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ARTICLE

**DUE PROCESS TOLLING OF THE POST-
CONVICTION STATUTE OF LIMITATIONS IN
TENNESSEE AFTER WHITEHEAD V. STATE**

*By: Brennan T. Hughes**

On May 9, 2002, a man with a handgun slipped inside the back door of B.B. King's Restaurant and Blues Club in Memphis, Tennessee. He headed toward the basement office where the restaurant kept its safe. At the same time, a chef named Mr. Arnold was in the basement of B.B. King's. Mr. Arnold noticed a man carrying a shipping box. When Mr. Arnold asked the man what he was doing in the basement, the man pulled out a gun. Mr. Arnold fought back. The gunman shot him in the head. It was not fatal.

Shortly thereafter, a purchasing agent walked into the basement office of the restaurant. To her surprise, on the office floor she saw a man, Mr. Arnold, bleeding, with his hands and feet hog-tied behind his back. The next thing the woman saw was a gun pointed at her face. The gunman forced her to the floor and hog-tied her, too. In doing so, the gunman kned her in the back, cracking one of her vertebrae. Later, a produce delivery driver and another purchasing agent came downstairs. They also were

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captured. The gunman ordered each victim to open the safe. None of them could, and soon, there were four people lying hog-tied on the office floor.

A fifth person, Ms. Miller, stumbled upon the scene. When she entered the office, she screamed and immediately fled down the hallway. The gunman chased and caught her. But while the gunman was outside the room, Mr. Arnold, bleeding from the gunshot wound to his head, struggled free from his bonds and armed himself with a broom. Wielding this wooden weapon, Mr. Arnold waited behind the door as the gunman dragged the petrified Ms. Miller back into the office. Mr. Arnold lunged at his assailant and swung his broom, but to no avail. The gunman shot him again, this time in the hip. Again, Mr. Arnold found himself hog-tied on the floor. Frustrated that no one knew the combination to the safe, the gunman removed his victims' money and jewelry. The gunman knew he had to find the general manager to open the safe, so he went upstairs.

Bleeding from the head and hip, Mr. Arnold again struggled up from the floor and telephoned the police. He was still on the phone when someone knocked on the office door. It was the general manager. The gunman found the manager, but the manager had distracted the gunman and escaped. With the police on the way and his victims free, the robbery was over. The gunman, later identified by witnesses as Artis Whitehead, fled the scene.

Although Mr. Whitehead's robbery attempt was a dismal failure, the State's prosecution against him was a smashing success. A Memphis jury convicted Mr. Whitehead of five counts of especially aggravated kidnapping, two counts of aggravated assault, two counts of aggravated robbery, two counts of especially aggravated

robbery, and one count of attempted aggravated robbery. Mr. Whitehead received a 249-year sentence.¹

Mr. Whitehead lost his direct appeal, and the state and federal supreme courts declined to accept his case. At this point, Mr. Whitehead's story makes an impact on Tennessee law. Mr. Whitehead filed a petition seeking a new trial under Tennessee's Post-Conviction Procedure Act.² Unfortunately for him, Mr. Whitehead failed to submit his petition within the one-year statute of limitations. Mr. Whitehead argued, however, that his petition ought not be dismissed as untimely on the ground of due process.³

Like the crime itself, Mr. Whitehead's post-conviction process was a series of unfortunate events. Mr. Whitehead had hired an attorney to handle his direct appeal. When the direct appeal was concluded by virtue of the federal Supreme Court's denial of a writ of certiorari, appellate counsel sent Mr. Whitehead what was essentially a good-bye letter informing him that his appeal was concluded and that he had one year to file for post-conviction relief. But there were two problems. First, appellate counsel's letter gave Mr. Whitehead the *wrong deadline date* because the attorney had mistakenly calculated his statute of limitations period from the federal Supreme Court's denial of certiorari rather than the state supreme court's denial of his Tennessee Rule of Appellate Procedure 11 application to appeal. Second, although the letter asked Mr. Whitehead where he would like his records sent and although Mr. Whitehead responded twice, appellate counsel did not send Mr. Whitehead his trial records until after the actual statute of limitations had

¹These facts were gleaned from *State v. Whitehead*, No. W2004-03058-CCA-R3-CD, 2006 WL 1273749, at *1-4 (Tenn. Crim. App. May 10, 2006), *appeal denied* (Tenn. Oct. 16, 2006).

²TENN. CODE ANN. §§ 40-30-101 to -122 (2012 & Supp. 2013).

³See *Whitehead v. State*, 402 S.W.3d 615, 618-21 (Tenn. 2013).

expired. As soon as he received the record, Mr. Whitehead quickly composed a relatively lengthy and detailed post-conviction petition, but by then it was too late.⁴

The post-conviction court and the Tennessee Court of Criminal Appeals decided that these circumstances did not authorize them to toll the post-conviction statute of limitations on due process grounds.⁵ The Tennessee Supreme Court accepted the case and used the opportunity to adopt a new rule for evaluating whether due process warrants tolling the one-year post-conviction deadline.

In its opinion, the Tennessee Supreme Court reviewed the grounds for which it had tolled the statute of limitations in the past. As of 2013, the court had designated three categories of circumstances that called for due process tolling: later-arising claims, mental incompetence, and serious attorney misconduct.⁶ Mr. Whitehead said his case was an attorney misconduct case. Nonetheless, in a previous case the court held that only egregious intentional misconduct, not mere attorney negligence, could trigger due process tolling.⁷ The court determined in *Whitehead* that the distinction between attorney negligence and attorney misconduct was too nebulous to be helpful.⁸ The court also decided to discard its previous “ad hoc” approach to due process tolling.⁹ Instead, the court decided to follow the federal courts and many state jurisdictions and adopt the test articulated by the Supreme Court in *Holland v. Florida* as a one-size-fits-all framework for analyzing post-conviction due process tolling claims.¹⁰ Under the

⁴ *See id.*

⁵ *See id.* at 620; *Whitehead v. State*, No. W2010-00784-CCA-R3-PC, 2011 WL 3912856, at *5 (Tenn. Crim. App. Sept. 7, 2011).

⁶ *Whitehead*, 402 S.W.3d at 623-24.

⁷ *See id.* at 624-25; *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011); *Williams v. State*, 44 S.W.3d 464, 468 n.7 (Tenn. 2001).

⁸ *Whitehead*, 402 S.W.3d at 630-31.

⁹ *Id.* at 631.

¹⁰ *Id.*

Holland test, a petitioner is entitled to equitable tolling of a statute of limitations if the petitioner (1) “has been pursuing his or her rights diligently, and (2) . . . some extraordinary circumstance stood in [the petitioner’s] way and prevented timely filing.”¹¹

The problem that gives rise to this article is that, in its post-*Whitehead* decisions, the Tennessee Court of Criminal Appeals has not consistently applied the *Whitehead-Holland* test. Instead of recognizing that the Tennessee Supreme Court intended the *Whitehead-Holland* test to replace its prior ad hoc framework, several panels of the Court of Criminal Appeals have understood the test to apply only in attorney misconduct cases like Mr. *Whitehead*’s. Under this view, the three pre-*Whitehead* categories of circumstances that warrant due process tolling remain in force, but the *Whitehead-Holland* test comes into play only when the third category is at issue. This article will trace the development of this misunderstanding and attempt to correct it.

Part I will summarize the case law leading up to *Whitehead v. State* and engage in a more fine-grained reading of the analytical section of the Tennessee Supreme Court’s 2013 *Whitehead* opinion. Part II will survey the Tennessee Court of Criminal Appeals’ use of the *Whitehead* opinion between the publication of *Whitehead* and the Tennessee Supreme Court’s January 2014 opinion, *Bush v. State*. Part III will examine *Bush v. State*, in which the Tennessee Supreme Court applied the *Whitehead-Holland* test in a case that did not concern attorney error. One particular sentence in *Bush* appears to have been written to gently correct the intermediate appellate court’s misunderstanding of the scope of *Whitehead*. Part IV will survey the Tennessee Court of Criminal Appeals’ use of the *Whitehead* opinion since the publication of *Bush* in January

¹¹ *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

2014, which shows that the Tennessee Supreme Court's attempt in *Bush* to clarify *Whitehead* largely went unnoticed. Part V makes concluding recommendations.

I. Due Process Tolling Takes Shape: From *Burford* to *Whitehead*

It is appropriate at this juncture to say a few words about the Post-Conviction Procedure Act and due process. Tennessee's Post-Conviction Procedure Act, which was significantly amended in 1995, allows prisoners who did not appeal their convictions, or whose state appeals are exhausted, to challenge their conviction or sentence on the basis of the conviction or sentence being "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States."¹² The majority of post-conviction petitions allege ineffective assistance of counsel.

As courts are sometimes quick to point out, the United States Constitution does not require states to provide prisoners with post-conviction relief.¹³ But Tennessee has provided post-conviction relief since the passage of the Post-Conviction Procedure Act in 1967.¹⁴ The 1986 Amendment to the Act gave prisoners three years after their sentences became final to file a petition for post-conviction relief.¹⁵ This statute of limitations is what gave rise to the doctrine of due process tolling in Tennessee.

The concept of due process, as enshrined in the state and federal constitutions,¹⁶ embodies the concepts of

¹²TENN. CODE ANN. § 40-30-103 (2012).

¹³*Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

¹⁴Act of May 25, 1967, ch. 310, 1967 Tenn. Pub. Acts 801.

¹⁵*See Burford v. State*, 845 S.W.2d 204, 206 (Tenn. 1992) (citing 1986 Tenn. Pub. Acts 348).

¹⁶*See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall .

fundamental fairness and the community's sense of decency and fair play.¹⁷ As a leading Tennessee case explains, there is no precise definition of due process because what is fundamentally fair depends on the facts of the individual situation.¹⁸ The contours of due process are therefore flexible and can be ascertained, the Tennessee Supreme Court has held, by weighing three factors: "(1) the [nature of the] private interest at stake; (2) the risk of erroneous deprivation of [that] interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and finally, (3) the government's interest, including the nature of the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁹ The question thus becomes: under this balancing of interests, when does the Post-Conviction Procedure Act's statute of limitations become fundamentally unfair such that applying the statute would offend the citizenry's notions of fair play and decency?

A. Placing Limitations on the Statute of Limitations

The seminal Tennessee due process tolling case is *Burford v. State*.²⁰ The post-conviction petitioner in

. . . deprive any person of life, liberty, or property, without due process of law. . . ."); TENN. CONST. art. I, § 8 ("[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.").

¹⁷ See *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Rochin v. California*, 342 U.S. 165, 173 (1952); *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000).

¹⁸ *Seals*, 23 S.W.3d at 277.

¹⁹ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993)).

²⁰ *Burford*, 845 S.W.2d at 204.

Burford claimed he had been “caught in a procedural trap.”²¹ The petitioner, a repeat offender, had been given an enhanced sentence. After the three-year post-conviction deadline for the enhanced sentence expired, the trial court ruled that his predicate convictions were invalid, and vacated them.²² However, the expiration of the statute of limitations barred Mr. Burford from petitioning to have his subsequent enhanced sentence reduced. Mr. Burford argued to the Tennessee Supreme Court that the statute of limitations was unconstitutional on its face. While the high court rejected this argument, it held that denying Mr. Burford relief on the basis of these “later arising grounds” would violate due process.

The court explained that on one hand the State had a legitimate interest in enacting procedural rules in the post-conviction context to prevent stale or fraudulent claims and to curtail the costs associated with repeated groundless claims.²³ On the other hand, the court held that before the State can terminate a claim for failure to comply with procedural rules, such as a statute of limitations, due process requires that the claimant be given a “reasonable opportunity” to have the issue heard and determined.²⁴ The court found the Act’s deadline to be unreasonable under these circumstances, and remanded the case for an evidentiary hearing.²⁵ *Burford* therefore established that certain types of “later-arising grounds” claims may warrant tolling of the post-conviction statute of limitations.²⁶

Three years after *Burford*, the Tennessee General Assembly significantly amended the Post-Conviction

²¹ *Id.* at 208.

²² *Id.* at 210.

²³ *Id.* at 207.

²⁴ *Id.* at 208.

²⁵ *Id.* at 205.

²⁶ *See Sands v. State*, 903 S.W.2d 297 (Tenn. 1995) (applying *Burford* and declining to toll the statute of limitations).

Procedure Act.²⁷ Two changes are significant to this discussion. First, the legislature shortened the statute of limitations from three years to one year.²⁸ The legislature doubled down on this statute of limitations in 1996 when it added the following proviso to Tenn. Code Ann. § 40-30-102(a):

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.²⁹

²⁷ Post-Conviction Procedure Act of April 26, 1995, ch. 207, 1995 Tenn. Pub. Acts 305.

²⁸ See TENN. CODE ANN. § 40-30-102(a).

²⁹ Post-Conviction Procedure Act of Apr. 25, 1996, ch. 995, 1996 Tenn. Pub. Acts 753.

This was a clear message from the General Assembly to the courts that the statute of limitations was meant to have teeth.

Second, the legislature codified a list of three exceptional circumstances that would permit a petitioner to bypass the statute of limitations or to amend a previously-filed petition.³⁰ The first statutory exception is implicated when an appellate court recognizes a new constitutional right for which retroactive application is required. That ruling triggers a new one-year statute of limitations.³¹ The second exception occurs when the petitioner obtains “new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted.”³² The third exception codifies the *Burford* scenario: when a sentence enhancement is based on a prior conviction that is later held invalid, this holding resets the statute of limitations.³³

These three new statutory exceptions, however, did not take the Tennessee Supreme Court out of the due process tolling business. The court recognized a second due process-based exception to the post-conviction statute of limitations in 2000 in *Seals v. State*.³⁴ The court in *Seals* essentially established that when a prisoner is mentally incompetent to file for post-conviction relief, the statute of

³⁰ See TENN. CODE ANN. § 40-30-102(b) (exceptions to the statute of limitations); TENN. CODE ANN. § 40-30-117 (grounds for amending a previously-filed petition). The circumstances described in these two statutes are identical.

³¹ TENN. CODE ANN. § 40-30-102(b)(1).

³² TENN. CODE ANN. § 40-30-102(b)(2). The Tennessee Supreme Court interpreted this provision in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

³³ TENN. CODE ANN. § 40-30-102(b)(3).

³⁴ *Seals*, 23 S.W.3d, at 272.

limitations is tolled during the period of the prisoner's incompetency.³⁵

The Tennessee Supreme Court recognized a third due process tolling exception in 2001 in *Williams v. State*,³⁶ the case that set the stage for *Whitehead*. Mr. Williams claimed his untimely post-conviction petition had been unfairly dismissed. Mr. Williams said his appointed appellate counsel withdrew from representation without informing him, and in fact misled Mr. Williams into believing he was appealing the case to the Tennessee Supreme Court. While Mr. Williams waited to learn the outcome of this appeal, he alleged that the deadlines for appealing to the supreme court and for petitioning for post-conviction relief both passed.³⁷

The Tennessee Supreme Court held that if Mr. Williams “was, in fact, misled to believe that counsel was continuing the appeals process,” this would require tolling the statute of limitations.³⁸ The court later explained this decision: “[I]ike the ‘procedural trap’ in *Burford v. State* and the petitioner’s mental incompetence in *Seals v. State*, ‘an attorney’s misrepresentation, either attributable to deception or other misconduct, would also be beyond a defendant’s control.’”³⁹ The court emphasized that mere attorney negligence would not meet this threshold.⁴⁰ The supreme court remanded Mr. Williams’s case for an

³⁵ *Id.* at 279. When a prisoner is mentally incompetent, Tennessee common law permits a “next friend” to file a post-conviction petition on the prisoner’s behalf. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 484 & n.1 (Tenn. 2013).

³⁶ *Williams*, *supra* note 7, at 464.

³⁷ *Id.* at 470-71.

³⁸ *Id.* at 471.

³⁹ *Whitehead*, 402 S.W.3d at 624 (quoting *Williams*, 44 S.W.3d at 469).

⁴⁰ *Williams*, 44 S.W.3d at 468 n.7.

evidentiary hearing, and the post-conviction court found that due process tolling was not actually warranted.⁴¹

Justice Drowota, joined by Justice Holder, dissented in *Williams* and averred that the conduct of Mr. Williams's attorney was "textbook negligence," and that there was no meaningful distinction between attorney negligence and attorney misconduct.⁴² Instead, the dissenting Justices would have effectuated the Tennessee General Assembly's "clearly expressed legislative intent" that the statute of limitations be strictly construed, and would have denied relief.⁴³

The Tennessee Supreme Court elaborated on its *Williams* decision in *Smith v. State*⁴⁴ in 2011. Regarding the rule of *Williams*, the court noted:

In every case in which we have held the statute of limitations is tolled, the pervasive theme is that circumstances *beyond a petitioner's control* prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations. In *Williams*, 44 S.W.3d at 468, we held that *misrepresentation* concerning the status of the direct appeal could constitute ineffective assistance of counsel. Short

⁴¹ *Id.* at 624 & n.9; *Williams v. State*, No. E2004-01267-CCA-R3-PC, 2005 WL 2148626, at *1 (Tenn. Crim. App. Sept. 7, 2005), *appeal denied* (Tenn. Dec. 19, 2005).

⁴² *Williams*, 44 S.W.3d at 476-77 (Drowota, J., dissenting).

⁴³ *Id.* at 474, 476 (Drowota, J., dissenting).

⁴⁴ *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011).

of active misrepresentation, however, we have never held that trial or appellate counsel's inadvertent or negligent failure to inform his or her client of the right to file a post-conviction petition constitutes ineffective assistance of counsel.⁴⁵

Thus, after the *Williams* and *Smith* decisions, it appeared that due process tolling was warranted only when a prisoner suffered from active misrepresentation – not mere negligence – of his or her attorney. Essentially, petitioners who did not qualify for one of the three statutory exceptions could obtain due process tolling only if they could fit their claim into one of three common law pigeonholes: (1) later-arising claims under *Burford*; (2) mental incompetence under *Seals*; and (3) active attorney misrepresentation under *Williams* and *Smith*. The Court's 2013 decision in *Whitehead v. State* changed this calculus.

B. *Whitehead v. State*: The Tennessee Supreme Court Shifts Gears

The distinction between attorney negligence and willful attorney misconduct that the Tennessee Supreme Court struggled to maintain in *Williams* and *Smith* fell apart once the court accepted Artis Whitehead's post-conviction appeal. Here was a clear case of attorney negligence which nevertheless left Mr. Whitehead "trapped." Despite his best efforts, he was unable to obtain his trial records. Further, despite his attempt to file a timely petition, he was sabotaged by the fact his appellate attorney gave him the

⁴⁵ *Id.* at 358 (alteration in original) (citation omitted).

wrong deadline date in her farewell letter. While the court signaled that neither problem would have warranted tolling on its own, the “sockdolager” – or knockout blow – that warranted tolling was the effect of the combination of attorney errors.⁴⁶ These facts did not fit the willful misconduct framework of *Williams* and *Smith* because the attorney testified that she had no idea why she miscalculated Mr. Whitehead’s deadline, and no evidence suggested the failure to return Mr. Whitehead’s files was anything more than an inter-office organizational management mishap.⁴⁷ Faced with these facts, the court not only decided that the negligence/misconduct distinction had to go, but also went further.

The court began its analysis by recounting in detail its prior decisions concerning due process tolling.⁴⁸ The court began this historical survey by stating, “To date, this Court has identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”⁴⁹ The court then described the three grounds: later-arising claims, mental incompetence, and attorney misconduct.⁵⁰

In the next section of the opinion, the court looked to “cases from other jurisdictions that have considered a prisoner’s similar claims under the analogous doctrine of ‘equitable tolling.’”⁵¹ The court deemed these foreign cases instructive because “Tennessee’s doctrine of due process tolling in the context of petitions for post-conviction relief is essentially the same as the doctrine of equitable tolling recognized in the federal courts and the courts of other

⁴⁶ *Whitehead*, 402 S.W.3d at 632.

⁴⁷ *Id.* at 619; *see also* *Whitehead v. State*, No. W2010-00784-CCA-R3-PC, 2011 WL 3912856 (Tenn. Crim. App. Sept. 7, 2011).

⁴⁸ *Whitehead*, 402 S.W.3d at 623-25.

⁴⁹ *Id.* at 623.

⁵⁰ *Id.* at 623-25.

⁵¹ *Id.* at 626. The Court’s discussion of cases from other jurisdictions is found at 626-30.

states.”⁵² By recognizing this equivalence, the court was charting new territory.

To demonstrate this equivalence between Tennessee’s post-conviction due process tolling and the doctrine of equitable tolling recognized by other states (particularly by federal habeas courts), the court emphasized the parallels between a key line in *Smith v. State* and the wording of the federal *Holland* test. Both doctrines, the court said, are triggered when “circumstances beyond a prisoner’s control prevent the prisoner from filing his or her petition on time.”⁵³ In fact, the court said there was no “substantive difference” between the application of the two doctrines.⁵⁴

The court then performed an in-depth examination of the 2010 United States Supreme Court case of *Holland v. Florida* (which “solidified” the federal doctrine) and the 2012 case of *Maples v. Thomas*,⁵⁵ in which the Supreme Court adopted much of the reasoning of Justice Alito’s concurring opinion in *Holland*.⁵⁶ Finding *Holland* and *Maples* “persuasive,” the Tennessee Supreme Court concluded that when it comes to attorney misconduct, the proper focus is not on the attorney’s mental state, but upon “whether the *result* of that negligent, reckless, or intentional attorney misbehavior amounted to an extraordinary circumstance beyond the petitioner’s control that thwarted timely filing.”⁵⁷ Under principles of agency law, when such extraordinary circumstances occur, the attorney’s errors cannot be fairly attributed to the client.⁵⁸

⁵² *Id.* at 626.

⁵³ *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Smith*, 357 S.W.3d at 358).

⁵⁴ *Whitehead*, 402 S.W.3d at 627.

⁵⁵ *Maples, v. Thomas*, 132 S. Ct. 912 (2012).

⁵⁶ *Whitehead*, 402 S.W.3d at 627-30.

⁵⁷ *Id.* at 631.

⁵⁸ *Id.* at 629-30.

Then comes the passage upon which this article must focus. In announcing its key holding, the court states:

Rather than perpetuate an artificial and unhelpful distinction between attorney negligence and attorney misrepresentation, we conclude that the better course is to adopt the rule of *Holland* and *Maples* for determining when due process necessitates tolling the Post-Conviction Procedure Act's one-year statute of limitations. While the elements of the *Holland* rule have been present in this state's due process tolling jurisprudence for some time, our courts have tended to focus on whether particular cases fit one of the three ad hoc due process exceptions we have identified in the past, i.e., later-arising claims, petitioner mental incompetence, and attorney misrepresentation significantly more egregious than negligence.

Henceforth, when a post-conviction petitioner argues that due process requires tolling the Post-

Conviction Procedure Act's statute of limitations based on the conduct of his or her lawyer, the two-prong inquiry of *Holland* and *Maples* should guide the analysis. A petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.⁵⁹

The court explained here that the three categories of exceptions the court “identified in the past” were developed “ad hoc,” and therefore lacked a clear unifying principle. Going forward (“Henceforth”), the court intends to replace this “ad hoc” approach with a single framework – the same one used by the federal courts and most other states, the *Holland* test.

The court is not necessarily sweeping away the three historical grounds for due process tolling. A person can reasonably infer from *Whitehead* that later-arising claims and petitioner mental incompetence will still toll the statute, even if these situations may not necessarily involve a petitioner who “has been pursuing his or her rights diligently.”⁶⁰ The *Whitehead* opinion effectively abrogates the third category – attorney misconduct – and adopts a one-size-fits-all tool for assessing any claims in which a prisoner’s attempted compliance with the statute of limitations is thwarted by external circumstances. For

⁵⁹ *Id.* at 631.

⁶⁰ *Id.*

example, the behavior of prison officials may give rise to a *Whitehead-Holland* claim.

The problem is that the Tennessee Court of Criminal Appeals did not fully grasp the sweeping nature of the court's adoption of the *Holland* test. The Tennessee Supreme Court attempted to correct this misapprehension in *Bush v. State*, but this attempt at correcting the Court of Criminal Appeals went essentially unnoticed and unheeded.

II. The *Whitehead-Holland* Test in the Court of Criminal Appeals: From *Whitehead* to *Bush*

The Tennessee Court of Criminal Appeals issued seven opinions between *Whitehead v. State*⁶¹ on March 21, 2013, and *Bush v. State*⁶² on January 28, 2014, that are relevant to our discussion – four from the Middle Section of the Court of Criminal Appeals⁶³ and three from the Western Section.⁶⁴ Each of these cases was assigned on briefs.

The first two opinions – *Morgan v. State* and *Lackey v. State* – were released on the same day by the same three-judge panel of the Middle Division. Both opinions appear to interpret *Whitehead* in a manner that

⁶¹ *Whitehead*, 402 S.W.3d at 618.

⁶² *Bush v. State*, 428 S.W.3d 1 (2014).

⁶³ *Alderson v. State*, No. M2012-01154-CCA-R3-PC, 2013 WL 6237027 (Tenn. Crim. App. Dec. 3, 2013); *Perry v. State*, No. M2013-00986-CCA-R3-PC, 2013 WL 5775814 (Tenn. Crim. App. Oct. 24, 2013), *appeal denied* (Tenn. Feb. 24, 2014); *Lackey v. State*, No. M2012-01482-CCA-R3-PC, 2013 WL 5232345 (Tenn. Crim. App. Sept. 17, 2013), *appeal denied* (Tenn. Jan. 15, 2014); *Morgan v. State*, No. M2012-02329-CCA-R3-CO, 2013 WL 5232459 (Tenn. Crim. App. Sept. 17, 2013).

⁶⁴ *Brown v. State*, No. W2012-02584-CCA-R3-PC, 2013 WL 6405736 (Tenn. Crim. App. Dec. 5, 2013); *Nelson v. State*, No. W2012-02234-CCA-R3-PC, 2013 WL 6001955 (Tenn. Crim. App. Nov. 12, 2013); *Thomas v. State*, No. W2012-00999-CCA-R3-PC, 2013 WL 6001938 (Tenn. Crim. App. Nov. 8, 2013), *appeal denied* (Tenn. Mar. 5, 2014).

perpetuates the three pre-*Whitehead* categories as the framework that governs due process tolling. The key language in both opinions is verbatim: “In the recent case of *Artis Whitehead v. State of Tennessee*, our supreme court discussed the matter of due process in a post-conviction context. The court identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”⁶⁵ The appellate court then listed the three historical circumstances. Nowhere in these two opinions does the appellate court reference the *Holland* test.

As suggested in part I.B, the section of *Whitehead* that the Court of Criminal Appeals referenced was a section containing an historical survey of due process tolling in Tennessee. The *Whitehead* opinion went on to describe these three categories as exceptions that the court had “identified in the past” in an “ad hoc” manner.⁶⁶ Instead, “[h]enceforth,” the court said, the *Holland* test should apply in due process tolling cases, especially since the *Holland* test was in substance identical to Tennessee’s guiding principle that due process tolling depended on the presence of circumstances “beyond a petitioner’s control.”⁶⁷ The failure of the Court of Criminal Appeals to mention this shift in its first two post-*Whitehead* opinions set an unfortunate precedent.

The next case, *Perry v. State*, came a month later from a different panel of the Middle Section. Mr. Perry sought tolling on the basis that he believed his attorney had appealed his case to the Tennessee Supreme Court, when in

⁶⁵ *Lackey*, 2013 WL 5232345, at *5; *Morgan*, 2013 WL 5232459, at *3. In *Lackey*, the petitioner alleged he had been mentally incompetent. In *Morgan*, the petitioner alleged that his post-conviction attorney’s failures should have tolled the statute of limitations.

⁶⁶ *Whitehead*, *supra* note 3 at 631.

⁶⁷ *Id.* at 625 (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011)).

fact the attorney had not.⁶⁸ In addressing *Whitehead*, the appellate court stated:

Recently, the Tennessee Supreme Court clarified its earlier holdings with regard to due process tolling based on the conduct of a petitioner's attorney, ruling in *Whitehead* that '[a] petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.'⁶⁹

This characterization of *Whitehead* is essentially correct. The *Perry* court also found no need to discuss the three pre-*Whitehead* categories of due process tolling situations.

The next opinion, *Thomas v. State*,⁷⁰ is the first post-*Whitehead* tolling opinion from the Western Section. The court in *Thomas* stated the significance of *Whitehead* even more precisely than the court in *Perry*: "In the recent case of *Whitehead v. State*, our supreme court adopted a new standard for determining if due process required tolling of the statute of limitations in post-conviction cases."⁷¹ The opinion then quotes two paragraphs from

⁶⁸ *Perry*, 2013 WL 5775814, at *2.

⁶⁹ *Id.* (quoting *Whitehead*, 402 S.W.3d at 631).

⁷⁰ *Thomas*, 2013 WL 6001938, at *2 (applying the *Holland* test and finding no ground for relief).

⁷¹ *Id.*

Whitehead, beginning at the crucial “[h]enceforth.”⁷² When it comes to applying *Whitehead*, the Western Section started off on the right foot.

The next case, *Nelson v. State*,⁷³ came four days later from another Western Section panel. The *Nelson* opinion also handled *Whitehead* correctly, surmising that the Tennessee Supreme Court in *Whitehead* “clarified the proper analysis” for attorney misconduct tolling cases.⁷⁴ The court analyzed *Whitehead* rather thoroughly and found no basis for tolling the statute for Mr. Nelson.

The sixth case is *Alderson v. State*,⁷⁵ which was released by the Middle Section in December 2013. Rather than claiming attorney misconduct, the petitioner in *Alderson* alleged that misinformation given by prison officials prevented her from filing on time.⁷⁶ Although the *Alderson* court appeared poised to apply the *Whitehead-Holland* test, it noted that the post-conviction court had discredited the petitioner’s testimony that she had been misled by a prison guard concerning whether she could file for post-conviction relief.⁷⁷ Because the post-conviction court found no misinformation was given, the Court of Criminal Appeals found that Ms. Alderson’s claim did not merit relief.⁷⁸

The seventh opinion that emerged between *Whitehead* and *Bush* was written by the same judge who authored the first two. This opinion, *Brown v. State*,⁷⁹ exacerbated the misinterpretation of *Whitehead* that was

⁷² *Id.*

⁷³ *Nelson*, 2013 WL 6001955.

⁷⁴ *Id.* at *4.

⁷⁵ *Alderson*, 2013 WL 6237027.

⁷⁶ *Id.* at *1.

⁷⁷ *Id.* at *5.

⁷⁸ *Id.* at *6.

⁷⁹ *Brown v. State*, No. No. W2012-02584-CCA-MR3-PC, 2013 WL 6405736, at *2 (Tenn. Crim. App. Dec. 5, 2013), *appeal denied* (Tenn. May 14, 2014).

latent in *Morgan* and *Lackey*. It may have prompted the Tennessee Supreme Court to make a clarification in *Bush*.

The tolling issue in *Brown* was not premised on alleged attorney error. Instead, Mr. Brown stated that he was unable to complete his petition on time because the correctional facility where he was housed was on “administrative lockdown” for a few days about one week before his petition was due.⁸⁰ Would the Court of Criminal Appeals apply the *Whitehead-Holland* test even though *Brown* was not an attorney misconduct case? The answer at that time was no.

The *Brown* court’s treatment of *Whitehead* began well enough. “Our supreme court recently noted,” the court said, that “our courts have tended to focus on one of the three ad hoc due process exceptions we have identified in the past.”⁸¹ The Court of Criminal Appeals noted that the supreme court in *Whitehead* “adopted a two-prong analysis from [*Holland* and *Maples*].”⁸² However, the *Brown* court then decided to read *Whitehead* narrowly:

The way the *Whitehead* opinion is written, the two-prong inquiry is literally limited to situations of attorney conduct. (‘Henceforth, when a post-conviction petitioner argues that due process requires tolling the Post-Conviction Procedure Act’s statute of limitations **based on the conduct of his or her lawyer**, the two prong

⁸⁰ *Id.* at *2-3.

⁸¹ *Id.* at *2 (quoting *Whitehead*, 402 S.W.3d at 631).

⁸² *Id.*

inquiry of *Holland* and *Maples* should guide the analysis.’ *Whitehead*, 402 S.W.3d at 631 (emphasis added)).⁸³

Although the *Brown* court made a plausible reading of *Whitehead*, the court’s decision to focus on the phrase “based on the conduct of his or her lawyer” narrowed the impact of *Whitehead* in a way that is at odds with other language in the *Whitehead* opinion.⁸⁴ In *Whitehead*, the Tennessee Supreme Court intended to adopt the same one-size-fits-all equitable tolling test that most jurisdictions were already using. A holistic reading of *Whitehead* does not generate the conclusion that the *Whitehead* court intended the *Holland* test apply solely in attorney misconduct cases. The supreme court acted quickly to repudiate this narrow interpretation.

III. *Bush v. State*: All You Need is *Whitehead*

The *Brown* opinion was released on December 5, 2013.⁸⁵ On January 28, 2014, the Tennessee Supreme Court announced *Bush v. State*.⁸⁶ Mr. Bush pled guilty to attempted rape but was not informed that his guilty plea would result in a sentence of lifetime community supervision. Mr. Bush was eventually released and was surprised to learn of this additional indeterminate sentence.⁸⁷ The Tennessee Supreme Court held that failure to inform a defendant that his or her plea subjects him or

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *Brown*, No. 2013 WL 6405736.

⁸⁶ *Bush*, 428 S.W.3d at 1.

⁸⁷ *Id.* at 6.

her to lifetime community supervision violates due process.⁸⁸

The main issue in *Bush* was whether the petitioner could rely on the statutory exception to the post-conviction statute of limitations that concerned the retroactive application of new constitutional rulings.⁸⁹ The court determined that its 2010 ruling in *Ward v. State*⁹⁰ did not qualify for retroactive application under the *Teague v. Lane*⁹¹ test that the Tennessee General Assembly had imported into the Post-Conviction Procedure Act in 1995.⁹² The court then considered whether Mr. Bush might nevertheless be eligible for due process tolling, and applied the *Whitehead-Holland* test for the first time since the *Whitehead* opinion.⁹³

The court summarized its prior holding in *Whitehead* (pay particular attention to the final sentence):

We recently clarified Tennessee's due process tolling standard in *Whitehead v. State*. We held that a post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance

⁸⁸ See *Ward v. State*, 315 S.W.3d 461 (Tenn. 2010).

⁸⁹ *Bush*, 428 S.W.3d at 5.

⁹⁰ *Ward*, 315 S.W.3d 461 (Tenn. 2010).

⁹¹ See *Teague v. Lane*, 489 U.S. 288 (1989).

⁹² *Bush*, 428 S.W.3d at 5-6 (citing TENN. CODE ANN. § 40-30-102(b)(1), (2012)).

⁹³ *Id.* at 21-23.

stood in his or her way and prevented timely filing. *Whitehead v. State*, 402 S.W.3d at 631 (citing *Holland v. Florida*, [560 U.S. 631, 648-49 (2010)]). This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.⁹⁴

Several observations are noteworthy at this juncture. First, the court in *Bush* applied the *Whitehead-Holland* test in a case where the ground for tolling had nothing whatsoever to do with attorney negligence or misconduct. Simply put, Mr. Bush's case did not fit into any of the three pre-*Whitehead* ad hoc due process tolling categories. This approach repudiates the reasoning of the Court of Criminal Appeals in *Brown v. State* that the *Whitehead-Holland* test applies only to tolling claims based on attorney misconduct.⁹⁵

Second, the supreme court made the repudiation of *Brown* explicit, stating that the *Whitehead-Holland* test "applies to all due process tolling claims, not just those that concern alleged attorney misconduct."⁹⁶ Although the supreme court in *Bush* did not cite *Brown* (or *Morgan* or *Lackey*), the supreme court likely reasoned that this sentence, embedded in a tolling case that was not based on attorney misconduct, would correct the error. However, the Court of Criminal Appeals has not subsequently cited this

⁹⁴ *Id.* at 22.

⁹⁵ See *Brown*, 2013 WL 6405736, at *2 ("The way the *Whitehead* opinion is written, the two-prong inquiry is literally limited to situations of attorney conduct.")

⁹⁶ *Bush*, 428 S.W.3d at 22.

statement from *Bush*, and the *Brown* court's error persists in some appellate opinions.

Third, one might also notice how *Bush* handles the tripartite pre-*Whitehead* due process tolling framework. After describing the *Holland* test, the *Bush* court explained:

Prior to *Whitehead*, this Court had tolled the post-conviction deadline on due process grounds in cases (1) where the grounds for overturning the conviction arose after the statute of limitations had run; (2) where the prisoner was mentally incompetent; and (3) where a prisoner has been actively misled by attorney misconduct.⁹⁷

The supreme court then reasoned that Mr. Bush's claim could be construed as a *Burford*-style later-arising claim, with the petitioner's awareness that his rights had been violated serving as the later-arising ground.⁹⁸ But the court held that even viewed through this lens, Mr. Bush was not eligible for due process tolling because he was not "diligently pursuing his rights under the first prong of the *Whitehead-Holland* test."⁹⁹ At the risk of going out on a limb, this paragraph could imply that a prisoner faced with

⁹⁷ *Id.* at 23 (citing *Whitehead*, 402 S.W.3d at 623-24).

⁹⁸ *Id.* As the Court explained, the violation of Mr. Bush's rights (failure to inform him of lifetime community supervision prior to a plea deal in a sex-crime case) occurred before he was sentenced in 2001. Mr. Bush learned about his lifetime community supervision sentence much later, by December 2004. He failed to apply for post-conviction relief until April 2011. *Id.*

⁹⁹ *Id.*

a *Burford*-style later-arising-grounds claim could toll the statute of limitations by acting quickly once he or she becomes aware of the later-arising grounds. Conversely, this dicta could merely be the court offering an alternative rationale for finding that Mr. Bush loses his appeal.

What can we gather from the supreme court's opinion in *Bush*? In this non-attorney-misconduct case, the court began its analysis with the *Whitehead-Holland* test. Only later did the court even list the three pre-*Whitehead* tolling categories. Even when, toward the end of the opinion, the court re-conceptualized the case as a species of *Burford* later-arising-grounds claim, the court applied the *Whitehead-Holland* test. The supreme court made clear in *Bush* that the *Whitehead-Holland* test, not the ad hoc framework, is the go-to rule for assessing post-conviction due process tolling claims.

It is worth mentioning that *Whitehead* and *Bush* had nothing to say about tolling claims that involve alleged petitioner mental incompetence. While one could easily say that mental incompetence is a “circumstance beyond the petitioner’s control” that can thwart a timely petition, it would be difficult to assess whether a mentally incompetent petitioner is pursuing his or her rights diligently. This observation is simply to note that petitioner mental incompetence might be a free-standing ground for tolling, and that the *Whitehead-Holland* test should govern all other types of claims.¹⁰⁰ For example, a person in a later-arising-grounds case will be pursuing his or her rights diligently when the petitioner acts quickly to take advantage of the

¹⁰⁰ Two months before the publication of *Whitehead*, the Court released *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013) cert. denied, 134 S. Ct. 224 (2013), in which the Court clarified the analysis used to determine petitioner mental incompetency in cases that involve due process tolling of the post-conviction statute of limitations. At this juncture *Reid ex rel. Martiniano* remains the governing case for mental incompetence post-conviction cases.

later-arising grounds, as the court's analysis in *Bush* may imply.

IV. *Bush* Unheeded: The Court of Criminal Appeals Remains Divided on *Whitehead*

In *Brown v. State*, the Tennessee Court of Criminal Appeals suggested that the *Whitehead-Holland* test applied only to due process tolling cases that are based on attorney misconduct.¹⁰¹ But then, in *Bush v. State*, the Tennessee Supreme Court clarified that the *Whitehead-Holland* test “applies to all due process tolling claims, not just those that concern alleged attorney misconduct.”¹⁰² The Tennessee Supreme Court likely wrote this sentence specifically to correct the *Brown* court's misinterpretation of *Whitehead v. State*. In *Whitehead*, the Supreme Court adopted a new, two-pronged, one-size-fits-all test to analyzing post-conviction due process tolling claims. This section will examine the post-*Bush* cases in which the Court of Criminal Appeals applied *Whitehead*. The focus will be to determine whether the Tennessee Supreme Court successfully corrected the Court of Criminal Appeals' misplaced notion that the *Whitehead-Holland* test applies only in tolling cases premised on alleged attorney misconduct or negligence.

Between the publication of *Bush v. State* on January 28, 2014, and the writing of this article in November 2014, the Court of Criminal Appeals released ten opinions relevant to this discussion. Seven are from the Middle Section,¹⁰³ one is from the Eastern Section,¹⁰⁴ and two

¹⁰¹ *Brown*, 2013 WL 6405736, at *2.

¹⁰² *Bush*, 428 S.W.3d at 22.

¹⁰³ *Woodard v. State*, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641 (Tenn. Crim. App. Sept. 15, 2014); *King v. State*, No. M2013-02505-CCA-R3-PC, 2014 WL 2854804 (Tenn. Crim. App. June 23, 2014); *Kimbrough v. State*, No. M2013-02536-CCA-R3-PC, 2014 WL

come from the Western Section.¹⁰⁵ The court held oral arguments in only one of these cases,¹⁰⁶ and *Whitehead* was never mentioned in the arguments.¹⁰⁷

A. Post-*Bush* Cases Based on Alleged Attorney Negligence or Misconduct

It is useful to distinguish the post-*Bush* cases that were based on alleged attorney error (six cases) from those that were based on grounds other than alleged attorney error (four cases). This section will consider the post-*Bush* cases in which the petitioner sought equitable tolling based on alleged attorney error. The earliest of these, *Johnson v. State*,¹⁰⁸ is the first post-*Whitehead* tolling case from the Eastern Section. In this brief opinion, the Court of Criminal Appeals applied the *Whitehead-Holland* test without mentioning the old ad hoc categories and denied relief.¹⁰⁹ The same can be said for the Middle Section's opinion in

2592877 (Tenn. Crim. App. June 10, 2014); *Rutherford v. State*, No. M2013-01575-CCA-R3-PC, 2014 WL 1669960 (Tenn. Crim. App. Apr. 25, 2014); *Samuel v. State*, No. M2013-01272-CCA-R3-PC, 2014 WL 1669963 (Tenn. Crim. App. Apr. 25, 2014); *Wong v. State*, No. M2013-01684-CCA-R3-PC, 2014 WL 1369756 (Tenn. Crim. App. Apr. 7, 2014); *Morris v. State*, No. M2013-01652-CCA-R3-PC, 2014 WL 1323617 (Tenn. Crim. App. Apr. 2, 2014).

¹⁰⁴ *Johnson v. State*, No. E2013-01464-CCA-R3-PC, 2014 WL 1118018 (Tenn. Crim. App. Mar. 20, 2014).

¹⁰⁵ *Webb v. State*, No. W2013-01250-CCA-R3-PC, 2014 WL 4244028 (Tenn. Crim. App. Aug. 27, 2014); *Griffin v. State*, No. W2013-01009-CCA-R3-PC, 2014 WL 2941239 (Tenn. Crim. App. June 26, 2014).

¹⁰⁶ *Woodard*, 2014 WL 4536641.

¹⁰⁷ Oral arguments are available at <http://tncourts.gov/courts/court-criminal-appeals/arguments/2014/07/16/state-tennessee-v-dennis-cedric-woodard>.

¹⁰⁸ *Johnson v. State*, No. E2013-01464-CCA-R3-PC, 2014 WL 1118018 (Tenn. Crim. App. Mar. 20, 2014).

¹⁰⁹ *Id.* at *2.

Wong v. State.¹¹⁰ Neither of these opinions is at odds with *Whitehead* and *Bush*.

In *Samuel v. State*,¹¹¹ however, a panel from the Middle Section adopted verbatim the boilerplate description of *Whitehead* from *Morgan* and *Lackey*.¹¹² In other words, the Court of Criminal Appeals said that *Whitehead* “identified three circumstances” in which tolling was warranted, i.e., the three old ad hoc categories.¹¹³ But the court blunted this potential misreading by stating, “Essentially, due process serves to toll the post-conviction statute of limitations for petitioners who face circumstances beyond their control, such as the above numerated circumstances, which preclude them from actively raising their post-conviction claims.”¹¹⁴ The court then quoted the *Whitehead-Holland* test and applied the test to find that tolling was not warranted.¹¹⁵ The most generous reading of *Samuel* is that the Court of Criminal Appeals says the three ad hoc categories are examples of circumstances in which the *Whitehead-Holland* test has historically been met. While this is not an incorrect approach to *Whitehead*, it would be better for the appellate court to begin with the *Whitehead-Holland* test, as the supreme court did in *Bush*.¹¹⁶

¹¹⁰ *Wong v. State*, No. M2013-01684-CCA-RE-PC, 2014 WL 1369756, at *3-4 (Tenn. Crim. App. Apr. 7, 2014).

¹¹¹ *Samuel v. State*, No. M2013-01272-CCA-R3-PC, 2014 WL 1669963 (Tenn. Crim. App. Apr. 25, 2014).

¹¹² See the discussion *supra*, Part II.

¹¹³ *Samuel*, 2014 WL 1669963, at *2. The *Samuel* court also noted that the “attorney misconduct” rationale also applied to “possible misrepresentation by prison officials.” *Id.* (citing *Alderson v. State*, No. M2010-00896-CCA-R3-PC, 2010 WL 4888137 (Tenn. Crim. App. Nov. 30, 2010)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *3, *6.

¹¹⁶ See *supra*, Part III.

The fourth alleged attorney error case is *Kimbrough v. State*,¹¹⁷ written by the author of *Samuel, Morgan, and Lackey*. The *Kimbrough* court applied the *Whitehead-Holland* test, but its analysis implied that the test only applies “when the claim is predicated on attorney misconduct.”¹¹⁸ Applying *Whitehead*, the court found no diligent pursuit and no extraordinary circumstance.¹¹⁹

The analysis in *Webb v. State*¹²⁰ is similar. The petitioner in *Webb* sought due process tolling on two grounds – attorney misconduct and mental incompetence. The appellate court’s analysis began by citing *Whitehead* for the “three circumstances” the Tennessee Supreme Court “identified” that warrant tolling. The court found that Mr. Webb had “raised the second and third circumstances.”¹²¹ When the court turned to the attorney misconduct question, it implied that the *Whitehead-Holland* test applied only to attorney error claims.¹²² Moreover, the court relied on a statement from *Williams and Smith* that *Whitehead* expressly overruled:

“Short of active misrepresentation, however, [the supreme court has] never held that trial or appellate

¹¹⁷ *Kimbrough v. State*, No. M2013-02536-CCA-R3-PC, 2014 WL 2592877 (Tenn. Crim. App. June 10, 2014).

¹¹⁸ *See id.* at *2.

¹¹⁹ *Id.* at *3.

¹²⁰ *Webb v. State*, No. W2013-01250-CCA-R3-PC, 2014 WL 4244028, at*3-4 (Tenn. Crim. App. Aug. 27, 2014).

¹²¹ *Id.* at *3.

¹²² *Id.* at *4 (“To toll the statute of limitations for attorney misconduct or abandonment, a petitioner must make ‘a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.’”) *Id.* (citing *Whitehead*, 402 S.W.3d at 631 (citing *Holland v. Florida*, 560 U.S. 631, 648-49 (2010))).

counsel's inadvertent or negligent failure to inform his or her client of the right to file a post-conviction petition constitutes ineffective assistance of counsel" sufficient to toll the statute of limitations in post-conviction proceedings.¹²³

Here, the appellate court seems unaware that the supreme court overruled its earlier "artificial and unhelpful distinction" between "active misrepresentation" and negligence in *Whitehead*.¹²⁴

In the recent case of *Woodard v. State*, the Court of Criminal Appeals remanded an untimely petition for an evidentiary hearing.¹²⁵ Mr. Woodard sought due process tolling on two bases. First, Mr. Woodard said his attorney failed to inform him for almost two years that his application for permission to appeal to the Tennessee Supreme Court had been denied.¹²⁶ Second, Mr. Woodard made a later-arising ground claim that he presented in the form of a writ of error coram nobis: Mr. Woodard said he did not learn until 2012 that his trial attorney had committed malpractice by simultaneously representing (and allegedly coaching) one of the witnesses against him at his murder trial.¹²⁷

In its analysis, the *Woodard* court began with *Whitehead*, but stated that the *Whitehead* opinion

¹²³ *Id.* (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011); citing *Williams*, *supra* note 7 at 468 n.7 (Tenn. 2001) (alteration in original)).

¹²⁴ *See Whitehead*, 402 S.W.3d at 631.

¹²⁵ *Woodard v. State*, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641 (Tenn. Crim. App. Sept. 15, 2014).

¹²⁶ *Id.* at *5.

¹²⁷ *Id.* at *6.

“identified three scenarios” that require tolling. The court cited the *Whitehead-Holland* test, but implied that the test applies only to attorney misconduct cases.¹²⁸ The court determined that an evidentiary hearing was necessary in “the interests of justice,” especially when Mr. Woodard appeared to have been “pursuing his rights diligently.”¹²⁹

The Tennessee Court of Criminal Appeals’ post-*Bush* attorney misconduct cases therefore contain two cases that apply the *Whitehead-Holland* test without mentioning the ad hoc categories and four cases that begin with the ad hoc categories and apparently situate the *Whitehead-Holland* test within category three. The appellate court’s approach is not uniform.

B. Post-*Bush* Tolling Cases Not Premised on Attorney Error.

There are four post-*Bush* cases in which the Tennessee Court of Criminal Appeals considered due process tolling claims founded on bases other than alleged attorney negligence or misconduct. These cases deserve special attention because if the Court of Criminal Appeals applied the *Whitehead-Holland* test to a non-attorney case, this would indicate an awareness that the *Whitehead* rule is not limited strictly to tolling claims premised on attorney error. Again, none of these cases makes reference to the *Bush* opinion’s clarification of the scope of the *Whitehead-Holland* test. Three of these opinions are at odds with *Bush*, but the final case appears to get it right.

*Morris v. State*¹³⁰ from the Middle Section of the Court of Criminal Appeals only addresses *Whitehead*

¹²⁸ *Id.* at *9.

¹²⁹ *Id.* at *11.

¹³⁰ *Morris v. State*, No. W2013-01652-CCA-R3PC, 2014 WL 1323617, at *1 (Tenn. Crim. App. Apr. 2, 2014), *appeal denied* (Tenn. June 25, 2014). The petitioner’s grounds for due process tolling in *Morris* are

briefly, and when it does so, it makes the same error as the pre-*Bush* cases of *Morgan* and *Lackey* and the post-*Bush* cases of *Samuel* and *Rutherford*.¹³¹ The court in *Morris* states that in *Whitehead*,

the Tennessee Supreme Court identified three circumstances in which due process requires tolling the limitations period: (1) claims for relief that arise after the statute of limitations has expired; (2) claims involving prisoners whose mental incompetence prevents them from complying with the procedural deadline; and (3) claims in which attorney misconduct resulted in the delay in filing the petition. Petitioner argues that he was unaware that his conviction could be used to enhance punishment in subsequent cases. This is not one of the circumstances that would require tolling of the statute of limitations.¹³²

The appellate court never cites the *Holland* test in this opinion. The *Morris* opinion is, therefore, another Court of

unclear, although the grounds do not appear to involve any allegation of attorney negligence or misconduct.

¹³¹ The author of the *Morris* opinion was on the panel that decided *Samuel* and *Rutherford*. *Id.*

¹³² *Id.* at *2.

Criminal Appeals opinion at odds with the Tennessee Supreme Court's tolling analysis in *Bush*. Rather than applying the *Whitehead-Holland* test as the Tennessee Supreme Court has instructed, the appellate court approached the tolling issue by asking whether the petitioner's claim could be located within one of the old pre-*Whitehead* ad hoc categories. The Tennessee Supreme Court abrogated this approach in *Whitehead*, as it made clear in *Bush*.¹³³

The second post-*Bush* non-attorney case is *Rutherford v. State*,¹³⁴ released the same day as the attorney misconduct case of *Samuel* and decided by the same panel. Written by the same judge who wrote *Samuel*, *Morgan*, and *Lackey*, the *Rutherford* opinion contains the same boilerplate description of *Whitehead* which claims that *Whitehead* "identified three circumstances" in which due process tolling of the post-conviction statute of limitations is warranted.¹³⁵ The Court of Criminal Appeals in *Rutherford* does allude to the *Whitehead-Holland* test (the language is identical to language in *Samuel*),¹³⁶ but the court's analysis focuses on whether the petitioner's tolling claim fits within one of the three (now four)¹³⁷ ad hoc categories.¹³⁸ The analysis in *Rutherford* is therefore at odds with *Bush*.

¹³³ See *Bush*, 428 S.W.3d at 22. ("[The *Whitehead-Holland*] rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.") *Id.*

¹³⁴ *Rutherford v. State*, No. M2013-01575-CCA-R3PC, 2014 WL 1669960, at *2 (Tenn. Crim. App. Apr. 25, 2014).

¹³⁵ *Id.* at *2.

¹³⁶ *Id.*

¹³⁷ The fourth category is the *Alderson* situation, in which the petitioner alleges misrepresentation by prison officials. *Id.*

¹³⁸ *Id.* at *3 ("The petitioner has not presented a later-arising claim, makes no allegation of mental incompetence precluding the raising of the issues, no allegations of attorney misconduct, and no allegations of interference by prison author[it]ies.") *Id.*

The third case in this category is *King v. State*,¹³⁹ decided by the Middle Section (like *Morris* and *Rutherford*). The analysis in *King* is by now familiar. “[O]ur supreme court,” the court says, “has identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”¹⁴⁰ Mr. King’s tolling claim was based on a lack of access to legal materials at his local correctional facility’s library. The Court of Criminal Appeals found no need to determine whether this would “constitute a fourth circumstance” that warranted due process tolling.¹⁴¹ The court did not quote, cite, or consider the *Whitehead-Holland* test. This silence by itself suggests the court believed, as in *Brown*, that the test applied only to tolling claims premised on attorney error.

The Tennessee Court of Criminal Appeals delivered a better analysis in *Griffin v. State*,¹⁴² decided by the Western Section in late June 2014. Like the petitioner in *Brown*,¹⁴³ Mr. Griffin claimed his petition was late because his facility was on administrative lockdown for several days in April 2011.¹⁴⁴ The *Griffin* court’s analysis is superior to that in *Morris*, *Rutherford*, and *King* because the court goes straight to the *Whitehead-Holland* test and does not bother with trying to locate the administrative lockdown within one of the old ad hoc tolling categories.¹⁴⁵ Applying *Whitehead*, the Court of Criminal Appeals declined to toll the statute of limitations.¹⁴⁶

¹³⁹ *King v. State*, No. M2013-02505-CCA-R3PC, 2014 WL 2854804, at *1 (Tenn. Crim. App. June 23, 2014).

¹⁴⁰ *Id.* at *3.

¹⁴¹ *Id.*

¹⁴² *Griffin v. State*, No. W2013-01009-CCA-R3PC, 2014 WL 2941239, at *1 (Tenn. Crim. App. June 26, 2014).

¹⁴³ *Brown*, 2013 WL 6405736, at *1, discussed *supra*, Part II.

¹⁴⁴ *Griffin*, 2014 WL 2941239, at *1. Mr. Griffin specified that the reason for the lockdown was “inclement weather.” *Id.*

¹⁴⁵ *See id.* at *3.

¹⁴⁶ *Id.* at *4.

With *Griffin*, the Court of Criminal Appeals finally applied the *Whitehead-Holland* test without first considering the ad hoc categories to a tolling claim that was not premised on attorney error. It remains to be seen whether future cases will hew to the narrow reading of *Whitehead* that persists within the Court of Criminal Appeals' due process tolling jurisprudence, or whether *Griffin* is the true harbinger of things to come.

V. Concluding Remarks

In *Whitehead v. State*,¹⁴⁷ the Tennessee Supreme Court eliminated its previous distinction between attorney negligence and willful misconduct and also abrogated the ad hoc approach to due process tolling. The court embraced the test of *Holland v. Florida* as a one-size-fits-all rubric for assessing post-conviction due process tolling claims.

The Court of Criminal Appeals has tended to misread *Whitehead*. Rather than wielding the *Holland* test as the multi-tool it really is, the Court of Criminal Appeals persists in citing the portion of *Whitehead* in which the Tennessee Supreme Court described the way things used to be. The Court of Criminal Appeals often begins its analyses by expounding the three categories that defined the boundaries of due process tolling prior to *Whitehead*. Further, the court has circumscribed the scope of the *Whitehead-Holland* test by confining its use to attorney misconduct cases. The Tennessee Supreme Court noticed this error and clarified in *Bush v. State* that the *Whitehead-Holland* test “applies to all due process tolling claims, not just those that concern alleged attorney misconduct.”¹⁴⁸ But the Court of Criminal Appeals has never cited this language or any other part of the *Bush* Court's application of *Whitehead*.

¹⁴⁷ *Whitehead*, 402 S.W.3d at 631 (Tenn. 2013).

¹⁴⁸ *Bush*, 428 S.W.3d at 22 (Tenn. 2014).

This article's ambition has been to make clear that – with the possible exception of petitioner mental incompetence claims – claims for due process tolling of the Tennessee Post-Conviction Procedure Act's one-year statute of limitations should be analyzed under the two-step *Whitehead-Holland* test regardless of the specific basis of the claim. The practical effect is that petitioners will be free to point to any circumstance beyond their control that thwarted their otherwise diligent efforts to file their petitions on time. Although the bar one must clear to obtain due process tolling is still incredibly high,¹⁴⁹ Tennessee courts are no longer straightjacketed by an ever-growing list of narrowly defined pigeonholes into which they must stick a tolling claim before tolling is possible. The Tennessee Supreme Court in *Whitehead* made a sagacious decision to adopt a flexible test that was already being deftly utilized by courts across the country. The new rule promotes fairness, and lower courts and practitioners would do well to embrace it in all its breadth.

¹⁴⁹ As the Tennessee Supreme Court has emphasized,

[D]ue process tolling must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result. The threshold for triggering this form of relief is very high, lest the exceptions swallow the rule.

Id. (internal citations and quotation marks omitted).

