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Tennessee Rule of Criminal Procedure 36.1's New Clothes: How the Tennessee Supreme Court's Opinion in *State v. Brown* Limited the Inherent Authority of Trial Courts to Correct Illegal Sentences by Overlooking the Plain Language of Rule 36.1 and the "Jurisprudential Context" from Which Rule 36.1 Developed

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Cover Page Footnote

Jason R. Smith is a law clerk to Judge D. Kelly Thomas, Jr., of the Tennessee Court of Criminal Appeals. He graduated from The University of Tennessee College of Law, *summa cum laude* and Order of the Coif, in 2009. Prior to clerking for Judge Thomas, he was a research attorney at Butler, Vines & Babb, PLLC in Knoxville, TN. Mr. Smith would like to thank E. Caitlin Heath, his friend and former colleague, who read an early draft of this article and whose comments were invaluable. The views and opinions expressed in this article are Mr. Smith's own and in no way should be construed as reflecting the views or opinions of Judge Thomas or the Tennessee Court of Criminal Appeals.

ARTICLE

**TENNESSEE RULE OF CRIMINAL PROCEDURE 36.1’S NEW
CLOTHES**

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BROWN LIMITED THE INHERENT AUTHORITY OF TRIAL COURTS
TO CORRECT ILLEGAL SENTENCES BY OVERLOOKING THE PLAIN
LANGUAGE OF RULE 36.1 AND THE “JURISPRUDENTIAL
CONTEXT” FROM WHICH RULE 36.1 DEVELOPED

*By: Jason R. Smith**

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I. Introduction

On July 1, 2013, Tennessee Rule of Criminal Procedure 36.1 went into effect.¹ The stated purpose for Rule 36.1 was straightforward: “to provide a mechanism for the defendant or the State to seek to correct an illegal sentence.”² To further effectuate that purpose, Tennessee Rule of Appellate Procedure 3 was also amended to reflect the right of a defendant or the State to appeal an adverse Rule 36.1 ruling.³ Both purposes were designed to correct flaws in the prior methods used to correct illegal sentences.⁴ But then something strange happened. By late August of 2015, there had been over seventy-five opinions filed by the Tennessee Court of Criminal Appeals dealing with Rule 36.1 motions.⁵ Most of these Rule 36.1 motions were “filed by inmates in state or federal custody” long after the challenged sentences “should have been fully served.”⁶ Most of these cases involved claims “of an illegal concurrent sentence.”⁷ Why were large numbers of prisoners filing to correct illegal

¹ TENN. R. CRIM. P. 36.1 (2013) (amended 2016).

² TENN. R. CRIM. P. 36.1 (2013), Advisory Comm’n Cmt. (amended 2016).

³ *Id.*

⁴ *See, e.g.,* State v. Brown, 479 S.W.3d 200, 208 (Tenn. 2015) (noting that prior to the enactment of Rule 36.1 the State “had no mechanism for seeking to correct illegal sentences”); State v. Moody, 160 S.W.3d 512, 516 (Tenn. 2005) (noting that direct appeal was not authorized for the dismissal of a common law motion to correct an illegal sentence).

⁵ State v. Taylor, NO. W2014-02446-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 849, at *29–30 (Tenn. Crim. App. Oct. 13, 2015) (Holloway, J., concurring).

⁶ *Id.* at *30.

⁷ *Id.*

sentences that were shorter than what had been statutorily mandated?

The answer to that question laid in subsection (c)(3) of the original text of Rule 36.1, which provided that if “the illegal sentence was entered pursuant to a plea agreement” and “the illegal provision was a material component of the plea agreement,” the trial court was required to give the defendant “an opportunity to withdraw his or her plea” and to reinstate the original charge against the defendant if the defendant chose to withdraw the plea.⁸ Additionally, the original text of Rule 36.1 simply stated that an illegal sentence could be corrected “at any time.”⁹ Prisoners began challenging sentences that had long ago expired in hopes that they would be allowed to withdraw their pleas and, ultimately, nullify their convictions, which had been used to enhance other sentences. The floodgates had been opened.

The Tennessee Court of Criminal Appeals quickly fractured over how to interpret Rule 36.1. Some members of that court interpreted Rule 36.1 as allowing for the correction of an illegal sentence even after it had expired.¹⁰ Other members of the court concluded that the doctrine of mootness prevented Rule 36.1 from being used to challenge

⁸ TENN. R. CRIM. P. 36.1(c)(3) (2013) (amended 2016). This portion of Rule 36.1 reflects the long-standing case law in Tennessee that a defendant is entitled to withdraw a guilty plea when an illegal sentence is “a material element” of the plea agreement. *See, e.g., Summers v. State*, 212 S.W.3d 251, 258 (Tenn. 2007); *State v. Burkhardt*, 566 S.W.2d 871, 873 (Tenn. 1978). However, the inclusion of the ability to attack the underlying conviction in Rule 36.1 appears to be unique to Tennessee law. *See* 21A AM. JUR. 2D *Criminal Law* § 834 (2016) (noting that, generally, a motion to correct an illegal sentence “is not a vehicle for a collateral attack on a conviction” and that “the relief available . . . is correction of a sentence rather than reversal of a conviction”).

⁹ TENN. R. CRIM. P. 36.1(a) (2013) (amended 2016).

¹⁰ *State v. Talley*, NO. E2014-01313-CCA-R3-CD, 2014 WL 7366257, at *4 (Tenn. Crim. App. Dec. 26, 2014) (Woodall, P.J., concurring in the judgment) (stating that, to him, “‘at any time’ means what it says, whether before or after sentences have been fully served”).

an expired sentence.¹¹ In *State v. Brown*, the Tennessee Supreme Court rejected both of these interpretations and held that Rule 36.1 did not “expand the scope of relief available for illegal sentence claims” from what would have been available if such claims were brought in a petition for writ of habeas corpus and, therefore, did not “authorize the correction of expired illegal sentences.”¹² In essence, the Tennessee Supreme Court concluded that Rule 36.1 implicitly incorporated certain procedural requirements from the state’s habeas corpus law. With that, the floodgates were effectively closed.

This article will examine how the Tennessee Supreme Court’s opinions in *Brown* and its companion case, *State v. Wooden*,¹³ interpreted Rule 36.1 inconsistently with the principles of statutory construction and overlooked significant aspects of “the jurisprudential context from which Rule 36.1 developed.”¹⁴ Part II of this article will take a close look at Rule 36.1 and the reasoning of the *Brown* and *Wooden* opinions. Part III will examine the “jurisprudential context from which Rule 36.1 developed”¹⁵ and will discuss how it was actually much broader than described in *Brown*. Part IV will look at the plain language of Rule 36.1 and how it was inconsistent with the Court’s interpretation of the Rule in *Brown*. Part V will discuss how the definition of “illegal sentence” found in Rule 36.1 was not a definition exclusive to “the habeas corpus context”¹⁶ as was asserted in *Brown* and *Wooden*. Part VI will examine the potential “unconstitutional applications of Rule 36.1”¹⁷ described in *Brown* and how that concern did not apply to the facts at issue in *Brown*. Part VII will address the doctrine of

¹¹ *Id.* at *3.

¹² 479 S.W.3d 200, 213 (Tenn. 2015).

¹³ 478 S.W.3d 585 (Tenn. 2015).

¹⁴ *Brown*, 479 S.W.3d at 211.

¹⁵ *Id.*

¹⁶ *Id.* at 209.

¹⁷ *Id.* at 211.

mootness and how it, likewise, did not apply to the facts at issue in *Brown*. Part VIII will conclude the article by looking at the recent amendment of Rule 36.1 and how it will, for better or worse, bring the text of Rule 36.1 into agreement with the *Brown* and *Wooden* opinions.

II. Rule 36.1, *Brown*, and *Wooden*

A. Rule 36.1

The original text of Rule 36.1 provided that either the defendant or the State could, “at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.”¹⁸ An “illegal sentence” was defined for purposes of Rule 36.1 as a sentence “that is not authorized by the applicable statutes or that directly contravenes an applicable statute.”¹⁹ If the motion stated a “colorable claim” alleging an illegal sentence and the defendant was indigent, the original text of Rule 36.1 required the trial court to appoint an attorney to represent the defendant.²⁰ The movant was required to “promptly provide[.]” notice of the motion to the adverse party.²¹ The adverse party was given thirty days to file a written response to the motion, after which the trial court was required to “hold a hearing on the motion, unless all parties waive[d] the hearing.”²²

Subsection (c) of the original text of Rule 36.1 outlined the possible outcomes of a Rule 36.1 motion. If the trial court ultimately determined that the sentence was not

¹⁸ TENN. R. CRIM. P. 36.1(a) (2013) (amended 2016).

¹⁹ *Id.*

²⁰ TENN. R. CRIM. P. 36.1(b) (2013) (amended 2016).

²¹ *Id.*

²² *Id.*

illegal, it was required to file an order denying the motion.²³ Should the trial court determine that the sentence was illegal but that it was not entered pursuant to a guilty plea, it was required to enter “an amended uniform judgment document” reflecting “the correct sentence.”²⁴ If the illegal sentence was entered pursuant to a plea agreement, the trial court was then required to determine whether the illegal sentence “was a material component of the plea agreement.”²⁵ If the illegal sentence was not a material component of the plea agreement, the trial court was required to enter an amended judgment document reflecting the correct sentence.²⁶ Conversely, if the illegal sentence was a material component of the plea agreement, the trial court was required to “give the defendant an opportunity to withdraw his or her plea,” and if the defendant so chose, to enter an order “reinstating the original charge against the defendant.”²⁷ Rule 36.1 provided both the State and the defendant with the right to appeal from the trial court’s disposition of a Rule 36.1 motion.²⁸

B. State v. Wooden

The Tennessee Supreme Court examined Rule 36.1 for the first time in the companion cases of *State v. Wooden*²⁹ and *State v. Brown*.³⁰ In *Wooden*, the defendant filed a Rule 36.1 motion alleging that “the trial court increased his sentence above the statutory presumptive minimum sentence but failed to find enhancement factors justifying the

²³ TENN. R. CRIM. P. 36.1(c)(1) (2013) (amended 2016).

²⁴ TENN. R. CRIM. P. 36.1(c)(2) (2013) (amended 2016).

²⁵ TENN. R. CRIM. P. 36.1(c)(3) (2013) (amended 2016).

²⁶ TENN. R. CRIM. P. 36.1(c)(4) (2013) (amended 2016).

²⁷ TENN. R. CRIM. P. 36.1(c)(3) (2013) (amended 2016).

²⁸ TENN. R. CRIM. P. 36.1(d) (2013) (amended 2016).

²⁹ 478 S.W.3d 585, 586 (Tenn. 2015).

³⁰ 479 S.W.3d 200, 202 (Tenn. 2015).

increase.”³¹ The State responded by arguing that the defendant’s “allegations were not sufficient to state a colorable claim for relief under Rule 36.1.”³² In addressing Mr. Wooden’s argument on appeal, the court “determine[d] the meaning of two terms used in Rule 36.1—‘colorable claim’ and ‘illegal sentence.’”³³

After noting that “Rule 36.1 does not define ‘colorable claim,’”³⁴ the court referred to the definition of the term used “for purposes of post-conviction relief”³⁵ Specifically, the court noted that “colorable claim” was defined in the post-conviction context as “a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.”³⁶ The court concluded that “the term has the same general meaning in both [post-conviction and Rule 36.1] contexts,” and held that “for purposes of Rule 36.1, . . . ‘colorable claim’ means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1.”³⁷

With respect to the term “illegal sentence,” the court stated that the Rule 36.1 definition “mirror[ed] that [definition] adopted” in *Cantrell v. Easterling*, which “defin[ed] the term for purposes of habeas corpus petitions seeking correction of illegal sentences.”³⁸ The court held that “the definition of ‘illegal sentence’ in Rule 36.1 . . . [was] coextensive with, and not broader than, the definition of the term in the habeas corpus context,” and that holding

³¹ *Wooden*, 478 S.W.3d at 587.

³² *Id.* at 589.

³³ *Id.* at 587.

³⁴ *Id.* at 592.

³⁵ *Id.*

³⁶ *Id.* (internal quotation marks omitted) (quoting TENN. SUP. CT. R. 28, § 2(H)).

³⁷ *Id.* at 593.

³⁸ *Id.* at 594.

otherwise would require it “to ignore the plain language of Rule 36.1 and of *Cantrell*.”³⁹ The court ultimately concluded that Mr. Wooden’s allegations were “insufficient to state a colorable claim for relief under Rule 36.1”⁴⁰ because even if the trial court erred in enhancing his sentence, it was still “statutorily available for the offense of which he was convicted” and, therefore, not illegal.⁴¹

C. *State v. Brown*

In *Brown*, the defendant filed a Rule 36.1 motion alleging:

[T]hat his sentences [were] illegal because . . . the trial court failed to award him pretrial jail credit[,] . . . the trial court imposed six-year sentences . . . when his plea agreement called for three-year sentences[,] . . . and[,] [like the defendant in *Wooden*,] the trial court imposed sentences above the presumptive statutory minimum . . . without finding enhancement factors.⁴²

In the *Brown* opinion, the court framed the issues as “whether Rule 36.1 expand[ed] the scope of relief available for illegal sentence claims . . . [to allow for] correction of *expired* illegal sentences,” and whether the failure to award pretrial jail credit was “a colorable claim for relief . . . under Rule 36.1.”⁴³

Regarding the first issue, the State conceded that “Rule 36.1 [allowed for] the correction of expired illegal

³⁹ *Id.* at 594–95.

⁴⁰ *Id.* at 596 (internal footnote omitted).

⁴¹ *Id.*

⁴² *State v. Brown*, 479 S.W.3d 200, 202–03 (Tenn. 2015) (internal footnotes omitted).

⁴³ *Id.* at 205.

sentences” and agreed with Mr. Brown’s interpretation of Rule 36.1.⁴⁴ The court began its analysis of the issue by noting that the same rules used to construe statutes are used in construing rules of procedure like Rule 36.1.⁴⁵ In regard to interpreting procedural rules, the court stated that courts “need not look beyond the plain language [of the rule] to ascertain [its] meaning” if “the text is clear and unambiguous”⁴⁶ Put another way, courts “are constrained . . . to construe the language [of a rule] in a way that is natural, ordinary, and unforced.”⁴⁷ Additionally, courts “interpret a procedural rule in light of the law existing at the time the procedural rule was adopted.”⁴⁸ In doing so, “courts may presume that the [drafter] knows the ‘state of the law.’”⁴⁹ After stating these rules, the court then reviewed “the development of Tennessee law regarding the correction of illegal sentences”⁵⁰

The court noted that, generally, “a trial court’s judgment becomes final thirty days after entry . . . [or] upon [the] ‘entry of the order denying a new trial’” or another specified post-trial motion,⁵¹ and that “a trial court has no power to alter a final judgment.”⁵² The court also noted the exception to this rule recognized in the 1978 case *State v. Burkhart*, where the Tennessee Supreme Court “held that ‘a

⁴⁴ *Id.* at 210.

⁴⁵ *Id.* at 205 (citing *State v. Johnson*, 342 S.W.3d 468, 471 (Tenn. 2011)).

⁴⁶ *Id.* at 205 (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010)).

⁴⁷ *Moreno v. City of Clarksville*, 479 S.W.3d 795, 808 (Tenn. 2015).

⁴⁸ *Brown*, 479 S.W.3d at 205 (citing *Beecher*, 312 S.W.3d at 527).

⁴⁹ *Beecher*, 312 S.W.3d at 527 (quoting *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005)).

⁵⁰ *Brown*, 479 S.W.3d at 205.

⁵¹ *Id.* at 205–06 (quoting TENN. R. APP. P. 4(c)) (citing *State v. Green*, 106 S.W.3d 646, 648–49 (Tenn. 2003); *State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001); *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)).

⁵² *Id.* at 206 (citing *Green*, 106 S.W.3d at 648–49; *Peele*, 58 S.W.3d at 704; *Pendergrass*, 937 S.W.2d at 837).

trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final.”⁵³ However, when the Tennessee Rules of Criminal Procedure became effective in 1979, they did not “specify any procedure for making such requests,”⁵⁴ and “the Tennessee Rules of Appellate Procedure, which also became effective in 1979, did not authorize an appeal as of right from a trial court’s decision on a motion to correct an illegal sentence.”⁵⁵ Instead, defendants seeking to challenge an illegal sentence followed the procedure that was used in *Burkhart*, which was to file a motion to correct the illegal sentence in the trial court and then rely “upon the discretionary common law writ of certiorari to seek appellate review of trial court orders”⁵⁶

After reviewing the rule and procedure found in *Burkhart*, the court examined its 2005 opinion in *Moody v. State* and concluded that *Moody* reaffirmed “the rule announced in *Burkhart*—that an allegedly illegal sentence may be challenged at any time, even after it is final,” but that *Moody* rejected “the *Burkhart* procedure.”⁵⁷ The court quoted the holding in *Moody*, stating that “the proper procedure for challenging an illegal sentence at the trial level [was] through a petition for writ of habeas corpus, the grant or denial of which [could] then be appealed under the Rules of Appellate Procedure.”⁵⁸ In *Brown*, the court reasoned that

⁵³ *Id.* (quoting *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978)).

⁵⁴ *Id.* (citing *Cantrell v. Easterling*, 346 S.W.3d 445, 453 (Tenn. 2011)).

⁵⁵ *Id.* at 206 (internal footnote omitted) (quoting *State v. Moody*, 160 S.W.3d 512, 516 (Tenn. 2005)).

⁵⁶ *Id.* at 206 (citing *Moody*, 160 S.W.3d at 515). In fact, “[t]he common law writ of certiorari [is] codified in Tennessee Code Annotated section 27-8-101,” and is available when the trial court has acted “without legal authority and where no other ‘plain, speedy or adequate remedy’ is available.” *Moody*, 160 S.W.3d at 515 (quoting TENN. CODE ANN. § 27-8-101 (2000)) (citing *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002)).

⁵⁷ *Brown*, 479 S.W.3d at 206 (citing *Moody*, 160 S.W.3d at 516).

⁵⁸ *Id.*

“[b]y adopting habeas corpus as the mechanism for challenging illegal sentences, the *Moody* Court implicitly limited the scope of relief for illegal sentence claims to *unexpired* illegal sentences.”⁵⁹ The court reasoned this was because habeas corpus relief is statutorily limited to persons “imprisoned or restrained of liberty”⁶⁰ and that it had previously held, in the habeas corpus context, that “[u]se of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.”⁶¹

The *Brown* opinion asserted that it was “[a]gainst this jurisprudential backdrop” that Rule 36.1 was adopted.⁶² The court then turned to the text of Rule 36.1, noting that Rule 36.1 differed “from the procedure applicable to habeas corpus petitions challenging illegal sentences” in that it allowed the State to seek correction of an illegal sentence and that the motion was to be filed in the trial court where the judgment of conviction was entered rather than the county where the defendant was incarcerated.⁶³ The court asserted that Rule 36.1 was “identical to habeas corpus in other respects” but cited only its conclusion in *Wooden* to support the proposition that definition of “illegal sentence” in Rule 36.1 was “coextensive with, and actually mirror[ed], the definition [the] Court [had] applied to that term in the habeas corpus context.”⁶⁴

The court also reasoned that the phrase “at any time” had “no bearing on whether Rule 36.1 authorizes relief from

⁵⁹ *Id.*

⁶⁰ *Id.* at 206–07 (quoting TENN. CODE ANN. § 29-21-101(a) (2012)).

⁶¹ *Id.* at 207 (quoting *Hickman v. State*, 153 S.W.3d 16, 23 (Tenn. 2004)).

⁶² *Id.* at 208.

⁶³ *Id.* at 209 (quoting TENN. R. CRIM. P. 36.1(a)).

⁶⁴ *Id.* at 209 (citing *State v. Wooden*, 478 S.W.3d 585 (Tenn. 2015)).

expired illegal sentences.”⁶⁵ Instead, the court asserted that the phrase was designed to convey that illegal sentences could be challenged even after the judgment became final and that, like habeas corpus petitions, Rule 36.1 motions were “not subject to any statute of limitations.”⁶⁶ The court further asserted that the phrase “at any time” “simply [did] not answer the question of whether Rule 36.1 permit[ed] the correction of expired illegal sentences” because “the text of Rule 36.1 [was] silent” on this point.⁶⁷ The court admitted that “one possible interpretation of this silence [was] that Rule 36.1 authorize[d] the correction of expired illegal sentences”⁶⁸ However, the court rejected this interpretation, finding that it was “not reasonable in light of the expressed purpose of Rule 36.1, its language, and the jurisprudential background from which it developed.”⁶⁹ The court then reasoned that

Rule 36.1 was adopted “to provide a *mechanism* for the defendant or the State to *seek* to correct an illegal sentence.” Neither the comments to Rule 36.1 nor its text suggest that it was intended to expand the *scope of relief* available on such claims by permitting the correction of expired illegal sentences. Had such an expansion been intended, Rule 36.1 would have almost certainly included language clearly expressing that intent, given its inconsistency with this Court’s prior decisions refusing to grant habeas corpus relief for expired illegal sentences. That Rule 36.1 was not, in fact,

⁶⁵ *Id.* at 210.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

intended to expand the scope of relief for illegal sentence claims is evidenced by the portion of Rule 36.1 defining “illegal sentence” exactly as this Court had already defined that term in the habeas corpus context.⁷⁰

The court also asserted that interpreting Rule 36.1 to allow for the correction of expired sentences could “potentially produce absurd, and even arguably unconstitutional, results.”⁷¹ The court argued that if Rule 36.1 allowed the State to correct an illegally lenient sentence after it had been served, defendants would likely argue that such an action would violate constitutional protections against double jeopardy.⁷² The court concluded that the “outcry would be unimaginable” if the State were to “start using Rule 36.1 to jail untold numbers of citizens that by all indications [had] completely served their sentences. . . .”⁷³ As such, the court held “that Rule 36.1 [did] not expand the scope of relief [from what was available in a habeas corpus proceeding] and [did] not authorize the correction of expired illegal sentences.”⁷⁴

In so holding, the court rejected the argument propounded by some members of the Tennessee Court of Criminal Appeals that claims regarding expired sentences were moot. The Court noted that in the habeas corpus context, a challenged conviction’s “collateral consequences may prevent a habeas corpus petition from becoming moot,” but the fact that the claim is not moot does not mean that it

⁷⁰ *Id.* at 210–11 (internal citation omitted) (quoting TENN. R. CRIM. P. 36.1, Advisory Comm’n Cmt.).

⁷¹ *Id.* at 211.

⁷² *Id.* (citing *Commonwealth v. Selavka*, 14 N.E.3d 933, 941 (2014)).

⁷³ *Id.* at 211 (internal quotation marks omitted) (quoting *Lee v. State*, NO. W2014-00994-CCA-R3-CO, 2015 WL 2330063, at *5 (Tenn. Crim. App. May 13, 2015) (Williams, J., dissenting)).

⁷⁴ *Id.* at 211.

will fall “within the scope of habeas corpus jurisdiction.”⁷⁵ Because the court had interpreted Rule 36.1 as implicitly limiting the scope of relief for illegal sentence claims to unexpired illegal sentences, the court concluded that “[c]ollateral consequences may prevent a case from becoming moot in the traditional sense of the mootness doctrine, but Rule 36.1 [was] not an appropriate avenue for seeking relief from collateral consequences.”⁷⁶

The court then examined the issue of whether failure to award pretrial jail credit was a colorable claim for Rule 36.1 relief and held it was not.⁷⁷ The court concluded its opinion by addressing Mr. Brown’s claim that the trial court erroneously imposed six-year sentences rather than three-year sentences as provided by the plea agreement.⁷⁸ The court concluded that the mistake was a mere clerical error that could be corrected pursuant to Tennessee Rule of Criminal Procedure 36.⁷⁹ Rule 36 also contained the phrase “at any time.” The court reasoned that “[p]ermitting correction of the clerical error pursuant to Rule 36 despite the expiration of [the] sentence [did] not contravene [its]

⁷⁵ *Id.* at 211–12 n.12 (internal quotation marks omitted) (quoting *May v. Carlton*, 245 S.W.3d 340, 356 (Tenn. 2008) (Koch, J., dissenting)).

⁷⁶ *Id.* at 212 n.12.

⁷⁷ *Id.* at 212–13. The court did so despite the fact that the awarding of pretrial jail credits is statutorily mandated. TENN. CODE ANN. § 40-23-101(c) (2012). The court reasoned that pretrial jail credits did not alter the sentence itself; rather, they merely affected “the length of time a defendant is incarcerated.” *Brown*, 479 S.W.3d at 212. The court concluded, therefore, that the denial of pretrial jail credits could never render a sentence illegal. *Id.* at 213. Instead, a trial court’s failure to award pretrial jail credits could be challenged on direct appeal. *Id.* at 212–13. It remains to be seen whether this holding forecloses post-conviction or habeas corpus relief for defendants erroneously deprived of pretrial jail credits or is merely limited to Rule 36.1 relief.

⁷⁸ *Brown*, 479 S.W.3d at 213.

⁷⁹ *Id.*; see also TENN. R. CRIM. P. 36 (stating that a trial court “may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission”).

principal holding that Rule 36.1 [did] not authorize courts to grant *relief* from expired illegal sentences.”⁸⁰ The court further reasoned that “[c]orrecting clerical errors so that the record accurately reflects the sentence imposed [did] not amount to granting relief from expired illegal sentences.”⁸¹ As such, the court remanded the case to the trial court for correction of the clerical error pursuant to Rule 36.⁸²

III. “Jurisprudential Context” of Rule 36.1

A. Common Law Motions to Correct Illegal Sentences

As noted in Part II, the Tennessee Supreme Court first dealt with the issue of a trial court’s inherent power to correct illegal sentences in the 1978 case of *State v. Burkhart*.⁸³ At issue in *Burkhart* was the trial court’s failure to order, as mandated by statute, two sentences to be served consecutively.⁸⁴ Mr. Burkhart was convicted of “burglary in the first degree,” escaped from prison, was subsequently convicted for the escape, and sentenced to one year in prison running from the day of his conviction.⁸⁵ When the State Department of Correction realized that this, in effect, would allow the prisoner to serve his two sentences concurrently (contrary to Tennessee Code Annotated section 39-3802), it notified the prisoner that he would have to serve his sentence for the escape after his sentence for burglary concluded.⁸⁶ Mr. Burkart petitioned the trial court to prevent the State Department of Corrections from altering the terms of his sentence; however, the trial court, realizing its mistake,

⁸⁰ *Brown*, 479 S.W.3d at 213.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *State v. Burkhart*, 566 S.W.2d 871 (Tenn. 1978).

⁸⁴ *Id.* at 872.

⁸⁵ *Id.*

⁸⁶ *Id.*

denied the petition.⁸⁷ On appeal, the Tennessee Supreme Court held that the trial court had the inherent power to correct the defendant's illegal sentence, stating that "the judgment entered in the trial court . . . was in direct contravention of the express provisions of [a statute], and consequently was a nullity."⁸⁸ The court further stated that "the trial judge . . . had both the power, and the duty, to correct the judgment . . . as soon as its illegality was brought to his attention."⁸⁹ The court held that "[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final."⁹⁰

In *Burkhart*, the court did not state its rationale for holding that a trial court could correct an illegal sentence. However, the court did cite to several cases from other jurisdictions that establish the source of a trial court's power to correct illegal sentences.⁹¹ In *State v. Culver*, the New Jersey Supreme Court stated that a trial court's "power to punish criminal offenders . . . would seem naturally to include the power to correct the sentences imposed by it."⁹² The New Jersey Supreme Court then held that when a trial court has imposed an illegal sentence "the court's jurisdiction to impose a correct sentence [would not expire] until a valid sentence was imposed."⁹³ Likewise, the Iowa Supreme Court held in *State v. Shilinsky* that "[u]ntil a valid judgment [is] entered, the [trial] court [does] not exhaust its jurisdiction, and might be required to correct any

⁸⁷ *Id.*

⁸⁸ *Id.* at 873.

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *State v. Leathers*, 531 P.2d 901 (Or. 1975); *Frazier v. Langlois*, 240 A.2d 152 (R.I. 1968); *State v. Fountaine*, 430 P.2d 235 (Kan. 1967); *In re Sandel*, 412 P.2d 806 (Cal. 1966); *State v. Shilinsky*, 81 N.W.2d 444 (Iowa 1957); *State v. Culver*, 129 A.2d 715 (N.J. 1957)).

⁹¹ *Id.*

⁹² *Culver*, 129 A.2d at 720.

⁹³ *Id.* at 724.

irregularities by pronouncing a valid sentence and entering a valid judgment.”⁹⁴ This is so because, as noted by the Kansas Supreme Court in *State v. Fountaine*, “a void sentence in contemplation of law is non-existent.”⁹⁵ Therefore, as held by the Oregon Supreme Court in *State v. Leathers*, a trial court that has imposed an illegal sentence “has not exhausted its jurisdiction [because] it has in fact failed to pronounce any sentence.”⁹⁶ This reasoning regarding illegal sentences was in line with Tennessee case law of the time, which maintained that “where a judgment is void then there is no judgment and consequently the [trial] court does not lose jurisdiction over the matter.”⁹⁷ Yet, the court’s opinion in *Brown* made no mention of these cases in its discussion of the jurisprudential context of Rule 36.1.

B. Illegal Sentence Claims in the Years Between *Burkhart* and *Moody*

In the years following *Burkhart*, the Tennessee Supreme Court, on at least two occasions in *State v. Mahler*⁹⁸

⁹⁴ *Shilinsky*, 81 N.W.2d at 449 (internal quotation marks omitted) (quoting *Nelson v. Foley*, 223 N.W. 323, 324 (S.D. 1929)).

⁹⁵ *Fountaine*, 430 P.2d at 239 (internal quotation marks omitted) (quoting *United States v. Howell*, 103 F. Supp. 714, 718 (S.D.W. Va. 1952)).

⁹⁶ *State v. Leathers*, 531 P.2d 901, 303 (Or. 1975) (internal quotation marks omitted) (quoting *State v. Nelson*, 424 P.2d 223, 225 (Or. 1967)).

⁹⁷ *Tennessee ex rel. Underwood v. Brown*, 244 S.W.2d 168, 170 (Tenn. 1951). This reasoning was also in line with the purpose of the original text of Federal Rule of Criminal Procedure 35(a), which provided that a federal district court could “correct an illegal sentence at any time.” See *United States v. James*, 709 F.2d 298, 307–08 (5th Cir. 1983) (noting that Rule 35 was designed to continue the existing decisional law which recognized that a district court’s power to correct an illegal sentence “sprang from the court’s want of jurisdiction to impose [an] illegal sentence in the first place”).

⁹⁸ *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987).

and *McConnell v. State*,⁹⁹ addressed illegal sentence claims that had been raised as part of a petition for post-conviction relief. Again, the *Brown* opinion made no reference to these cases in its discussion of the jurisprudential context of Rule 36.1. Meanwhile, the Tennessee Court of Criminal Appeals was more vexed by the question of how to procedurally treat a motion to correct an illegal sentence. For example, in *State v. Reliford*,¹⁰⁰ a panel of the Court of Criminal Appeals addressed a defendant's appeal from the trial court's dismissal of his motion to correct his sentences.¹⁰¹ The *Reliford* opinion noted that there was no direct appeal as of right from the trial court's dismissal.¹⁰² However, citing the holding of *Burkhart*, the panel reasoned that "[l]ogic dictate[d] that some avenue of appeal [lay] from an adverse ruling of the trial court" and elected to treat the defendant's appeal as a common law petition for writ of certiorari.¹⁰³ Citing to *Mahler* and *McConnell*, the panel concluded that the defendant's sentence was illegal.¹⁰⁴ Specifically, the panel noted that "[s]entencing is jurisdictional and must be executed in compliance with the applicable legislative mandates" and that trial courts lack "the statutory authority to impose a sentence . . . that deviate[s] from the penalties proscribed by law."¹⁰⁵

In an opinion filed eleven days after *Reliford*, a separate panel of the Court of Criminal Appeals stated that "the appropriate procedure for challenging a void sentence

⁹⁹ *McConnell v. State*, 12 S.W.3d 795, 796 (Tenn. 2000).

¹⁰⁰ *State v. Reliford*, No. W1999-00826-CCA-R3-CD, 2000 WL 1473846 (Tenn. Crim. App. Oct. 2, 2000).

¹⁰¹ *Id.* at *1.

¹⁰² *Id.* at *2.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987)).

¹⁰⁵ *Id.* at *2 (citing *McConnell v. State*, 12 S.W.3d 795, 798–800 (Tenn. 2000)).

is a petition for habeas corpus relief.”¹⁰⁶ The panel reasoned that a petition for habeas corpus relief is “the appropriate procedure” because “[i]n cases arising from criminal convictions, the remedy of habeas corpus relief applies when the judgment is void.”¹⁰⁷ However, the panel then stated that “because an illegal sentence may be corrected at any time, [it did] not believe that the defendant’s failure to seek habeas corpus relief necessarily deprive[d] him of appellate review.”¹⁰⁸ Citing to *Reliford*, the panel concluded that a defendant could “pursue appellate review from the denial of a motion to correct an illegal sentence through the common law writ of certiorari.”¹⁰⁹ The panel ultimately declined to grant the defendant an appeal after concluding, on the merits, that his sentence was not illegal.¹¹⁰

Less than a year later, in April 2001, a third panel of the Court of Criminal Appeals addressed the procedural nature of illegal sentence claims in a published opinion,¹¹¹ *Cox v. State*.¹¹² In outlining its analysis of the issue, the *Cox* opinion stated that

¹⁰⁶ *State v. Jones*, No. M2000-00381-CCA-R3-CD, 2000 WL 1520012, at *2 (Tenn. Crim. App. Oct. 13, 2000) (citing *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. Sept. 21, 2000)). The long-standing rule in Tennessee is that “the writ of habeas corpus will issue only in the case of a void judgment or to free a prisoner after his term of imprisonment or other restraint has expired.” *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007) (citing *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992)).

¹⁰⁷ *Jones*, 2000 WL 1520012, at *2 (citing *Passarella v. State*, 891 S.W.2d 619, 626 (Tenn. Crim. App. 1994); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)).

¹⁰⁸ *Id.* at *2.

¹⁰⁹ *Id.* (citing *State v. Reliford*, No. W1999-00826-CCA-R3-CD, 2000 WL 1473846, at *2 (Tenn. Crim. App. Oct. 2, 2000)).

¹¹⁰ *Id.* at *3–4.

¹¹¹ Published opinions are controlling authority in Tennessee state courts until they are reversed or modified by a court of competent jurisdiction. TENN. SUP. CT. R. 4(G)(2).

¹¹² 53 S.W.3d 287 (Tenn. Crim. App. 2001).

[t]he key to analyzing these collateral attacks on sentences is to appreciate that the phrase “illegal sentence” as used in our caselaw [sic] is a term of art that refers to sentences imposed by a court that is acting beyond its jurisdiction—that is to say, sentences that result from void judgments. The upshot of our analysis [would] be that *habeas corpus* is the preferred, if not the only, method of collaterally attacking void sentences and that collateral attacks that assert lesser claims of merely erroneous or voidable sentences are generally doomed, unless by nature they fit within some other recognized form of action.¹¹³

This panel reasoned that “[t]he distinction made in *Mahler* and *Burkhart* between erroneous, voidable sentences . . . and illegal or void sentences . . . call[ed] to mind the scope of the writ of *habeas corpus*” and that “the phrase ‘illegal sentence’ [was] synonymous with the *habeas corpus* concept of a ‘void’ sentence.”¹¹⁴ Noting that “a claim that merely assert[ed] a void *sentence*, even though it may not assert a void *conviction*, [was] cognizable as a *habeas corpus* proceeding,” the panel concluded that “the better method of challenging illegal or void sentences [was] via an application for a writ of *habeas corpus*.”¹¹⁵ The panel further noted that “illegal or void sentence claims” sounding in a *habeas corpus* proceeding would “be subject to dismissal [for] fail[ing] to meet the procedural requirements” of such a

¹¹³ *Id.* at 291.

¹¹⁴ *Id.* at 291–92 (citing *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)).

¹¹⁵ *Cox*, 53 S.W.3d at 292 (citing *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000)).

proceeding.¹¹⁶ However, the panel recognized that an illegal sentence claim could be brought in a petition for post-conviction relief.¹¹⁷ Likewise, the panel recognized that, while they should “rarely be granted,” appeals via the common law writ of certiorari were available for claims that rose “to the level of illegality or voidness.”¹¹⁸

C. Habeas Corpus Cases

It was against this backdrop that the Tennessee Supreme Court issued its opinion in *Moody v. State*. In *Brown*, it is asserted that *Moody* stands as a rejection of “the *Burkhart procedure*” because “[b]y adopting habeas corpus as the mechanism for challenging illegal sentences, the *Moody* court implicitly limited the scope of relief for illegal sentence claims to *unexpired* illegal sentences.”¹¹⁹ Underpinning the *Brown* court’s reasoning is the assumption that *Moody* adopted habeas corpus as the exclusive procedural vehicle for challenging illegal sentences. However, a close reading of *Moody* indicates that may not be true.

The court in *Moody* took the “opportunity to clarify the proper procedure for seeking review of illegal sentence claims at both the trial level and on appeal.”¹²⁰ The court held that the *Cox* opinion’s “reliance on *Burkhart* as supporting certiorari review of the denial of a motion to correct an illegal sentence [was] misplaced” because *Burkhart* was decided prior to the adoption of the Rules of Appellate Procedure, which were “intended to replace the appellate court procedure that was governed by scattered provisions of the Tennessee Code and the rules and decisions

¹¹⁶ *Id.* at 293.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 294.

¹¹⁹ *State v. Brown*, 479 S.W.3d 200, 206 (Tenn. 2015).

¹²⁰ *State v. Moody*, 160 S.W.3d 512, 515 (Tenn. 2005).

of the appellate courts.”¹²¹ Noting that the Rules of Appellate Procedure did not “authorize a direct appeal of a dismissal of a motion to correct an illegal sentence[.]” *Moody* clarified “that the proper procedure *for challenging an illegal sentence* at the trial level [was] through a petition for writ of habeas corpus, *the grant or denial of which [could] then be appealed under the Rules of Appellate Procedure.*”¹²² The fact that the summary dismissal of a habeas corpus petition could be challenged on appeal was one of the key factors in the court’s holding. The court further clarified that because a defendant could use a habeas corpus proceeding to challenge an illegal sentence, “the writ of certiorari [was] not available to review an illegal sentence claim that [had] been presented through a motion.”¹²³

However, in so holding, the court noted that “[a] void or illegal sentence also [could] be challenged collaterally in *a post-conviction proceeding* when the statutory requirements are met.”¹²⁴ Concluding the opinion, the court restated its holding that “[a] habeas corpus action [was] the proper procedure for collaterally challenging an illegal sentence,” but then stated that “[a]lthough a trial court may correct an illegal sentence at any time, appellate courts may not review the denial of a motion to correct an illegal sentence through the common law writ of certiorari.”¹²⁵ These two aspects of the *Moody* opinion were not mentioned

¹²¹ *Id.* at 516 (citing *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978)).

¹²² *Id.* at 516 (emphasis added) (citing *Stephenson v. Carlton*, 28 S.W.3d 910, 912 (Tenn. 2000)).

¹²³ *Id.* at 516 (citing *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002)).

¹²⁴ *Id.* at 516 n.2 (emphasis added) (citing *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987)). Post-conviction relief is available “when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” TENN. CODE ANN. § 40-30-103 (2012).

¹²⁵ *Moody*, 160 S.W.3d at 516 (emphasis added).

by the court in *Brown*.¹²⁶ Contrary to the assertion in *Brown* that *Moody* established habeas corpus as the sole procedural vehicle for challenging an illegal sentence, *Moody* directly stated that illegal sentences could be challenged in a post-conviction proceeding as well as a habeas corpus proceeding.¹²⁷ Furthermore, *Moody* also directly stated that, while there was no method for direct appeal from a motion to correct an illegal sentence, trial courts continued to retain their inherent power to correct an illegal sentence at any time.¹²⁸

Two years after *Moody*, the Tennessee Supreme Court addressed whether an expired illegal sentence could be challenged in a habeas corpus proceeding in *Summers v. State*.¹²⁹ The court began its analysis by restating the rule that “[a] sentence imposed in direct contravention of a statute is void and illegal.”¹³⁰ The court then declared that “[a] trial court may correct an illegal or void sentence at any time” before reaffirming the holding of *Moody* that “[a] habeas corpus petition, rather than a motion to correct an illegal sentence, is the proper procedure for challenging an illegal sentence.”¹³¹ However, in restating these principles, the court again noted that an illegal sentence could also be challenged in a post-conviction proceeding “when the statutory requirements are met, including the one-year limitations period.”¹³²

The *Summers* court then addressed the question of whether an expired illegal sentence could be challenged in a habeas corpus proceeding.¹³³ The court noted that a

¹²⁶ See *State v. Brown*, 479 S.W.3d 200, 206 (Tenn. 2015).

¹²⁷ *Moody*, 160 S.W.3d at 516.

¹²⁸ *Id.*

¹²⁹ *Summers v. State*, 212 S.W.3d 251, 256 (Tenn. 2007).

¹³⁰ *Id.* (citing *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000)).

¹³¹ *Id.* at 256 (citing *Moody*, 160 S.W.3d at 516).

¹³² *Id.* at 256 n.3 (citing TENN. CODE ANN. § 40-30-102(a) (2006); *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987)).

¹³³ *Id.* at 257.

petitioner seeking habeas corpus relief must be “imprisoned or restrained of liberty.”¹³⁴ Such status has been deemed “[a] statutory prerequisite for eligibility to seek habeas corpus relief”¹³⁵ The court explained that the term “imprisoned” in the habeas corpus statutes referred “to actual physical confinement or detention.”¹³⁶ The court further explained that “restrained of liberty” was “a broader term and encompass[ed] situations beyond actual physical custody[.]” but only if “the challenged judgment itself impose[d] a restraint on the petitioner’s freedom of action or movement.”¹³⁷ As such, the court concluded that habeas corpus relief would not lie “to address a conviction after the sentence on the conviction [had] been fully served.”¹³⁸ However, the court ultimately determined this rule did not bar Mr. Summers’s petition because his total effective sentence had not been served and had not expired.¹³⁹

In the years following *Summers*, the court in *Cantrell v. Easterling*¹⁴⁰ “returned to the topic of illegal sentences [to] provide a more comprehensive analysis of sentencing errors and a more general definition of illegal sentences.”¹⁴¹ *Cantrell* will be discussed in more detail later in this article, but for purposes of this section it is important to note that in *Cantrell* the court again stated that a defendant could challenge an illegal sentence in a post-conviction proceeding “when the statutory requirements are met.”¹⁴² The

¹³⁴ *Id.* (internal quotation marks omitted) (quoting TENN. CODE ANN. § 29-21-101 (2000)).

¹³⁵ *Benson v. State*, 153 S.W.3d 27, 31 (Tenn. 2004).

¹³⁶ *Summers*, 212 S.W.3d at 257 (citing *Hickman v. State*, 153 S.W.3d 16, 22 (Tenn. 2004)).

¹³⁷ *Id.* (citing *Hickman*, 153 S.W.3d at 22).

¹³⁸ *Id.* (citing *Hickman*, 153 S.W.3d at 23–24).

¹³⁹ *Id.* at 258.

¹⁴⁰ *Cantrell v. Easterling*, 346 S.W.3d 445, 445 (Tenn. 2011).

¹⁴¹ *State v. Brown*, 479 S.W.3d 200, 208 (Tenn. 2015) (citing *Cantrell*, 346 S.W.3d at 448–55).

¹⁴² *Id.* at 453 n.7 (internal quotation marks omitted) (quoting *State v. Moody*, 160 S.W.3d 512, 516 n.2 (Tenn. 2005)).

statements in *Summers* and *Cantrell* demonstrate that, even after the court in *Moody* found that habeas corpus was the “proper procedure” for challenging an illegal sentence, the court continued to recognize the availability of post-conviction proceedings to challenge an illegal sentence.¹⁴³ More recently, the court in *State v. Brown* discussed the details of *Moody*,¹⁴⁴ *Summers*,¹⁴⁵ and *Cantrell*¹⁴⁶ at length, but it made no mention of the fact that all three opinions contained similar statements to that effect.

The court’s reasoning in *Brown*, maintaining that “the *Moody* Court implicitly limited the scope of relief for illegal sentence claims to *unexpired* illegal sentences[,]”¹⁴⁷ is highly questionable in light of the fact that the *Moody*, *Summer*, and *Cantrell* decisions never adopted habeas corpus proceedings as the *exclusive* mechanism for challenging an illegal sentence. Habeas corpus and post-conviction have long been recognized as the “two primary procedural avenues available in Tennessee to collaterally attack a conviction and sentence which have become final.”¹⁴⁸ The Tennessee Supreme Court “[has] rejected and will continue to reject efforts to intertwine the two procedures.”¹⁴⁹ For example, the court held in *Taylor v. State* that “the statute of limitations for filing post-conviction petitions in no way precludes the filing of petitions for habeas corpus which contest void judgments.”¹⁵⁰ Similarly, in *Summers*, the court “declin[ed] to incorporate the liberal procedural safeguards of the Post-Conviction Procedure Act

¹⁴³ *Id.* at 206 (citing *Moody*, 160 S.W.3d at 516).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 207.

¹⁴⁶ *Id.* at 208.

¹⁴⁷ *Id.* at 206.

¹⁴⁸ *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (citing *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992) (holding that “[t]hese procedural vehicles are theoretically and statutorily distinct.”)).

¹⁴⁹ *Summers v. State*, 212 S.W.3d 251, 261 (Tenn. 2007).

¹⁵⁰ *Taylor*, 995 S.W.2d at 84.

into the provisions governing habeas corpus.”¹⁵¹ Rather than habeas corpus being the only method to challenge an illegal sentence, as implied in the *Brown* opinion, there were at least two separate and distinct procedural vehicles to challenge an illegal sentence during the time between the *Moody* decision and the enactment of Rule 36.1.

D. Post-Conviction Proceedings and Expired Sentences

In addition to the fact that habeas corpus was not the sole mechanism for challenging an illegal sentence, a separate factor, related to the ability to challenge an illegal sentence via a post-conviction proceeding as stated in *Moody*, *Summers*, and *Cantrell*, undermines the court’s reasoning in *Brown* that “the *Moody* Court implicitly limited the scope of relief for illegal sentence claims to *unexpired* illegal sentences.”¹⁵² In 1977, the Tennessee Supreme Court held in *State v. McCraw* that the term “in custody” found in the Post-Conviction Relief Act meant “any possibility of restraint on liberty.”¹⁵³ The court then reiterated several factors concerning the mootness of a habeas petition post-conviction, including the possibility that a conviction could be used in the future to prevent a defendant from engaging “in certain businesses,” losing the right to vote, losing the ability to serve as a juror, and the possibility that the conviction “could impeach the petitioner’s character at any future criminal trial or be used as a basis for infliction of greater punishment on [the] petitioner.”¹⁵⁴

¹⁵¹ *Summers*, 212 S.W.3d at 261.

¹⁵² *Brown*, 479 S.W.3d at 206 (emphasis in original).

¹⁵³ *State v. McCraw*, 551 S.W.2d 692, 694 (Tenn. 1977).

¹⁵⁴ *Id.* (citing *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968); *Sibron v. New York*, 392 U.S. 40, 55–56 (1965)); *see also* *Hickman v. State*, 153 S.W.3d 16, 23 (Tenn. 2004) (narrowing the definition of “restrained of liberty” to situations where “the challenged judgment itself imposes a restraint upon the petitioner’s freedom of action or movement.”); Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency*,

In 1991, the court declined the State’s “invitation to reverse *McCraw*.”¹⁵⁵ Shortly after that, a panel of Tennessee Court of Criminal Appeals stated that *McCraw* stood for the proposition “that one may file a post-conviction petition, even after fully serving a sentence, as long as the petitioner remain[ed] subject to collateral legal consequences due to the challenged conviction.”¹⁵⁶ In fact, the Tennessee Court of Criminal Appeals has reviewed the denial of post-conviction relief because the petitioner’s prior sentences had been used to enhance his current sentence for a federal conviction even though the challenged sentences expired over ten years prior to its review.¹⁵⁷ The Tennessee Court of Criminal Appeals has recognized as recently as 2015 that “a petition for post-conviction relief [was] permitted to attack collaterally an expired sentence when ‘the challenged conviction [was] used to enhance punishment.’”¹⁵⁸

More importantly, the Tennessee Supreme Court in *State v. Hickman* recognized that “the language ‘imprisoned or restrained of liberty’ used in . . . the habeas corpus statute[s] was not co-extensive with the ‘person in custody’

Legitimacy, and Purpose to “Collateral” Punishment Policy, 10 HARV. L. & POL’Y REV. 123, 163 (2016) (analyzing the NICCC data and finding that Tennessee has 888 “post-release hidden” sentencing laws, fifty-eight percent of which have mandatory or automatic execution and eighty-three percent of which remain in effect for the remainder of the defendant’s life). Based on these findings, perhaps it is time to reexamine the issue of whether collateral consequences of a conviction can justify a habeas corpus challenge even after the conviction has “expired” given the life-long effects and voluminous number of collateral consequences in this state. Such a question, however, is beyond the scope of this article.

¹⁵⁵ *Albert v. State*, 813 S.W.2d 426, 427 (Tenn. 1991).

¹⁵⁶ *State v. Clemons*, 873 S.W.2d 1, 2 (Tenn. Crim. App. 1992).

¹⁵⁷ *Tyrice L. Sawyers*, NO. M2007-02867-CCA-R3-PC, 2008 WL 5424031, at *1 (Tenn. Crim. App. Dec. 31, 2008).

¹⁵⁸ *Massengill v. State*, NO. E2015-00501-CCA-R3-PC, 2015 WL 7259279, at *2 (Tenn. Crim. App. Nov. 17, 2015) (quoting *State v. McClintock*, 732 S.W.2d 268, 272 (Tenn. 1987)).

language of the [post-conviction statutes].”¹⁵⁹ The court reaffirmed that the term “in custody” “has long been broadly construed to permit persons to collaterally challenge, by means of a post-conviction petition, a judgment of conviction that later may be used to enhance a sentence on another conviction,” and that “[s]uch challenges have been allowed *even if the sentence on the challenged conviction has been served or has expired at the time of the post-conviction petition is filed.*”¹⁶⁰ The *Brown* court cited *Hickman* for the proposition that “habeas corpus relief may not be granted after [the] expiration of a sentence,”¹⁶¹ but the court’s discussion did not refer to *Hickman*’s statement that a petitioner “may be ‘in custody’ for purposes of the Post-Conviction Procedure Act, but he is neither ‘imprisoned’ nor ‘restrained of liberty’ for purposes of seeking habeas corpus relief.”¹⁶² Similarly, the *Brown* court did not discuss the fact that an expired sentence could be collaterally challenged in a post-conviction proceeding.

Until *Brown*, the court had never held that habeas corpus was the exclusive procedural vehicle to challenge an illegal sentence; instead, the court had consistently recognized two separate and distinct procedural mechanisms for challenging illegal sentences. In habeas corpus proceedings, the statutory pleading requirements “are mandatory and must be followed scrupulously.”¹⁶³ Post-conviction proceedings, on the other hand, have much more “liberal procedural safeguards”¹⁶⁴ and defendants can use them to collaterally attack a conviction or sentence even after the sentence has expired—the exact type of claims

¹⁵⁹ *Hickman*, 153 S.W.3d at 23 n.4.

¹⁶⁰ *Id.* (emphasis added) (citing *State v. McCraw*, 551 S.W.2d 692, 694 (Tenn. 1977)).

¹⁶¹ *State v. Brown*, 479 S.W.3d 200, 207 (Tenn. 2015).

¹⁶² *Hickman*, 153 S.W.3d at 23 n.4.

¹⁶³ *Archer v. State*, 851 S.W.2d 157, 165 (Tenn. 1993).

¹⁶⁴ *Summers v. State*, 212 S.W.3d 251, 261 (Tenn. 2007).

brought in the flood of Rule 36.1 litigation.¹⁶⁵ This weakens the court's reasoning in *Brown* that Rule 36.1 did "not expand the scope of relief [beyond that which is available in a habeas corpus proceeding] and [did] not authorize the correction of expired illegal sentences."¹⁶⁶ The drafters of Rule 36.1 were presumed to know this "'state of the law'" when drafting Rule 36.1,¹⁶⁷ but the *Brown* court overlooked a significant portion "of the law existing at the time" Rule 36.1 was adopted.¹⁶⁸ With this jurisprudential context in mind, this article now turns to the text of Rule 36.1.

IV. Plain Language of Rule 36.1

While admitting that the view that Rule 36.1 authorized "the correction of expired illegal sentences" was

¹⁶⁵ Admittedly, it would be difficult to challenge an expired illegal sentence in a post-conviction setting due to the one-year statute of limitations. See TENN. CODE ANN. § 40-30-102(a) (2012). The challenge would have to involve a misdemeanor sentence or the petition would have to show a statutory or due process reason for tolling the statute of limitations. *Id.* § 40-30-102(b) (listing the statutory bases for tolling the statute of limitations); *Bush v. State*, 428 S.W.3d 1, 23 (Tenn. 2014) (listing instances where the Tennessee Supreme Court has tolled the post-conviction statute of limitations on due process grounds). Additionally, the case law is unclear as to exactly what constitutional right is at issue when an illegal sentence is challenged in a post-conviction proceeding. *Mahler* and *McConnell* address alleged illegal sentences in the post-conviction context without addressing this issue. In at least one opinion, the Tennessee Court of Criminal Appeals held that, in the context of a guilty plea, failure to inform the petitioner he was agreeing to an illegal sentence constituted ineffective assistance of counsel which caused the defendant to unknowingly and involuntarily enter into a guilty plea. See, e.g., *Meriweather v. State*, NO. M2008-02329-CCA-R3-PC, 2010 WL 27947, at *2 (Tenn. Crim. App. Jan. 7, 2010).

¹⁶⁶ *Brown*, 479 S.W.3d at 211.

¹⁶⁷ *Lee Med., Inc., v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (citing *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005)).

¹⁶⁸ *Brown*, 479 S.W.3d at 205.

“one possible interpretation,” the court in *Brown* rejected that interpretation as unreasonable “in light of the expressed purpose of Rule 36.1, its language, and the jurisprudential background from which it developed.”¹⁶⁹ In looking at the text of Rule 36.1, the court stated that the phrase “at any time,” as used in Rule 36.1, had “no bearing” on the issue of whether Rule 36.1 authorized the correction of expired illegal sentences.¹⁷⁰ Instead, the court argued that the phrase “at any time” simply meant (1) that an illegal sentence could be corrected after it became final and (2) that there was no statute of limitations on Rule 36.1 motions.¹⁷¹ Also, in looking at the text of Rule 36.1, the court stated that the rule differed “from the procedure applicable to habeas corpus petitions challenging illegal sentences” in “at least two ways.” First, the rule allowed the State to challenge an illegal sentence. Second, it required the motion to be filed in the trial court where the judgment of conviction was entered rather than the county where the petitioner was incarcerated.¹⁷² Finally, the court reasoned that, had the drafters of Rule 36.1 intended for it to differ from the court’s “prior decisions refusing to grant habeas corpus relief for expired illegal sentences,” they “almost certainly” would have “included language clearly expressing that intent”¹⁷³

The court’s reasoning in *Brown* regarding the phrase “at any time” has led one Tennessee Court of Criminal Appeals judge to question how that term could “mean one thing in the text of Tennessee Rule of Criminal Procedure 36 and yet mean an entirely different thing in the text of Rule 36.1?”¹⁷⁴ The court concluded at the end of the *Brown*

¹⁶⁹ *Id.* at 210.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 209.

¹⁷³ *Id.* at 211.

¹⁷⁴ *State v. Bennett*, No. E2015-00510-CCA-R3-CD, 2015 WL 8773599, at *1 (Tenn. Crim. App. Dec. 14, 2015) (Witt, J., concurring).

opinion that Rule 36, addressing clerical errors, did apply to expired sentences because Rule 36 did not “authorize courts to grant *relief* from expired illegal sentences.”¹⁷⁵ However, nowhere in Rule 36 or Rule 36.1 is there any language to suggest the two rules are different because one could be used to grant relief “from expired illegal sentences.” Similar to the language found in the original text of Rule 36.1, Rule 36 stated that trial courts “may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.”¹⁷⁶ This has been a long-standing rule in Tennessee¹⁷⁷ and is similar to prior Tennessee case law holding that “where a judgment is void then there is no judgment and consequently the [trial] court does not lose jurisdiction over the matter.”¹⁷⁸ In light of this, there appears to be no textual reason to interpret the phrase “at any time” differently in Rule 36.1 from how the court treated the phrase in Rule 36.

In addition to its unique interpretation of the phrase “at any time,” the court in *Brown* also downplayed the differences between habeas corpus procedure and Rule 36.1. As previously stated, the pleading requirements in habeas corpus proceedings “are mandatory and must be followed scrupulously.”¹⁷⁹ To that end, petitioners seeking habeas corpus relief are required to state in their petitions that they

¹⁷⁵ *Brown*, 479 S.W.3d at 213 (emphasis in original).

¹⁷⁶ Compare TENN. R. CRIM. P. 36 (2013) (amended 2016), with TENN. R. CRIM. P. 36.1(a) (2013) (amended 2016) (stating that either “the defendant or the state may seek to correct an illegal sentence . . .”).

¹⁷⁷ See *Bailey v. State*, 280 S.W.2d 806, 807 (Tenn. 1955) (noting that trial courts have the power “to correct every mistake apparent on the face of the record”); *State v. Disney*, 37 Tenn. 598, 601 (1858) (“[A]fter the record is made up, and the term [of court] closed, [the record] admits of no alteration, by the same court, unless for some mistake patent upon the face of the record, or proceedings in the case.”).

¹⁷⁸ *State ex rel Underwood v. Brown*, 244 S.W.2d 168, 170 (Tenn. 1951).

¹⁷⁹ *Archer v. State*, 851 S.W.2d 157, 165 (Tenn. 1993).

are “illegally restrained of liberty” and to attach a copy of the alleged void judgment “or a satisfactory reason given for its absence.”¹⁸⁰ Furthermore, the habeas corpus statutes provide a method of summary dismissal “[i]f, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the writ may be refused”¹⁸¹ Put another way, “when a habeas corpus petition fails to establish that a judgment is void [upon the face of the judgment or record], a trial court may dismiss the petition without a hearing[]” or the appointment of counsel.¹⁸²

The original text of Rule 36.1, on the other hand, had no mechanism for summarily dismissing claims and allowed for the appointment of counsel and an evidentiary hearing if the motion merely stated “a colorable claim” and was not limited to proof on the face of the record.¹⁸³ These differences were in addition to the ones outlined by the court in *Brown*.¹⁸⁴ To that end, the original text of Rule 36.1 was much more in line with the “liberal procedural safeguards”¹⁸⁵ of post-conviction proceedings, which, likewise, required the trial court to appoint counsel and hold an evidentiary hearing when a petition states a colorable claim.¹⁸⁶ In fact, the court in *Wooden* actually adopted the definition of “colorable claim” used in the post-conviction context for use in Rule 36.1 proceedings.¹⁸⁷ In light of this, the court’s interpretation of the plain language of Rule 36.1 failed to construe the rule “in a way that is natural, ordinary,

¹⁸⁰ TENN. CODE ANN. § 29-21-107(b) (2012).

¹⁸¹ *Id.* § 29-21-109.

¹⁸² *Summers*, 212 S.W.3d at 260.

¹⁸³ TENN. R. CRIM. P. 36.1(b) (2013) (amended 2016); *see also* State v. Talley, No. E2014-01313-CCA-R3-CD 2014 WL 7366257, at *2 (Tenn. Crim. App. Dec. 26, 2014).

¹⁸⁴ State v. Brown, 479 S.W.3d 200, 209 (Tenn. 2015).

¹⁸⁵ *Summers v. State*, 212 S.W.3d 251, 261 (Tenn. 2007).

¹⁸⁶ TENN. SUP. CT. R. 28, §6(B).

¹⁸⁷ State v. Wooden, 478 S.W.3d 585, 592-93 (Tenn. 2015).

and unforced.”¹⁸⁸ In fact, court could only point to one similarity between a Rule 36.1 motion and a habeas corpus proceeding—the definition of “illegal sentence.”¹⁸⁹

V. Definition of Illegal Sentence

A key factor the court cited in *Brown* to support its conclusion that Rule 36.1 “was not . . . intended to expand the scope of relief for illegal sentence claims” was that Rule 36.1 defined “‘illegal sentence’ exactly as [this] Court had already defined that term in the habeas corpus context.”¹⁹⁰ But, the court’s reasoning in this regard suffered from the same flaw as its reasoning regarding the jurisprudential context of Rule 36.1: it assumed that the definition of “illegal sentence” found in Rule 36.1 had exclusively been applied in “the habeas corpus context.”¹⁹¹ However, a closer examination of that definition and its development in Tennessee case law proves that is not the case.

The original text of Rule 36.1 defined an “illegal sentence” as “one that [was] not authorized by the applicable statutes or that directly contravene[d] an applicable statute.”¹⁹² The *Brown* opinion refers to its companion case, *Wooden*, for the proposition that Rule 36.1’s definition of “illegal sentence” was “coextensive with, and actually mirror[s], the definition this Court has applied to that term in

¹⁸⁸ *Moreno v. City of Clarksville*, 479 S.W.3d 795, 808 (Tenn. 2015).

¹⁸⁹ *Brown*, 479 S.W.3d at 209. While not cited to in *Brown*, the language in subsection (c)(3) of Rule 36.1 dealing with illegal sentences when used as material components of a plea agreement is similar to language used in the court’s habeas corpus cases. See *Summers*, 212 S.W.3d at 258–59. However, for a demonstration of the principle that a defendant can withdraw his guilty plea in such a situation pre-dating *Moody* and its progeny, see *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978).

¹⁹⁰ *Brown*, 479 S.W.3d at 211.

¹⁹¹ *Id.*

¹⁹² TENN. R. CRIM. P. 36.1(a)(2) (2013) (amended 2016).

the habeas corpus context.”¹⁹³ In *Wooden*, the court held that the definition of “illegal sentence” found in Rule 36.1 “mirror[ed] [the one] adopted by this Court in [*Cantrell v. Easterling*]”¹⁹⁴ In *Cantrell*, the court held that an illegal sentence was “one which [was] ‘in direct contravention of the express provisions of [an applicable statute], and consequently [is] a nullity.’”¹⁹⁵ The *Cantrell* court also added that it would “include within the rubric [of] ‘illegal sentences’ those sentences which [were] not authorized under the applicable statutory scheme.”¹⁹⁶ In essence, the definition of “illegal sentence” found in Rule 36.1 and *Cantrell* concerns two types of sentences: (1) sentences in direct contravention of an applicable statute and (2) sentences “not authorized by the applicable statutes.”¹⁹⁷

In *State v. Burkhart*, the court defined an illegal sentence as one “in direct contravention of the express provisions of [an applicable statute]” and made no mention of sentences not authorized by the applicable statutes.¹⁹⁸ However, in *State v. Leathers*, one of the cases cited by the court in *Burkhart*, the Oregon Supreme Court defined an “illegal sentence” as a sentence “beyond the bounds of [the trial court’s] sentencing authority” that would subsequently be “void for lack of authority and thus totally without legal effect.”¹⁹⁹ Likewise, the court in *State v. Mahler*, a post-conviction case pre-dating *Cantrell* by over two decades, recognized the *Burkhart* definition of an illegal

¹⁹³ *Brown*, 479 S.W.3d at 209 (citing *State v. Wooden*, 478 S.W.3d 585 (Tenn. 2015)).

¹⁹⁴ *Wooden*, 478 S.W.3d at 594.

¹⁹⁵ *Cantrell v. Easterling*, 346 S.W.3d 445, 452 (Tenn. 2011) (alteration in original) (quoting *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978)).

¹⁹⁶ *Id.* (citing *Davis v. State*, 313 S.W.3d 751, 759 (Tenn. 2010)).

¹⁹⁷ TENN. R. CRIM. P. 36.1(a)(2) (2013) (amended 2016); *Cantrell*, 346 S.W.3d at 452 (citing *Davis*, 313 S.W.3d at 759).

¹⁹⁸ *Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978).

¹⁹⁹ *State v. Leathers*, 531 P.2d 901, 903 (Or. 1975) (citations omitted).

sentence and that there had also been cases “where sentences were imposed which were higher or lower than that authorized by the statute designating the punishment for the crime.”²⁰⁰ The *Mahler* court determined that such sentences were “held subject to being later vacated or corrected.”²⁰¹ The court reaffirmed this principle in *McConnell v. State*, another post-conviction case.²⁰²

The Tennessee Court of Criminal Appeals in *State v. Reliford* cited *McConnell* for the proposition that a sentence, which “the trial court lacked the statutory authority to impose,” was an illegal sentence.²⁰³ *Reliford*, which predated *Cantrell* by over a decade, involved a challenge to an illegal sentence brought in the trial court via a common law motion to correct an illegal sentence and subsequently brought to the intermediate appellate court via the common law writ of certiorari.²⁰⁴ *McConnell* was also cited by the Tennessee Supreme Court in *Stephenson v. Carlton* for the proposition that a sentence with “no statutory basis” was “illegal” and that a guilty plea agreement could not “salvage an illegal sentence or otherwise create authority for the imposition of a sentence that [had] not been authorized by statute.”²⁰⁵ *Stephenson* was cited by the Tennessee Supreme Court in *Davis v. State* for the proposition that trial courts lack jurisdiction to impose a sentence not authorized by the

²⁰⁰ *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987).

²⁰¹ *Id.* (citing *State v. Hamlin*, 655 S.W.2d 200, 201 (Tenn. Crim. App. 1983)).

²⁰² *McConnell v. State*, 12 S.W.3d 795, 799–800 (Tenn. 2000).

²⁰³ *State v. Reliford*, NO. W1999-00826-CCA-R3-CD, 2000 WL 1473846, at *2 (Tenn. Crim. App. Oct. 2, 2000) (citing *McConnell*, 12 S.W.3d at 795, 799–800).

²⁰⁴ *Id.*

²⁰⁵ *Stephenson v. Carlton*, 28 S.W.3d 910, 912 (Tenn. 2000) (citing *McConnell*, 12 S.W.3d at 799).

applicable statutes.²⁰⁶ The *Cantrell* court then cited *Davis* when it articulated the two-part definition.²⁰⁷

The definition of “illegal sentence” in *Cantrell* and Rule 36.1 was not unique to the habeas corpus context, as the court suggested in *Wooden* and *Brown*.²⁰⁸ Rather, that definition had been used by Tennessee courts in examining illegal sentence claims in post-conviction proceedings, in proceedings utilizing the common law motion to correct an illegal sentence, and in habeas corpus proceedings. In fact, the only aspect of the *Cantrell* definition that differed from the original definition of an illegal sentence found in *Burkhart* was the inclusion of sentences not authorized by the applicable statute. However, the Tennessee Supreme Court first recognized those types of sentences as illegal in the post-conviction context (several years before *Cantrell*), not the habeas corpus context as asserted in *Wooden* and *Brown*.²⁰⁹ As such, the definition of “illegal sentence” found in Rule 36.1 was not a definition adopted solely from the “habeas corpus context” but, instead, was simply the definition of “illegal sentence” found generally in Tennessee law and applied across all the procedural vehicles used to challenge illegal sentences prior to *Moody* and *Cantrell*.²¹⁰

VI. Double Jeopardy and Rule 36.1

In addition to the text and jurisprudential context of Rule 36.1, the *Brown* court also said that interpreting Rule 36.1 to allow for the correction of expired illegal sentences “could potentially produce absurd, and even arguably

²⁰⁶ *Davis v. State*, 313 S.W.3d 751, 759 (Tenn. 2010).

²⁰⁷ *Cantrell v. Easterling*, 346 S.W.3d 445, 452 (Tenn. 2010).

²⁰⁸ *State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015).

²⁰⁹ See generally *Brown*, 479 S.W.3d 200; *Wooden*, 478 S.W.3d 585.

²¹⁰ See generally *Brown*, 479 S.W.3d 200; *Wooden*, 478 S.W.3d 585; *Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2010); *Moody v. State*, 160 S.W. 3d 512 (Tenn. 2005); *State v. Burkhart*, 566 S.W.2d 871 (Tenn. 1978).

unconstitutional results.”²¹¹ Chiefly, the court stated that under such an interpretation of Rule 36.1 “the State would be entitled to correct an illegally *lenient* sentence, even after the sentence had been fully served.”²¹² The *Brown* court imagined that “[a] defendant faced with the prospect of returning to prison after already serving his sentence would undoubtedly raise many objections . . . including constitutional objections[,]”²¹³ and that “the ‘outcry’ would be unimaginable were ‘the State [to] start using Rule 36.1 to jail untold numbers of citizens that by all indications have completely served their sentences’”²¹⁴ The court stated that it would not interpret Rule 36.1 to allow for the correction of expired illegal sentences because such an interpretation had “the potential to result in unconstitutional applications” of the rule.²¹⁵

There are several problems with the *Brown* court’s analysis with respect to the danger of Rule 36.1 being applied unconstitutionally. First, to the extent that the court differentiated between illegally lenient sentences and other illegal sentences in *Brown*, its reasoning was in direct contravention of the court’s prior holding that a trial court “lacks jurisdiction to impose an agreed sentence that is illegal, even an illegally lenient one.”²¹⁶ Put another way, an illegally lenient sentence is just as void as any other type of illegal sentence. Additionally, the question of whether a government’s attempt to correct an expired illegally lenient sentence would violate constitutional protections against double jeopardy is not as straightforward as the court

²¹¹ *Brown*, 479 S.W.3d at 211.

²¹² *Id.* (emphasis in original).

²¹³ *Id.* (citing *Commonwealth v. Selavka*, 14 N.E.3d 933, 941 (Mass. 2014)).

²¹⁴ *Id.* (quoting *Lee v. State*, 2015 WL 2330063, at *5 (Tenn. Crim. App. May 13, 2015) (Williams, J., dissenting)) (alterations in original).

²¹⁵ *Id.*

²¹⁶ *Summers v. State*, 212 S.W.3d 251, 258 (Tenn. 2007) (citing *McConnell v. State*, 12 S.W.3d 795, 799 (Tenn. 2000)).

presented it in *Brown*.²¹⁷ Admittedly, at least one jurisdiction has issued a blanket pronouncement that such an action would violate double jeopardy protections.²¹⁸ However, other jurisdictions have taken a more nuanced view of the issue, noting that the issue requires the weighing of a defendant's interest in finality of the sentence against a state's interest in the correction of the illegality²¹⁹ and, moreover, that the passage of time is a key factor in determining whether a defendant has a legitimate expectation of finality in an illegal sentence.²²⁰ Further still, at least one jurisdiction has concluded that despite a sentence being already served by a defendant, a “[d]efendant [cannot] have a legitimate expectation of finality in the severity of the original sentence because it was illegally lenient”²²¹

²¹⁷ *Brown*, 479 S.W.3d at 211.

²¹⁸ *See* *State v. Ortiz*, 79 So. 3d 177, 178 (Fla. Dist. Ct. App. 2012) (quoting *Sneed v. State*, 749 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000)) (stating that “where a sentence has already been served, even if it is an illegal sentence, the court lacks jurisdiction and would violate the Double Jeopardy Clause by resentencing the defendant to an increased sentence”).

²¹⁹ *See* *State v. Trieb*, 533 N.W.2d 678, 681 (N.D. 1995) (citing *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992); *DeWitt v. Ventetoulo*, 6 F.3d 32, 35 (1st Cir. 1993)) (noting that a defendant “cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification” but recognizing that in some cases correction could be “so unfair that it must be deemed inconsistent with fundamental notions of fairness” and providing a balancing test).

²²⁰ *Commonwealth v. Selavka*, 14 N.E.3d 933, 941, 944 (Mass. 2014) (emphasis added) (recognizing that “a defendant’s legitimate expectation of finality may well be diminished when his sentence is illegal” but concluding that “even an illegal sentence, *with the passage of time*, acquire[s] a finality that bars further punitive changes detrimental to the defendant”).

²²¹ *People v. Thompson*, NO. 4609/99, 2009 WL 348370, at *3, *5 (N.Y. Sup. Ct. Feb. 11, 2009) (also noting that the defendant’s “expectation of finality” was further “undermined by the additional legal circumstance that New York courts have the inherent power to correct an illegal sentence”).

The question of whether the State could seek to correct an expired, illegally lenient sentence, however, was not dispositive to the claim at issue in *Brown*. The motion to correct an illegal sentence at issue in *Brown* had been brought by Mr. Brown, not the State.²²² It is well established that “[w]hen the accused himself procures a judgment to be set aside upon his own initiative and he voluntarily accepts the result, then he cannot by his own act avoid the jeopardy in which he stands and then assert it as a bar to a subsequent jeopardy.”²²³ As such, the question of whether use of Rule 36.1 by the State to correct an expired, illegally lenient sentence was not before the court and, therefore, not necessary for the determination of Mr. Brown’s case. Accordingly, the court should not have considered in its analysis the possible “constitutional objections” of a theoretical defendant in that situation.²²⁴ Ultimately, there was no constitutional impediment to Mr. Brown’s argument that he could use Rule 36.1 to correct his expired illegally lenient sentences.

VII. Mootness

Prior to the court’s decision in *Brown*, a panel of the Tennessee Court of Criminal Appeals concluded that the expiration of Mr. Brown’s sentences rendered his motion to correct them moot.²²⁵ Citing the mootness doctrine, the

²²² State v. Brown, 479 S.W.3d 200, 202 (Tenn. 2015).

²²³ State v. Clemons, 873 S.W.2d 1, 2 (Tenn. Crim. App. 1992) (quoting State v. Collins, 698 S.W.2d 87, 90 (Tenn. Crim. App. 1985)).

²²⁴ Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995) (observing that “under Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties” and that “courts should avoid deciding constitutional issues” if “a case can be resolved on non-constitutional grounds”).

²²⁵ State v. Brown, No. E2014-00673-CCA-R3-CD, 2014 WL 5483011, at *6 (Tenn. Crim. App. Oct. 29, 2014).

panel concluded that Mr. Brown's motion to correct his expired illegal sentences failed to present a "live controversy" and that the case could "no longer provide relief" to Mr. Brown.²²⁶ To support this reasoning, the panel cited to cases from other jurisdictions that had "concluded that a challenge to the legality of a sentence [became] moot once the sentence [had] been served."²²⁷ However, the cases to which the panel's decision referred cited little to no authority to support this reasoning.²²⁸ One of the cases contained a vigorous dissent, which noted that even after a sentence is served the sentence "still exists" unless it has been expunged and that there are "[a] countless number of situations [that] occur where a prison sentence has collateral consequences[]" that can plague a defendant in the future.²²⁹

Despite the fact that the Tennessee Supreme Court had previously referred to an expired illegal sentence claim brought in a habeas corpus proceeding as moot,²³⁰ the court in *Brown*²³¹ rejected the mootness argument of the Tennessee Court of Criminal Appeals. The court noted that the question of whether a defendant was imprisoned or restrained of liberty was a "separate and distinct" question from the issue of whether a "challenged conviction's

²²⁶ *Id.* at *5–6.

²²⁷ *Id.* at *6 (citing *State v. Ortiz*, 79 So. 3d 177, 179 (Fla. Dist. Ct. App. 2012); *Barnes v. State*, 31 A.3d 203, 207 (Md. 2011); *Sanchez v. State*, 982 P.2d 149, 150–51 (Wyo. 1999)).

²²⁸ See *Barnes*, 31 A.3d at 210 (citing only *Sanchez* to support its reasoning); *Sanchez*, 982 P.2d at 150–51 (citing no authority to support its conclusion). Additionally, the rules in all of these other jurisdictions, unlike Rule 36.1, did not provide a method to attack a defendant's underlying conviction. See MD. CODE ANN., Crim. Proc. § 4-345(a) (West 1984); WYO. R. CRIM. PROC. 35; FLA. R. CRIM. P. RULE 3.800.

²²⁹ *Barnes*, 31 A.3d at 212 (Eldridge, J., dissenting).

²³⁰ See *Summers v. State*, 212 S.W.3d 251, 257–58 (Tenn. 2007) (stating that the court would have accepted the State's argument that the defendant's illegal sentence claim was moot if the defendant had fully served his total effective sentence).

²³¹ *Brown*, 479 S.W.3d at 211 n.12.

collateral consequences [could] prevent . . . [it] from becoming moot.”²³² The court concluded that “[c]ollateral consequences [could] prevent a case from becoming moot in the traditional sense of the mootness doctrine” but that Rule 36.1, in light of the opinion’s interpretation of the rule, was “not an appropriate avenue for seeking relief from collateral consequences.”²³³ While this article has laid out a strong case against the court’s view that Rule 36.1 was not an appropriate vehicle for challenging the collateral consequences of an expired illegal sentence, I agree with the court’s reasoning regarding the inapplicability of the mootness doctrine to expired illegal sentence claims.

The court has stated in the past that showing a defendant is imprisoned or restrained of liberty is “[a] statutory prerequisite for eligibility to seek habeas corpus relief”²³⁴ Further, the court has declined to include restraints on a defendant’s liberty that it deemed “merely a collateral consequence of the challenged judgment” as cognizable in a habeas corpus proceeding.²³⁵ As previously discussed, the court has also held that an expired sentence may be challenged in a post-conviction proceeding.²³⁶ In so holding, the court stated that “a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.”²³⁷ As noted by the dissenting opinion in *Barnes* and the Tennessee Supreme Court in *McCraw*, there are numerous possible collateral consequences that flow from an expired illegal sentence. As such, the mootness doctrine would not apply to bar expired illegal sentence claims under Rule 36.1.

²³² *Id.* (internal quotation marks omitted) (quoting *May v. Carlton*, 245 S.W.3d 340, 356 n.22 (Koch, J., dissenting)).

²³³ *Id.*

²³⁴ *Benson v. State*, 153 S.W.3d 27, 31 (Tenn. 2004).

²³⁵ *Hickman v. State*, 153 S.W.3d 16, 23 (Tenn. 2004).

²³⁶ *See, e.g., State v. McCraw*, 551 S.W.2d 692, 694 (Tenn. 1977).

²³⁷ *Id.* (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1965)).

VIII. Conclusion

In *Brown*, the Tennessee Supreme Court overlooked a significant portion of the “jurisprudential context” from which Rule 36.1 originated, interpreted the plain language of Rule 36.1 in a way that was not “natural, ordinary, and unforced,”²³⁸ and unnecessarily raised a constitutional issue that had not been presented for the court’s review. The court based its reasoning upon the assumption that because of its opinion in *Moody*, habeas corpus was the sole procedural vehicle for challenging an illegal sentence and Rule 36.1 thereby implicitly incorporated the habeas corpus statutes’ procedural ban on challenging expired illegal sentences. This reasoning overlooked the fact that the court had repeatedly stated that some illegal sentences could be challenged in a post-conviction proceeding, a proceeding that has long been held to allow for challenges to expired sentences. Furthermore, the court’s interpretation of the plain language of Rule 36.1 discounted the fact that the rule more closely resembled a post-conviction proceeding, rather than a habeas corpus proceeding. Likewise, the one portion of Rule 36.1 the court cited as being identical to habeas corpus case law, the definition of the term “illegal sentence,” actually predated *Moody* and has been used by courts outside the habeas corpus context. Additionally, the court’s constitutional concerns and the doctrine of mootness both proved to be irrelevant to the issues presented in *Brown*. All of this leads to the conclusion that the court erred in interpreting Rule 36.1 to not allow for the correction of expired illegal sentences.

Nevertheless, *Brown* and its companion case *Wooden* will likely be mere footnotes in Tennessee’s jurisprudential history. On December 29, 2015, roughly four weeks after *Brown* and *Wooden* were filed, the Tennessee Supreme Court entered an order that replaced the original

²³⁸ *Moreno v. City of Clarksville*, 479 S.W.3d 795, 808 (Tenn. 2015).

text of Rule 36.1 in its entirety, effective July 1, 2016.²³⁹ The order removed the phrase “at any time” from Rule 36.1 and replaced it with a requirement that, except for one narrow exception, the motion “must be filed before the sentence set forth in the judgment order expires.”²⁴⁰ Rule 36.1 now requires the moving party to include “a copy of the relevant judgment order(s)” with the motion, allows the movant to include “other supporting documents,” and requires the movant “to state whether the motion is the first motion to correct the illegal sentence.”²⁴¹ The new Advisory Commission Comment to Rule 36.1 states that the rule’s definition of “illegal sentence” “incorporates the definition . . . set forth in *Cantrell*.”²⁴² The new version of Rule 36.1 also permits summary denial of motions that do not set forth a colorable claim.²⁴³

The new Rule 36.1 also “limit[s] the circumstances under which relief may be granted where the defendant has entered into a plea bargain which contains an illegal sentence.”²⁴⁴ Trial courts are now required to deny motions when the defendant has “benefitted from the bargained-for illegal sentence.”²⁴⁵ As an example, the new Advisory Commission Comment states that when a defendant has received illegal concurrent sentences, that defendant cannot bring a motion to correct the illegal sentences.²⁴⁶ Rule 36.1 additionally provides, in new subsection (d), a narrow exception to the rule’s prohibition on challenging expired illegal sentences.²⁴⁷ Subsection (d) allows the State “to seek

²³⁹ Order Amending the Rules of Criminal Procedure, No. ADM2015-01631 (filed Dec. 29, 2015).

²⁴⁰ TENN. R. CRIM. P. 36.1(a)(1) (2016).

²⁴¹ TENN. R. CRIM. P. 36.1(a) cmt. (ADVISORY COMM’N 2016).

²⁴² *Id.*

²⁴³ TENN. R. CRIM. P. 36.1(b)(2) (2016).

²⁴⁴ TENN. R. CRIM. P. 36.1(c)(3) (2016) (ADVISORY COMM’N 2016).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ TENN. R. CRIM. P. 36.1(d) (2016).

to correct a judgment order that failed to impose a statutorily required sentence of lifetime community supervision” if the motion is “filed no later than ninety days after the sentence imposed in the judgment order expires.”²⁴⁸

In essence, the amendment to Rule 36.1 wiped out the original version and replaced it with a new version explicitly in line with the court’s interpretation of the original Rule 36.1 in *Brown* and *Wooden*.²⁴⁹ The amendment to Rule 36.1 replaced the liberal procedural safeguards, similar to those of post-conviction proceedings found in the original text of the rule, with more stringent procedural requirements reminiscent of those found in habeas corpus proceedings. Also, the addition of subsection (d) is interesting, given the court’s statements in *Brown* allowing for the correction of expired illegal sentences that “could potentially produce absurd” results. These additions are especially interesting in light of the court’s concern that allowing the State to correct expired sentences had “the potential to result in unconstitutional applications” of the rule.²⁵⁰ Based on the court’s reasoning in *Brown*, any use by the State of subsection (d) would be open to an obvious constitutional challenge on double jeopardy grounds.

Also troubling is the new Rule 36.1’s language regarding defendants’ having “benefitted from the bargained-for illegal sentence.” This portion of the new rule seemingly ignores the precedent that a trial court “lacks jurisdiction to impose an agreed sentence that is illegal, even

²⁴⁸ TENN. R. CRIM. P. 36.1(d) (2016); TENN. R. CRIM. P. 36.1(d) cmt. (ADVISORY COMM’N 2016) (citing TENN. CODE ANN. § 39-13-524 (2014)).

²⁴⁹ “The [Tennessee] [S]upreme [C]ourt has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of [Tennessee] in all civil and criminal suits, actions and proceedings.” TENN. CODE ANN. § 16-3-402 (2009).

²⁵⁰ *State v. Brown*, 479 S.W.3d 200, 211 (Tenn. 2015).

an illegally lenient one.”²⁵¹ Additionally, while it is true that these defendants may have served shorter sentences on the front end, most of the defendants challenging illegal sentences under Rule 36.1 were incarcerated in state or federal prison, and their new sentences were enhanced by prior convictions infected with the challenged illegal sentence. It is hard to imagine that a defendant “benefits” from continuing to be exposed to such a collateral consequence. Moreover, the Tennessee Supreme Court adopted the amendments to Rule 36.1 without much thought to these issues or the shortcomings of the *Brown* and *Wooden* decisions. Perhaps, after the issuance of the *Brown* and *Wooden* opinions, the court was reminded of the ancient maxim, “[b]lessed be the amending hand.”²⁵²

²⁵¹ *Summers v. State*, 212 S.W.3d 251, 258 (Tenn. 2007).

²⁵² EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAW OF ENGLAND* 366 (4th ed., London, A. Crooke et al. 1669) (1644).