach of a contract/plea agreement claim, the law can't be any clearer and if left undisturbed, the State and lower federal court's decisions in this case will be taken as the controlling precedent for such statute of limitations for a breach of a contract/plea agreement claim standard than this Court applies.

CONCLUSION

Because there is no basis for treating the law regarding the statute of limitations for a breach of a contract/plea agreement claim standard differently than the State and lower federal court's decisions in this case, those decisions squarely conflicts with this Courts decisions and threatens to undermine the Due Process Clause of the Fourteenth Amendment that review should be **GRANTED**, with summary reversal as an appropriate disposition. If, on the other hand, there might be a basis for such differentiation, certiorari should be **GRANTED** for plenary review of the underlying questions, which would surely be important.

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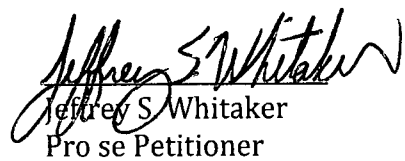
[17] Whitaker is now required to serve a "worse than before" sentence of: 100% day-for-day (as opposed to 30% with parole release eligibility and periodically parole hearings; consecutive sentences within the Roane County convictions (as opposed to concurrent Roane County convictions to be served concurrent with the Anderson County convictions); and an increased *ex post facto* additional sentence of Community supervision for life pursuant to *T.C.A. § 39-13-524.*

For the foregoing reasons, the petition for writ of certiorari should be **GRANTED**.

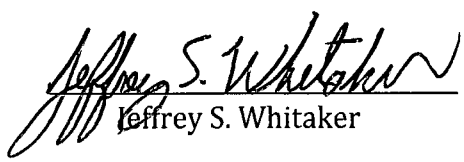
Respectfully submitted this 1st day of June, 2021.



Jeffrey S. Whitaker
Pro se Petitioner
M.C.C.X. #244298
P.O. Box 2000
Wartburg, TN 37887-2000

CERTIFICATE OF SERVICE

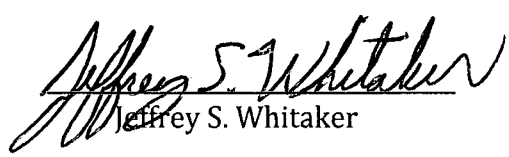
I, Jeffrey S. Whitaker, do hereby certify that a true and exact copy of the foregoing Petition for Writ of Certiorari has been sent to: Zachary L. Barker, Assistant Attorney General, Federal Habeas Corpus Division, P.O. Box 20207, Nashville, TN 37202-0207, by U.S. Mail, First Class Postage prepaid, on this 1st day of June, 2021.



Jeffrey S. Whitaker

DECLARATION OF MAILING

I, Jeffrey S. Whitaker, declare under the penalty of perjury that I have placed the foregoing Petition for Writ of Certiorari with the appropriate mailroom officials at the Morgan County Correctional Complex with sufficient First Class Postage to reach its destination on this 1st day of June, 2021.



Jeffrey S. Whitaker

I declare under the penalty of perjury that the foregoing is true and correct.[18]

Signed on this 1st day of June, 2021.

[18] See *28 U.S.C. § 1746* and *18 U.S.C. § 1621*

IN THE UNITED STATES SUPREME COURT
AT WASHINGTON DC

Jeffrey S. Whitaker	)	
Petitioner,	)	
	)	
VS.	)	**Case No.** _____
	)	
Shawn Phillips, Warden and	)	
State of Tennessee	)	
Respondent,	)	

DECLARATION OF INMATE FILING

I, Jeffrey S. Whitaker, am an inmate confined in the Morgan County Correctional Complex, a TDOC correctional institution. Today, June 1, 2021, I am depositing the Petition for Writ of Certiorari in this case in the institution's internal mail system. First-class postage is being prepaid by me or by the institution on my behalf.

I declare under the penalty of perjury that the foregoing is true and correct.[1]

Signed on this 1st day of June, 2021.

Jeffrey S. Whitaker

[1] See *28 U.S.C. § 1746* and *18 U.S.C. § 1621*