IMMIGRATION POST-CONVICTION REMEDIES
NOVEMBER 7, 2003

by DAVID L. RAYBIN

I. INTRODUCTION

1. What is it that you are trying to do?

2. Always project out where you are going with post-conviction relief.

3. Are you going to make it worse if you are successful.

II. METHODS OF ATTACKING GUILTY PLEA

1. A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed. But to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the guilty plea.
   Rule 31(d) Tenn. R. Crim. Proc.

2. See *State v. Green*, 106 S.W.3d 646 (Tenn. June 10, 2003) (we hold that a judgment of conviction upon a guilty plea becomes a final judgment thirty days after entry).

III. SAMPLE ARGUMENT REGARDING WITHDRAWAL OF GUILTY PLEA

The standard of review in such matters is well-settled. The decision of whether to grant a motion to withdraw a plea of guilty rests within the discretion of the trial judge and is not subject to reversal unless it appears that there was an abuse of discretion. *State v. Drake*, 720 S.W.2d 798 (Tenn. Crim. App. 1986), and *State v. Haynes*, 696 S.W.2d 26, 29 (Tenn. Crim. App. 1985). The burden of proof is on the defendant. *State v. Davis*, 823 S.W.2d, at 220.

A trial court will not, as a general rule, be reversed for denying the request for withdrawal of a guilty plea where the proof shows that the defendant had a "change of heart," or where the entry of the guilty plea is to avoid a harsher punishment, or the defendant is dissatisfied with the harsh punishment imposed by the trial court or a jury. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995).

It cannot be said that Mr. Filauro pled guilty to avoid a harsher punishment. Certainly it is conceivable that he could have received consecutive sentencing although, without any past criminal record it is highly unlikely that this would have been the case. Be that as it may, however, given the fact that Mr. Filauro is over 50 years old and the sentence is in excess of twenty-five years a "harsher" sentence would have been irrelevant. According to the mortality tables in the Tennessee Code Annotated, a white male at age 51 has a life expectancy of 22.55 years. In this case Mr. Filauro pled guilty to a crime and received a sentence which exceeds his life expectancy. Thus, it cannot be said that Mr. Filauro pled guilty to escape some harsher punishment such as, in the usual case, where a person takes a life sentence to avoid the death penalty. See *Rudd v. State*, 497 S.W.2d 746 (Tenn. Crim. App. 1973).

The remaining factor for which a withdrawal is not allowed is the so-called "change of heart." The most famous "change of heart" was that of James Earl Ray who pled guilty to the murder of Dr. Martin Luther King, Jr. and subsequently moved to withdraw his guilty plea. Under the facts the Tennessee Supreme Court found that "we are simply deciding whether or not, after he entered a plea of guilty. . . he can thereafter have a change of heart and make a motion for new trial. We think not." *Ray v. State*, 451 S.W.2d 854 (Tenn. 1970).

While the trial judge has broad discretion in these matters the discretion certainly can be abused. A recent case illustrating the problems with mistaken advice and misunderstanding illustrates the point. In *State v. Conrad*, Tenn. Crim. App. at Knoxville, filed May 15, 2003 (unpublished) (a copy attached hereto) the defendant pled guilty to three counts of attempted statutory rape. He argued that his guilty plea was involuntary because his attorney erroneously advised him that he would not have to register with the Tennessee Sexual Offender Registry. The defendant argued that had he known that he was subject to the registry he would not have pled guilty but would have gone to trial. This Court held that "the trial court abused its discretion in determining that a manifest injustice did not occur relative to the defendant's entry of guilty pleas."

It is clear that the "manifest injustice" doctrine is different than the constitutional standards we see in post-conviction cases:

> The concept of manifest injustice under Rule 32(f) is not identical to the requirements of constitutional due process. However, we agree that where there is a denial of due process, there is a manifest injustice as a matter of law. . . . Federal courts have consistently held that, although there may be considerable overlap between the standards, manifest injustice allows a trial judge greater latitude than the constitutional requirements. . . . The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done. . . . Implicit in this analysis is a

> recognition that, although the standards overlap, a trial court may, under some circumstances, permit the withdrawal of a guilty plea to prevent manifest injustice even though the plea meets the voluntary and knowing requirements of constitutional due process. . . . The term 'manifest injustice' is not defined either in the rule or in those cases in which the rule has been applied. Trial courts and appellate courts must determine whether manifest injustice exists on a case by case basis. The defendant has the burden of establishing that a plea of guilty should be withdrawn to prevent manifest injustice. . . In summary, the trial court must review the appellant's motion to withdraw the guilty plea under the manifest injustice standard of Rule 32(f) as it is amplified in this opinion. The review encompasses the elements enumerated in Rule 11(c), Tennessee Rules of Criminal Procedure. . . . subject to the proviso that manifest injustice may conceivably exist even where all of these elements are satisfied. If the trial court determines that the existing evidence is inadequate for applying the requisite standard, a further hearing should be ordered, bearing in mind that discretion should always be exercised in favor of innocence and liberty.
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> *State v. Lyons*, Tenn. Crim. App. at Nashville filed August 15, 1997 (unpublished).

There are numerous reasons why manifest injustice exists here. First, the record is clear that Mr. Filauro was taking anti-depressant medication and did not fully understand what he was doing. Most importantly, however, there was a severe conflict between his attorneys as to the advisability of taking his plea offer of twenty-five years at a hundred percent with no jail time. Given that Mr. Filauro is over fifty years old, a plea agreement of this duration is utter madness given the lack of evidence against him.

There have been numerous instances where a guilty plea was set aside because of gross misconception of the sentence. *State v. Haynes,* 696 S.W.2d 26 (Tenn. Crim. App. 1985) (plea set aside because of misconception in regard to the amount of time defendant would serve); *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988) (guilty plea set aside where defendant was misled as to the effect of his plea on a subsequent charge; extensive discussion of issue); *Woods v. State*, 928 S.W.2d 52 (Tenn. Crim. App. 1996) (plea set aside because the defendant was unaware that the agreed sentence was illegal); and *Summerlin v. State*, 607 S.W.2d 495 (Tenn. Crim. App. 1980) (everyone thought the defendant could apply for probation).See also, *Howell v. State*, 569 S.W.2d 428 (Tenn. 1978)(parole eligibility); *State v. Burkhart*, 566 S.W.2d 871 (Tenn. 1978) (consecutive sentence mandatory).

IV. FILING POST-CONVICTION PETITION SAMPLE I:

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION I

Aziz Al-Tamimi	)	
	)	
Petitioner,	)	
	)	**CASE NO. 2001-D-2469**
v.	)	
	)	
State of Tennessee	)	
	)	
Respondent.	)	

PETITION FOR POST-CONVICTION RELIEF

Comes now Petitioner, Aziz Al-Tamimi, through undersigned counsel in this Post-Conviction Petition and respectfully requests relief from his convictions pursuant to T.C.A. §40-30-201 et seq. Petitioner asserts that his convictions are constitutionally infirm resulting from the fact that the Petitioner suffered from a violation of the Due Process provisions of the Tennessee Constitution and the United States Constitution in that his guilty plea was the result of mistake as to the legal consequences of said convictions.

Pursuant to Rule 28 of the Rules of the Supreme Court of Tennessee (Tennessee Rules of Post-Conviction Procedure) the Petitioner submits this Petition for Post-Conviction Relief in substantial conformity with said rule.

1. The Petitioner lives at +++++++ , Nashville, Tennessee, 37216. He is currently on probation in this Court but is confined in the Federal Immigration Detention Facility in

Oakdale, Louisiana. The Petitioner's date of birth is January 7, 1960 and his social security number is +++++++++.

2. The convictions subject to this petition were entered by this Court on or about November 22, 2002 for two counts of attempted aggravated child abuse. The case numbers in said case were 2001-D-2469, Counts 1 and 2. The length of the sentence was four years on probation for each count with said sentences running concurrently. The Petitioner entered a plea of guilt to said offenses.

3. The Petitioner did not appeal the judgment of conviction nor has he filed any appeals or other post-conviction petitions or relief from said judgment of any kind.

4. Although the Petitioner is not raising any grounds concerning ineffective assistance of counsel, the rules of the Supreme Court of Tennessee require that the name of his prior attorney be stated in this petition. The name of his trial attorney was Mr. +++++++++++++++.

5. The attorney who is preparing this petition is Mr. David L. Raybin, with the firm of Hollins, Wagster & Yarbrough, SunTrust Center, 22nd Floor, 424 Church Street, Nashville, Tennessee, 37219.

6. The Petitioner respectfully submits that his guilty plea was as a result of mistake in violation of the Due Process provisions of the United States and Tennessee Constitutions. Specifically the Petitioner is a foreign national and has a poor command of the English language and the understanding of criminal law in the United States. Petitioner was of the view that deportation for a felony conviction for an aggravated felony would not occur if the

felony sentence is less than five years. While that apparently was the law at one time, all of this changed as part of the 1996 Immigration Reform Act. Most felony convictions where the possible punishment exceeds one year (whether confinement is served or not) will be termed an "aggravated felony" under the new law. The "aggravated felony" will permit automatic deportation without consideration of good moral character or whether the sentence was suspended by the court or not.

7. The Petitioner entered his plea of guilt well believing that he would not be subject to the automatic provisions of the immigration law. Given that the law is otherwise to his understanding he was arrested by the immigration authorities and is pending deportation in a hearing to be conducted on March 11, 2003.

8. The Petitioner asserts that his guilty plea was in violation of the Due Process provisions of the Tennessee and United States Constitutions in that it was the result of mistake as to the consequences of his plea which significantly impacted his liberty not withstanding that this Court imposed probation in good faith upon the recommendation of the government. For all these reasons the Petitioner respectfully asserts that this Court should vacate his convictions and set the matter upon the docket for further review and that this Court maintain continuing jurisdiction over this matter.

9. The Petitioner asserts that he is confined in the immigration facility in Oakdale, Louisiana and that he has authorized his attorney to file this petition for him as more particularly set forth in the certification of counsel attached to this petition.

WHEREFORE, PETITIONER PRAYS THAT THE COURT GRANT PETITIONER RELIEF TO WHICH THE PETITIONER MAY BE ENTITLED TO IN THIS PROCEEDING.

Respectfully submitted,

_____

David L. Raybin, BPR No. 3385
22nd Floor - SunTrust Center
424 Church Street
Nashville, Tennessee 37219
(615) 256-6666

CERTIFICATION AND AFFIDAVIT OF COUNSEL

I, David L. Raybin, after duly being sworn, do state as follows:

I have been retained by the Petitioner's family and the Petitioner's immigration attorney, Ms. Charla Haas, of the Davidson County Bar, to represent this Petitioner in this Post-Conviction Petition before this Court. I have been advised by Ms. Charla Haas that an immigration hearing is scheduled for March 11, 2003 and that the Petitioner is confined in Louisiana in the Federal Immigration Detention Facility and is subject to deportation on or about March 11, 2003. I have investigated all of the non-frivolous claims that are available to the Petitioner and that I believe, as an officer of the court, that this petition is entered in good faith and clearly is in the best interest of the Petitioner. I understand that any additional claim otherwise raised in this Post-Conviction Petition would be waived or not subject to litigation if not otherwise raised herein. For all these reasons the undersigned counsel

believes that this petition states valid claims for relief and that the Petitioner is otherwise entitled to relief and that the Court should grant this relief.

FURTHER AFFIANT SAITH NOT.

_____
David L. Raybin

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

Sworn to and subscribed before me this _____ day of March, 2003.

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been sent via hand delivery to Assistant District Attorney, 222 Second Avenue North, Suite 500, Washington Square, Nashville, Tennessee, 37201 on this the ____ day of March, 2003.

_____
David L. Raybin

V. POST CONVICTION PETITION SAMPLE II:

IN THE _____ COURT OF _____ COUNTY, TENNESSEE

PETITIONER	)	
	)	
	)	
VS.	)	CASE NO.
	)	
	)	(POST-CONVICTION)
STATE OF TENNESSEE	)	

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

Mailing address for petitioner:

Place of Confinement:

Department of Corrections Number:

NOTICE: BEFORE COMPLETING THIS FORM, READ CAREFULLY THE ACCOMPANYING INSTRUCTIONS.

1. Name and location (city and county) of court which entered the judgement of conviction or sentence challenged:

2. Date of judgement conviction:

3. Case Number:

4. Length of sentence:

5. Offense Convicted of:

6. What was your plea? (Check One)

   (a) Guilty ____

   (b) Not Guilty ____

(c) Not Guilty by reason of mental disease or defect ____

(d) Not Guilty and not guilty by reason of mental disease or defect ____

(e) Nolo contendere ____

(f) None ____

If you intend to enter a guilty plea to one count or indictment, and not guilty to another count or indictment, specify.

(a) guilty plea counts:

(b) not guilty counts:

7. Kind of trial: (Check One)

(a) Jury ____ (b) Judge Only ____

8. Did you testify at the trial?

Yes ____ No ____

9. Did you appeal from the judgement of conviction?

Yes ____ No ____

10. If you did appeal, answer the following:

(a) As to the state court which you first appealed, give the following information:

(1) Name of court:

(2) Result:

(3) Date of result:

(4) Grounds raised on appeal:

(b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:

(1) Name of court:

(2) Result:

(3) Date of result:

(4) Grounds raised :

(c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:

(1) Name of court:

(2) Result:

(3) Date of result:

(4) Grounds raised:

11. If more than one (1) year has passed since the date of final action on your direct appeal by the state appellate courts, state why the statute of limitations should not bar your claim.

12. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgement in any state or federal court?

Yes ____ No ____

13. If your answer to Question 12 was "yes", then give the following information in regard to the first such petition, application, or motion you filed:

(a) (1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(Attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result:

(6) Date of result:

(b) As to any second petition, application, or motion, give same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(Attach additional sheets if necessary)

14. Did you receive an evidentiary hearing on your petition, application, or motion?

Yes ____ No ____

(5) Result:

(6) Date of result:

(c) Did you appeal to any appellate court the result of the action taken on any petition, application, or motion identified above?

(1) First petition, etc. Yes ____ No ____

(2) Second petition, etc. Yes ____ No ____

(d) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not appeal:

15. If you have previously filed a petition, application or motion with respect to the judgement(s) in any court, explain why your claim in this case has not been waived for failure to raise it in that prior proceeding, or why the issue is not previously determined, if it was raised in that prior proceeding.

16. Specify every ground on which you claim that you are being held unlawfully, by placing a check mark on the appropriate line(s) below and providing the required information.

Include all facts which support the grounds you claim. You may attach pages stating additional grounds you claim. You may attach pages stating additional grounds and the facts supporting them.

GROUNDS OF PETITION

THE LIST ABOVE IS NOT A COMPLETE LIST OF ALL CONSTITUTIONAL VIOLATIONS. YOU MAY ADD ANY OTHERS YOU DEEM APPROPRIATE. ATTACH A SEPARATE SHEET OF PAPER LISTING EACH CONSTITUTIONAL VIOLATION THAT YOU CLAIM, WETHER OR NOT IT IS LISTED ABOVE. INCLUDE UNDER EACH VIOLATION YOU CLAIM EACH AND EVERY FACT YOU FEEL SUPPORTS THIS CLAIM. EXPLAIN IN DETAIL HOW YOU ARE PREJUDICED BY THE VIOLATION AND WHY YOU ARE ENTITLED TO RELIEF. BE SPECIFIC.

17. IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS: TENN. CODE ANN. § 40-30-102(c) LIMITS YOU TO ONLY ONE PETITION. §40-30-102(c) PROVIDES:

> This chapter contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgement. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed.

18. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No ____

19. Give the name and address, if known, of each attorney who represented you at the following stages of the case that resulted in the judgement under attack:

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from adverse ruling in a post-conviction proceeding:

20. Are you currently represented by counsel?

Yes ____ No ____

(a) If Yes, give name and address, if known, of the attorney representing you.

(b) If No, do you wish to have an attorney appointed?

Yes ____ No ____

21. In the judgement you are attacking, were you sentenced on more than one count of an indictment, in the same court at the same time?

Yes ____ No ____

22. Do you have any future sentence to serve after you complete the sentence imposed by the judgement under attack?

Yes ____ No ____

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgement which imposed the sentence to be served in the future?

Yes ____ No ____

23. What date is the petition being mailed?

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

PETITIONER'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct. Executed on _____, 2003.

_____
Signature of Petitioner

STATE OF TENNESSEE)
COUNTY OF _____)

SWORN TO AND SUBSCRIBED before me this the ___ day of , 2003.

_____
Notary Public

My Commission Expires:_____

CERTIFICATION OF COUNSEL

I , Certify that I have thoroughly investigated the petitioner's possible constitutional claims, including all those in paragraph 15 of the form petition set forth in Appendix A to Tennessee Rule of Post-Conviction Procedure 10, and any other ground that the petitioner may have for relief. I have discussed other possible constitutional claims with petitioner. I have raised all non-frivolous constitutional claims warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has. I am aware that any claim not raised shall be forever barred by application of Tenn. Code Ann. §40-30-106(g), and have explained this to petitioner.

_____
Counsel for Petitioner

_____
Board of Professional Responsibility Number

VI. WAYS TO ATTACK A GUILTY PLEA

1. Lack of ability to understand language.

2. Failure to give appropriate advice.

3. Rights and consequences. Law is very bad here for us. Federal cases on this issue hold that a judge is not required to advise a defendant of such collateral consequences which include the loss of civil rights, increase punishment if the defendant should repeat the offense, undesirable discharge from armed forces, deportation, revocation of existing parole, denial of good time as a multiple offender, an adverse recommendation from the court to the parole authorities, and an adverse effect on civil litigation. See *Wright and Miller*, Section 173. See *Hobby* v. *State*, 499 S.W.2d 956 (Tenn. Crim. App. 1973) (we know of no ruling that one should be advised of all of the possible collateral consequences from a guilty plea).

4. *Hill* v. *Lockhart*, 106 S.Ct. 366 (1985) (the Constitution does not require that the defendant be furnished with information about parole eligibility in order for the defendant's plea to be voluntary).

5. *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988) (guilty plea set aside where defendant was misled as to the effect of his plea on a subsequent charge).

6. *State v. Haynes*, 696 S.W.2d 26 (Tenn. Crim. App. 1985) (plea set aside because of misconception in regard to the amount of time defendant would serve).

7. *State v. Hodges*, 815 S.W.2d 151 (Tenn. 1991) The court held that even though there had been a plea bargain on a sentence and the judge accepts the plea, the judge has the authority to reduce the sentence agreed upon. However, an appellate court may not modify the sentence which was as a result of an agreed guilty plea in the trial court.

8. *Anderson v. State,2003* WL 22415128 (Fla. App. 5 Dist.) **SOME STATES HAVE A DUTY TO WARN -** Anderson appeals the trial court's denial of his Florida Rule of Criminal Procedure 3.850 motion for collateral relief alleging that his 1982 plea of no contest to grand theft auto and grand theft was unknowing and involuntary because he was not advised of the possibility of deportation. He also alleges that his trial counsel was ineffective for not advising him that he would be subject to deportation and for not seeking a judicial recommendation that would have eliminated that potential. Lastly, he argues that the 1989 adoption of Florida Rule of Criminal Procedure 3.172(c)(8), requiring the sentencing court to advise defendants of the consequences of deportation, should apply retroactively. A criminal defendant who is not a United States citizen and who has been found guilty of committing a crime in this country can be deported as one of the consequences of illegal activity. DENIED NO RETROACTIVE DUTY TO WARN

9. *People v. Nguyen* 2003 WL 22019799 (Colo.App.) **DEFENDANT AFFIRMATIVELY MISLEAD BY COURT AND LAWYER -** Defendant, Tho Nguyen, appeals the trial court's order denying his Crim. P. 35(c) motion asserting that his guilty plea was invalid. We vacate the order and remand the case for further proceedings. Pursuant to a plea agreement, defendant pleaded guilty to second degree murder in exchange for the dismissal of the original charge of first degree murder. Prior to sentencing, defendant moved to withdraw his plea. Following a hearing, the court denied the motion, finding that defendant had presented no fair and just reason to withdraw his plea. The court sentenced defendant to thirty-five years in the Department of Corrections (DOC).

Without appealing the conviction or sentence, defendant filed a "Motion to Withdraw Plea Due to Ineffective Assistance of Counsel." The court denied the motion, finding that defendant had not alleged facts that if true would warrant relief. Defendant filed a renewed post-conviction motion asserting the same arguments as in his first post-conviction motion.

Defendant then filed a Crim. P. 35(c) motion seeking to withdraw his plea and asserting for the first time that neither the providency court nor defense counsel had fully informed him of the consequences of a guilty plea on his immigration status. He asserted that the court, by its statement that his guilty plea should have no affect on his status in this country, led him erroneously to believe his conviction would not affect his immigration status. He further asserted that, contrary to the court's statement, he was now facing a deportation hearing, and had he known he could be deported he would not have entered a guilty plea, but would have gone to trial. The court denied this motion as time barred and found that defendant had been adequately advised. Specifically, the court found that the providency court's statement was qualified, which left open the possibility of immigration consequences.

Defendant contends that the trial court erred in denying his motion without a hearing. We agree. Initially, we note that, contrary to the trial court's finding, defendant's motion was not time barred. Defendant was convicted on July 27, 1998, when the sentence to the DOC was imposed. The motion from which defendant appeals was filed on July 26, 2001, within the three-year time limitation set forth under § 16-5-402, C.R.S.2002. Thus, defendant's motion was timely, and the court erred in denying it on this ground.

Further, although the People argue that defendant's claims concerning defense counsel's performance are successive, because the trial court considered the issues on the merits, we elect to address the issues raised on appeal without considering or resolving the various procedural contentions upon which the People rely. See *People v. Chambers*, 900 P.2d 1249 (Colo.App.1994).

The trial court shall grant a prompt hearing on a Crim. P. 35(c) motion unless the motion, files, and record establish that the defendant is not entitled to relief. *People v. Hartkemeyer*, 843 P.2d 92 (Colo.App.1992). The record as a whole must demonstrate that the court adequately advised the defendant about to enter a guilty plea concerning the penalties associated with the plea. This advisement includes informing the defendant of the direct consequences of the plea. Crim. P. 11; see *Craig v. People*, 986 P.2d 951 (Colo.1999).

A defendant may seek review under Crim. P. 35 if he or she alleges that the conviction was unconstitutionally obtained. Crim. P. 35(c)(2)(I). A guilty plea must be voluntarily, knowingly, and intelligently made to be valid and constitutional. *People v. Antonio-Antimo*, 29 P.3d 298 (Colo.2000).

Accordingly, although defendant denominates his motion as a motion to withdraw his guilty plea, we read it as contending that his conviction was unconstitutionally obtained because his guilty plea was not knowingly and intelligently made.

Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii) (2003). Murder is an aggravated felony. 8 U.S.C. § 1101(a)(43)(A) (2003). And, a discretionary waiver of deportation is no longer available to offenders who have been convicted of aggravated felonies. 8 U.S.C. § 1229(b) (2003). Thus, defendant is considered deportable. See *Rankine v. Reno,* 319 F.3d 93 (2d Cir.2003)(defendant convicted of second degree murder is deportable under 8 U.S.C.A. § 1227(a)(2)(A)(iii)).

These statutes were in effect at the time of defendant's plea. Defendant now asserts that deportation proceedings have been initiated against him.

The trial court is not required to advise a defendant sua sponte of potential federal deportation consequences of a guilty plea to a felony charge before accepting such plea. *People v. Pozo*, 746 P.2d 523 (Colo.1987). However, if the court affirmatively misinforms a defendant concerning collateral consequences and the defendant reasonably relies on such misrepresentation to his detriment, then the plea may be invalid. See *People v. Wilbur*, 890 P.2d 113 (Colo.1995)(trial court's erroneous interpretation of plea agreement upon which defendant reasonably and detrimentally relied entitled defendant to specific performance of agreement as presented by the court); *People v. Macrander*, 756 P.2d 356 (Colo.1988)(in determining whether defendant's interpretation of government's promise was reasonable, focus is on the meaning a reasonable person would give to the language of the agreement); *Daramy v. United States,* 750 A.2d 552 (D.C.2000)(reversal required where court misstated current status of immigration law to defendant during providency hearing).

Here, defense counsel knew that defendant was an alien legally residing in this country and informed the court that defendant had lived here since 1977, when he was admitted to the United States from Vietnam under an amnesty program. The court responded, "This guilty plea should have no effect then upon your

status in the country." Nothing further was said concerning defendant's immigration status. Further, because defense counsel was aware of defendant's immigration status, counsel should have investigated relevant law, informed defendant that his guilty plea could subject him to deportation proceedings, and alerted the court to its gratuitous, erroneous statement. See *People v. Pozo*, supra.

Defendant further asserted in his motion that the court's statement led him to enter his plea and that if he had known that he could be deported, he would not have done so. If defendant entered his guilty plea under the mistaken assurance that his plea would not affect his status as a legal resident in this country, then his plea may not have been made knowingly, voluntarily, and intelligently. Therefore, because questions have been raised concerning the validity of defendant's plea, the trial court erred in not holding a hearing on defendant's claims. Accordingly, the order is vacated, and the case is remanded for appointment of counsel and a hearing to determine whether defendant's plea counsel was effective, whether the providency court misled defendant, and whether defendant relied on the court's statement.

10. *People v. Carty,* 110 Cal.App.4th 1518 **LAWYER UNAWARE OF CONSEQUENCES** - *People v. Flores* (1974) 38 Cal.App.3d 484, 113 Cal.Rptr. 272 (Flores), held that a defendant had no right under *Boykin/Tahl* principles to a trial court advisement on the record concerning the collateral consequence that a guilty plea might subject the defendant to deportation, and a trial court did not err by denying a prejudgment motion to withdraw a guilty plea brought on the ground that the absence of such an advisement invalidated the plea. (Flores, supra, 38 Cal.App.3d at pp. 486-487, 113 Cal.Rptr. 272; see *People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1313, 68 Cal.Rptr.2d 786["[p]rior to the passage of section 1016.5, courts were not required to inform alien defendants of possible immigration consequences of their guilty pleas[,]" citing Flores.]) Later, in *People v. Superior Court* (Giron) (1974) 11 Cal.3d 793, 114 Cal.Rptr. 596, 523 P.2d 636 (Giron), our Supreme Court held that a trial court did not abuse its discretion by granting a defendant's prejudgment section 1018 motion to withdraw his negotiated guilty plea where the defendant, his counsel, and the court were unaware when the defendant pled guilty and accepted probation that the plea would subject him to deportation, and where he later received from immigration authorities an order to show cause why he should not be deported based on the conviction. (Giron, supra, 11 Cal.3d at pp. 795-798, 114 Cal.Rptr. 596, 523 P.2d 636.) Giron observed, however, that "We do not deem the thrust of [Giron's] ... argument to be that Giron was entitled as a matter of right to be advised of such

collateral consequences prior to the acceptance of his plea nor do we so hold." (Id. at p. 797, 114 Cal.Rptr. 596, 523 P.2d 636, italics added.) The seminal case of *People v. Wiedersperg* (1975) 44 Cal.App.3d 550, 118 Cal.Rptr. 755 (Wiedersperg), relying on Giron, held that a petition for a writ of error coram nobis adequately alleged grounds for relief where (1) the petition alleged that the defendant submitted the issue of his guilt for the underlying offense on a preliminary hearing transcript (a "slow plea") and was convicted, (2) immigration authorities later determined he should be deported based on the conviction, and (3) the defendant, his counsel, and the court were unaware at the time of the submission that it could lead to deportation. (*Wiedersperg*, supra, 44 Cal.App.3d at pp. 552-555, 118 Cal.Rptr. 755.)

11. *State v. Levkovich* ,2003 WL 21694582 (Minn.App. 1993) **ALTHOUGH DEPORTATION IS ONLY A COLLATERAL CONSEQUENCE OF GUILTY PLEA, BEING AFFIRMATIVELY MISINFORMED ABOUT THE COLLATERAL CONSEQUENCES OF A PLEA BY AN ATTORNEY MAY WARRANT GROUNDS TO WITHDRAW THAT PLEA**. Appellant Alexander Levkovich argues that he should be permitted to withdraw his guilty plea to terroristic threats on the grounds of (1) manifest injustice, or (2) ineffective assistance of counsel. We reject appellant's argument that there was not a sufficient factual basis for his plea but reverse and remand to the district court for a determination as to whether appellant's guilty plea was voluntary and intelligent. This court will reverse the district court's decision on a motion to withdraw a guilty plea only if the district court abused its discretion. *Kim v. State*, 434 N.W.2d 263, 266 (Minn.1989). The ultimate decision [to allow a defendant to withdraw a guilty plea] is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion. Under Minn. R.Crim. P. 15.05, sub. 1 (2000), a defendant may withdraw a guilty plea after sentencing only if the defendant can show "that withdrawal is necessary to correct a manifest injustice." If a guilty plea is not "accurate, voluntary, and intelligent (i.e. knowingly and understandingly made)," manifest injustice occurs and the plea may be withdrawn. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn.1997) (citation omitted). In a post-conviction proceeding, the burden is on the petitioner to prove by a preponderance of the evidence that withdrawal of the guilty plea is warranted. Minn.Stat. § 590.04, subd. 3 (2000). Voluntary and Intelligent The intelligent requirement ensures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty. *Brown v. State*, 449 N.W.2d 180, 182 (Minn.1989). The voluntariness requirement of a valid plea ensures that a defendant did not plead guilty because of improper

pressures or inducements. Appellant argues that his plea was not voluntarily or intelligently made because his attorney misinformed him about the deportation consequences of his guilty plea. Appellant was charged with one count of making terroristic threats and one count of fourth-degree assault. Appellant claims in his affidavit that his attorney advised him to plead guilty to one count of making terroristic threats because that would increase appellant's chances of receiving a misdemeanor sentence. Appellant then states in his affidavit that his attorney informed him that a guilty plea would not hurt his case in the immigration removal proceedings that were already underway prior to appellant's arrest. Based on this information from his attorney, appellant states that he agreed to plead guilty to one count of making terroristic threats. Following the plea, appellant received a misdemeanor sentence.

But the record indicates that appellant's conviction for making terroristic threats against a police officer did hurt him in his immigration removal proceedings. The court presiding over the immigration removal proceedings denied appellant's request for relief, stating that appellant's conviction for terroristic threats against a police officer was a serious negative factor in his removal case. Because appellant claimed to be misinformed about the deportation consequences of his guilty plea, appellant brought a motion requesting to withdraw his guilty plea. The district court acknowledged in its memorandum denying appellant's motion that both appellant's attorney and the sentencing judge "were under the impression that by handling the plea as a gross misdemeanor they were helping to prevent the petitioner from being deported" and that "[i]n this they were apparently mistaken." Then, citing *Alanis v. State*, 583 N.W.2d 573 (Minn.1998), the court concluded that [t]he fact that neither judge nor defense counsel advised the defendant accurately that he could be deported if convicted of even gross misdemeanor terroristic threats does not render defendant's plea to the charge involuntary.

But the holding in *Alanis* does not apply to the facts here. *Alanis* determined that because deportation did not flow definitely, immediately, and automatically from a criminal defendant's conviction arising from a guilty plea, it was only a collateral, not a direct, consequence of a criminal defendant's conviction. Id. at 578. Therefore, *Alanis* held that the failure of an attorney to advise a criminal defendant of deportation consequences which might arise from a conviction resulting from a guilty plea did not create a manifest injustice warranting withdrawal of the guilty plea. Id. at 579.

Here, appellant does not argue that his attorney failed to advise him about the possibility of deportation. Rather, appellant claims, and the district court appears to accept, that he was misinformed about the deportation consequences

of his guilty plea. And although deportation is only a collateral consequence of appellant's plea, being affirmatively misinformed about the collateral consequences of a plea by an attorney may warrant grounds to withdraw that plea. See *Barragan v. State*, 583 N.W.2d 571, 572 (Minn.1998) (suggesting that in some cases a defendant may be permitted to withdraw a guilty plea when the defendant is misinformed about the deportation consequences of that plea); see also *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983) (holding that the defense attorney's misstatements about the collateral consequences of his plea deprived the defendant of the opportunity to make an informed, self-determined choice and thus vacated the guilty plea); *Beal v. State*, 51 S.W.3d 109, 112 (Mo.Ct.App.2001) (observing that although the issue of parole eligibility is a collateral matter, the distinction between direct and collateral consequences is unimportant and a different rule applies where counsel misinforms his client regarding a particular consequence and the client relies upon the misrepresentation in deciding to plead guilty); *United States v. Russell*, 686 F.2d 35, 41 (D.C.Cir.1982) (stating that while the government may not be required to inform defendants of collateral plea consequences such as deportation, the government does have an obligation not to mislead defendants about those consequences).

Here, although appellant stated at the guilty plea hearing that he understood that his guilty plea may have some immigration repercussions, he claims by affidavit that in a private conversation he had with his attorney off the record, he was informed by his attorney that his guilty plea would not hurt his case in the immigration removal proceedings. And importantly, the district court erred in basing its denial of appellant's motion solely on *Alanis*. We therefore remand this matter to the district court to determine, in such proceedings as the district court deems appropriate, whether appellant's plea was voluntary and intelligent in light of any alleged misinformation from his attorney. Because appellant is seeking to withdraw his guilty plea, the burden is on appellant to establish by a preponderance of the evidence that he was affirmatively misinformed and that any misinformation affected whether the plea was accurate, voluntary, and intelligent. To prevail on a claim of ineffective assistance of counsel, appellant must show two elements. First, he must show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). This requires a showing of errors so serious that counsel's representation fell below an objective standard of reasonableness. Id. at 687-88, 104 S.Ct. at 2064-65. Second, appellant must show prejudice. Id. at 692, 104 S.Ct. at 2067.

Appellant argues that he received ineffective assistance of counsel because his attorney misinformed appellant about the deportation consequences of his

guilty plea. But appellant fails to establish that the *Strickland* standards are met. Moreover, if appellant is able to establish on remand that he was affirmatively misinformed, this may provide sufficient grounds to vacate the guilty plea to correct a manifest injustice. Therefore, we need not determine whether misleading or misinforming appellant about the deportation consequences of his plea could result in conduct that falls below the standards established in *Strickland.* Reversed.

12. *State v. Rojas-Martinez*, 73 P.3d 967 (Utah App.,2003) **INEFFECTIVE ASSISTANCE OF COUNSEL GREAT CASE!!** Defendant argues the trial court erred in ruling that Defendant was afforded effective assistance of counsel and therefore erred in denying his motion to withdraw his guilty plea. "We review this claim as a matter of law." State v. Smith, 2003 UT App 52,¶ 12, 65 P.3d 648.S

Defendant contends he was denied his Sixth Amendment right to effective assistance of counsel because his counsel misstated the law regarding the deportation consequences of Defendant's guilty plea. See U.S. Const. Amend. VI. In deciding a claim for ineffective assistance of counsel, we apply the test set out in *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984). See, e.g., *State v. Martinez*, 2001 UT 12,¶ 16, 26 P.3d 203. "Under the *Strickland* test, an individual has been denied the effective assistance of counsel if: (1) counsel's performance was deficient below an objective standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant." Id.We have held that deportation is a "collateral consequence" of conviction. *State v. McFadden*, 884 P.2d 1303, 1304-05 (Utah Ct.App.1994). Thus, "an attorney's failure to inform a client of the deportation consequences of a guilty plea, without more, does not fall below an objective standard of reasonableness." *United States v. Couto*, 311 F.3d 179, 187 (2nd Cir.2002) (emphasis added); see *McFadden*, 884 P.2d at 1305.

However, a commonly recognized exception to this rule exists when an attorney affirmatively misrepresents deportation consequences to his or her client. See McFadden, 884 P.2d at 1305 n. 3 (noting exception exists but finding it inapplicable where attorney entirely failed to advise client on the subject of deportation); see also, e.g., *Couto*, 311 F.3d at 187-88; *El-Nobani v. United States*, 287 F.3d 417, 422 (6th Cir.2002) (finding plea legitimate "[b]ecause the government did not misrepresent to petitioner the consequences of his plea"); *People v. Correa*, 108 Ill.2d 541, 92 Ill.Dec. 496, 485 N.E.2d 307, 311 (1985); *People v. Soriano*, 194 Cal.App.3d 1470, 240 Cal.Rptr. 328, 336 (1987) (finding counsel ineffective where counsel merely warned

defendant there "might be immigration consequences to his guilty plea" (emphasis added)); *Roberti v. State*, 782 So.2d 919, 920 (Fla.Ct.App.2001) ("Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."). Under this exception, we conclude that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable." *Couto*, 311 F.3d at 188. This makes particular sense in light of the Supreme Court's recent analysis in *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). **Citing the amicus brief for the National Association of Criminal Defense Lawyers, the Court noted that "[e]ven if the defendant were not initially aware of [possible waiver of deportation under the Immigration and Nationality Act's prior] § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." Id., 533 U.S. at 323 n. 50, 121 S.Ct. at 2291 n. 50 (emphasis added). The Court also noted that "the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of conviction, defense counsel 'should fully advise the defendant of these consequences.' " Id., 533 U.S. at 323 n. 48, 121 S.Ct. at 2291 n. 48 (citation omitted). Further, "[d]eportation, although collateral, is, nonetheless, a drastic consequence.** In most cases this collateral consequence is more severe than the penalty imposed by the court in response to the plea." *People v. Correa*, 108 Ill.2d 541, 92 Ill.Dec. 496, 485 N.E.2d 307, 311 (1985). Because of this, an attorney's affirmative misstatement on the matter presents an objectively unreasonable deficiency.

Here, the trial court found that counsel told Defendant "that his guilty plea and conviction could lead to deportation, but it might or might not." (Emphasis added.) Defendant was convicted by guilty plea of sexual battery, a class A misdemeanor in Utah, see Utah Code Ann. § 76-9-702(3) (Supp.2002), and the alleged victim was a minor. This crime is considered an "aggravated felony" under 8 U.S.C.A. § 1101(a)(43)(A) (2002). [FN4] See *Guerrero- Perez v. INS,* 242 F.3d 727, 737 (7th Cir.2001) (concluding aggravated felonies can apply to state misdemeanor offenses); *United States v. Padilla-Reyes*, 247 F.3d 1158, 1162-63 (11th Cir.2001) (concluding "sexual abuse of a minor," which is an "aggravated felony," "includes acts that involve physical contact between the perpetrator and the victim as well as acts that do not"). Further, "because the 1996 amendments to the Immigration and Nationality Act eliminated all discretion as to deportation of non-citizens convicted of aggravated felonies, [Defendant's] plea of guilty mean[s] virtually automatic, unavoidable deportation." *Couto*, 311 F.3d at 183-84; see *United States v. Amador-Leal*, 276 F.3d 511, 516 (9th Cir.2002) ("[I]t is now virtually certain that an

aggravated felon will be [deported]."). Under section 1101(a)(43), "aggravated felony" includes "sexual abuse of a minor." 8 U.S.C.A. § 1101(a)(43)(A) (2002). Here, the INS has initiated deportation proceedings against Defendant, and the State does not challenge the conviction's classification as an "aggravated felony." Therefore, by advising Defendant he "might or might not" be deported, Defendant's counsel affirmatively misrepresented the deportation consequences of Defendant's plea, and thus counsel's "performance was deficient below an objective standard of reasonable professional judgment." *Martinez,* 2001 UT 12 at ¶ 16, 26 P.3d 203.

Defendant must also meet the prejudice prong of the *Strickland* test, which requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at ¶ 17 (quotations and citation omitted). In Defendant's affidavit supporting his motion to withdraw his guilty plea, he stated that he "would not have pleaded guilty" had he known he would be deported. Instead, he "would have gone to trial [to] prove [his] innocence."

The record does not conflict with this testimony, and the State does not challenge it. Thus, we conclude counsel's representation prejudiced Defendant. We conclude the trial court erred in ruling that Defendant was afforded effective assistance of counsel and therefore erred in denying his motion to withdraw his guilty plea. We reverse and remand for proceedings consistent with this opinion.

FN5. Defendant also argues his guilty plea entered pursuant to incompetent advice of counsel is "involuntary" and therefore invalid. We need not address this issue, for "[a]n 'accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by that plea because a plea of guilty is valid only if made intelligently and voluntarily.' " *United States v. Couto*, 311 F.3d 179, 187 (2nd Cir.2002) (quoting United *States v. George*, 869 F.2d 333, 335- 36 (7th Cir.1989)) (additional citation omitted).

VII. APPLICATION TO GENERAL SESSIONS COURT

1. *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987) (all courts, including general sessions courts, must comply with the express requirements of the Rules of Criminal Procedure).

2. There are no petitions for post-conviction relief in general sessions court. T.C.A. § 40-30-104(a) provides that "petitions challenging misdemeanor convictions not in a court of record shall be filed in a court of record having criminal jurisdiction in the county in which the conviction was obtained."

VIII. POST-CONVICTION PROCEDURE/TIME

1. Prisoner may petition for post-conviction relief within one year of the date of the final action of the highest state appellate court to which the appeal is taken or, if no appeal is taken, within one year of the date on which the judgment becomes final or consideration of such petition shall be barred. T.C.A. § 40-30-102.

2. Exception may exist where a prisoner shows the inability to manage his personal affairs or to understand his legal rights and liabilities. *State v. Nix*, 40 S.W.3d 459 (Tenn. 2001).

3. *State v. McKnight*, 51 S.W.3d 559 (Tenn. 2001) (the period for filing a petition for post-conviction relief was tolled as to the defendant, who argued that the DUI sentence had expired, but did not receive notice to start serving the sentence until two months after the limitations had expired).

4. *Paul v. State*, 76 S.W.3d 926 (Tenn. Crim. App. 2001) (prisoners pro se petition delivered to the prison authorities was timely even though the prison officials did not mail it until later).

IX. EXPIRATION OF SENTENCE DOES NOT PROHIBIT POST-CONVICTION RELIEF:

1. *Ellison v. State*, 549 S.W.2d 691 (Tenn. Crim. App. 1976) (post-conviction is permitted even when a petitioner has served his sentence and is no longer on parole; if there is a possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction then post-conviction is proper).

2. *Holt v. State*, 489 S.W.2d 845 (Tenn. Crim. App. 1972) (discharge of petitioner upon expiration of his sentence does not bar his right to post-conviction relief where the crime for which he was convicted is infamous and could be proved as a prior conviction under the habitual criminal law).

X. EXCEPTIONS NOT ALLOWED

1. The fact that a defendant was incarcerated in another state did not affect the running of the statute of limitations for filing post-conviction relief. *Phillips v. State*, 890 S.W.2d 37 (Tenn. Crim. App. 1994).

2. *State v. Phillips*, 904 S.W.2d 123 (Tenn. Crim. App. 1995) (petitioner claims that a lawyer's advice against filing a petition constitute ineffective assistance of counsel and gave him the right to file regardless of the expiration of the limitation period was not valid since he had a reasonable opportunity to seek relief before that time and the statute of limitation was not tolled).

3. *Brown v. State*, 928 S.W.2d 453 (Tenn. Crim. App. 1996) (ignorance of the statute of limitation was not an excuse).

XI. OTHER POSSIBLE EXCEPTIONS

1. Retroactive application of new rule. T.C.A. § 40-30-102(b) provides that a court may consider a late filed petition if the claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial if retroactive application of that right is required. Such petition must be filed within one year of the ruling of the highest state court establishing a constitutional right.

2. A claim may also be filed after one year if the claim in the petition "is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted."

3. Another exception exists where the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence and the previous conviction was subsequently invalid in which case the petition must be filed within one year of the finality of the ruling holding the previous conviction to be invalid.

4. Petition for post-conviction relief may be "reopened" under the limited circumstances set forth in T.C.A. § 40-30-117 dealing with retroactive rulings, scientific evidence and related matters. This is designed to allow a pending

petition for post-conviction relief to be amended or altered or reopened where new rulings are in effect at the time.

XII. GROUNDS FOR RELIEF

1. The only ground for relief permitted in a post-conviction relief petition is for a constitutional violation. T.C.A. § 40-30-103. Usually this deals with illegal guilty plea or ineffective assistance of counsel.

XIII. TECHNICAL REQUIREMENTS

1. The petition must be filed in the court of record. It must be under oath all as required by T.C.A. § 40-30-104.

2. Designation of judge. The judge is now assigned by presiding judge.

3. Preliminary consideration and preliminary order entered by trial court pursuant to T.C.A. § 40-30-106.

XIV. ANSWER OF STATE

1. The district attorney will represent the state and must file an answer or other responsive pleading within 30 days. T.C.A. § 40-30-108 may file a motion to dismiss based on statute of limitations or other defenses.

2. Pre-hearing procedure is required within 90 days as required by T.C.A. §40-30-109.

XV. HEARING

1. The petitioner must appear at the post-conviction hearing and "give testimony at the evidentiary hearing if such petition raises substantial questions of fact as to the events in which the petitioner participated, unless the petitioner is incarcerated out-of-state in which case the trial judge may permit the introduction of an affidavit or deposition of the petitioner and shall permit the state adequate time to file any affidavits or depositions in response to the state."

XVI. BURDEN OF PROOF

1. The petitioner has the burden of proving all allegations of fact by clear and convincing evidence. "There is a rebutable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived."

XVII. FINAL DISPOSITION

1. Trial court must rule on petition within 60 days of conclusion of the proof.

XVIII. RULES OF POST-CONVICTION PROCEDURE

I. Rule 28 of the Supreme Court Rules implements the statutory provisions. Discovery is regulated by Rule 16, Tenn. R. of Crim. Proc.

XIX. ALTERNATIVES TO POST-CONVICTION RELIEF

1. WRIT OF ERROR CORAM NOBIS

Trial courts may grant a criminal defendant a new trial following a judgment of conviction under limited circumstances through the extraordinary remedy offered by a writ of error coram nobis. Tenn.Code Ann. § 40-26-105.; *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn.1999). A writ of error coram nobis may be granted where the defendant establishes the existence of newly discovered evidence relating to matters litigated at trial if the defendant shows he was without fault in failing to present the evidence at the proper time, and if the judge determines the evidence may have resulted in a different judgment had it been presented to the jury. Tenn.Code Ann. § 40-26-105; Mixon, 983 S.W.2d at 668.

A writ of error coram nobis must be filed within one year after the judgment becomes final in the trial court, which is thirty days after judgment is entered or, if a post-trial motion is filed, upon entry of an order disposing of the post-trial motion. Tenn.Code Ann. § 27-7-103; Mixon, 983 S.W.2d at 670.

In the instant case, there is no question that petitioner's motion, filed approximately five years after judgment was final in the trial court, was clearly outside the statute of limitations. However, our state's appellate courts have held due process may require that the

statute of limitations for filing a petition for writ of error coram nobis be tolled. See *Workman v. State*, 41 S .W.3d 100, 103 (Tenn.2001) (holding due process required tolling of the statute of limitations where "Workman's interest in obtaining a hearing to present newly discovered evidence that may establish actual innocence of a capital offense far outweighs any governmental interest in preventing the litigation of stale claims"); *State v. Ratliff*, 71 S.W.3d 291, 298(Tenn.Crim.App.2001) (holding due process required tolling of the statute of limitations where the petition was filed fourteen days late and the "great weight of the evidence against [the petitioner]" came from the victim, who recanted her testimony).

2. MOTION TO ALTER CLERICAL MISTAKE

A clerical mistake in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after notice, if any, as the court orders. Rule 36, Tenn. R. of Crim. Proc.

- END -