

APPENDIX

A-1

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

03/23/2018

Clerk of the
Appellate Courts

RANDALL TURNER v. STATE OF TENNESSEE

**Criminal Court for Hamilton County
No. 303816**

No. E2018-00520-CCA-R3-PC

ORDER

Before the court is the pro se appellant's "Appeal from the Final Judgment of Hamilton County Criminal Court at Chattanooga," seeking an appeal as of right from the trial court's January 29, 2018 order denying post-judgment relief. The pleading was filed on March 23, 2018. The pro se appellant acknowledges that the pleading is untimely but asserts that he was recently transferred to a different correctional facility and did not receive the trial court's order until March 8, 2018. An attachment to the pleading indicates that the pro se appellant attempted to file a notice of appeal in the trial court on March 13, 2018.

Effective July 1, 2017, "the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment." Tenn. R. App. P. 4(a). "[H]owever, in all criminal cases the 'notice of appeal' document is not jurisdictional and the timely filing of such document may be waived in the interest of justice." *Id.* "The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice." *Id.*

We conclude that the interest of justice requires a waiver of the filing of the notice of appeal in this case. Therefore, the appellant's request to waive the timely filing of the notice of appeal is GRANTED. The appellate court clerk is directed to provide to the trial court clerk a copy of this order. This case shall proceed in accordance with the appellate rules.

The court also notes that the pro se appellant, in the instant pleading, seeks the appointment of counsel and permission to proceed as a poor person on appeal. The court takes judicial notice that the appellant has been previously determined to be indigent and

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is currently serving an effective sentence of life without the possibility of parole for his convictions of first degree murder, aggravated kidnapping, and two counts of aggravated robbery. Accordingly, his request to proceed as a poor person is GRANTED. The request for appointment of counsel is, however, DENIED, as premature. The pro se appellant may renew his request for appointment of counsel following the filing of the record.

PER CURIAM

(NORMA MCGEE OGLE, JUDGE)

(D. KELLY THOMAS, JR., JUDGE)

(ROBERT H. MONTGOMERY, JR., JUDGE)

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

RANDALL TURNER v. STATE OF TENNESSEE

Criminal Court for Hamilton County
No. 303816

No. E2018-00520-CCA-R3-PC

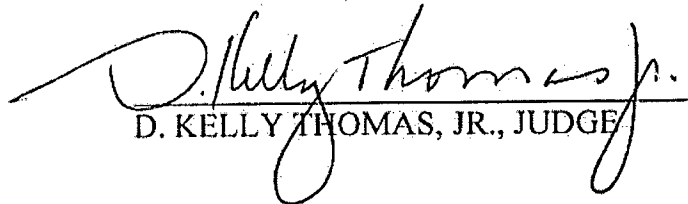
FILED

JUN 4 2018

Clerk of the Appellate Courts
Rec'd By _____

ORDER

On June 1, 2018, the appellate court clerk received from the trial court clerk a notice that the appellant had failed to file either a transcript or notice of no transcript in the trial court. *See* Tenn. R. App. P. 25(a). The docketing statement submitted by the pro appellant indicates that there is no transcript to be filed. Therefore, the court has determined that the requirements concerning the filing a notice of transcript or no transcript shall be waived. Accordingly, the court DIRECTS the trial court clerk to prepare and transmit the record for filing within 45 days of the entry of this order.


D. KELLY THOMAS, JR., JUDGE

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**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE**

RANDALL TURNER v. STATE OF TENNESSEE

**Hamilton County Criminal Court
303816**

No. E2018-00520-CCA-R3-PC

Date Printed: 06/08/2018

Notice / Filed Date: 06/08/2018

NOTICE - Brief - Appellant's Brief Filed

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

RANDALL TURNER v. STATE OF TENNESSEE

Hamilton County Criminal Court
303816

No. E2018-00520-CCA-R3-PC

Date Printed: 08/07/2018

Notice / Filed Date: 08/07/2018

NOTICE - Docket Activity - Docketed (On Briefs)

This case has been docketed as an on-briefs case. You will receive another notice when an opinion is filed.

James M. Hivner
Clerk of the Appellate Courts

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State of Tennessee
Appellate Court Public Case History

E2018-00520-CCA-R3-PC

Short Style: RANDALL TURNER v. STATE OF TENNESSEE

Classification: Appeal by Right - TRAP 3 - Post-Conviction

Status: Docketed

Trial Court Information

Trial Court: Hamilton County Criminal Court

Trial Court Judge: Don W. Poole

Trial Court No.: 303816

**Original Appeal
Offense:** POST CONVICTION RELIEF

Record Information

	Volumes	Supplemental	Abridged	Available
Technical Record	1	N	N	Y

Appeal Milestones/Major Events

Appeal Filed	03/23/2018
Record Filed	06/08/2018
Appellant(s) Briefing Complete	06/08/2018
Appellee(s) Briefing Complete	07/10/2018
Oral Argument/Submission	09/26/2018
Panel	
Decision Date	
Decision Type	
Disposition	
Appeal to S. Ct. Date	
Closed Date	

Parties

Name	Role	Lead Counsel
Randall Turner	Appellant/Petitioner	Pro Se
State of Tennessee	Appellee/Respondent	Benjamin A. Ball Assistant Attorney General Criminal Justice Division P. O. Box 20407 Nashville, TN 37202

Case History

Date	Event Description	Filer
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State of Tennessee
Appellate Court Public Case History
E2018-00520-CCA-R3-PC

Date	Event Description	Filer
03/23/2018	Initiating Document - TRAP 3 Notice of Appeal Filed	Turner, Randall, Pro Se (Appellant/Petitioner)
03/23/2018	Action - New Pending Matter	
03/23/2018	Order (Other) - Miscellaneous (Sua Sponte)	
03/29/2018	Notice (Incoming) - Miscellaneous Court Forms	Turner, Randall, Pro Se (Appellant/Petitioner)
06/01/2018	Notice (Incoming) - Letter From Clerk - No Transcript/Stmt. Filed	Hamilton County Criminal Court (Trial Court Clerk)
06/04/2018	Order (Other) - Miscellaneous (Sua Sponte)	
06/07/2018	Motion - Appointment of Counsel	Turner, Randall, Pro Se (Appellant/Petitioner)
06/07/2018	Order - Appointment of Counsel Denied	
06/08/2018	Appellate Record - Original Received	
06/08/2018	Appellate Record - Original Filed	
06/08/2018	Brief - Appellant's Brief Filed	Turner, Randall, Pro Se (Appellant/Petitioner)
06/08/2018	Case Status - APPELLANT BRIEFING COMPLETE	
06/08/2018	Appellate Record - Checked Out	Nicholas White Spangler
07/10/2018	Appellate Record - Checked In	
07/10/2018	Brief - Appellee's Brief Filed	State of Tennessee (Appellee/Respondent)
07/10/2018	Case Status - APPELLEE BRIEFING COMPLETE	
08/07/2018	Docket Activity - Docketed (On Briefs)	
08/13/2018	Notice (Incoming) - Correspondence Received	Turner, Randall, Pro Se (Appellant/Petitioner)

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2018

RANDALL TURNER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 303816 Don W. Poole, Judge

No. E2018-00520-CCA-R3-PC

FILED

NOV 28 2018

Clerk of the Appellate Courts
Rec'd By _____

The petitioner, Randall Turner, appeals the denial of his petition for post-conviction relief, which petition challenged his 2001 guilty-pleaded convictions of first degree murder, aggravated kidnapping, and aggravated robbery. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and ROBERT L. HOLLOWAY, JR., JJ., joined.

Randall Turner, Only, Tennessee, pro se.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and Neal Pinkston, District Attorney General, for the appellee, State of Tennessee.

OPINION

The pro se petitioner, Randall Turner, appeals the Hamilton County Criminal Court's denial of his petition for post-conviction relief. In March 2001, the petitioner pleaded guilty to charges of first degree murder, aggravated kidnapping, and aggravated robbery. The trial court imposed an effective sentence of life imprisonment without the possibility of parole.

I. Procedural History

This is not the petitioner's first attempt to challenge the validity of his guilty-pleaded convictions. As this court detailed only a year ago, the petitioner has filed several petitions for post-conviction relief, at least one petition for habeas corpus relief, at least one petition for writ of error coram nobis, and various motions that this court has

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construed as post-conviction petitions or motions to reopen. *See Randall Turner v. State*, No. E2016-01969-CCA-R3-PC, slip op. at 1, (Tenn. Crim. App., Knoxville, July 7, 2017), *perm. app. denied* (Tenn. Dec. 6, 2017) (*Turner V*) (providing history of petitioner's filings).

Following his guilty pleas in 2001, the petitioner filed a timely petition for post-conviction relief; however, the petitioner later moved to dismiss that petition, which motion the post-conviction court granted. At some point thereafter, the petitioner filed a petition for writ of error coram nobis in this court, which petition this court dismissed in 2007 for lack of jurisdiction because the petition was "an original pleading improperly filed initially in this court and well beyond the one-year limitations period." *Randall Turner v. State*, No. E2006-02787-CCA-OT-CO (Tenn. Crim. App., Knoxville, Dec. 21, 2007) (Order).

The petitioner next filed a pleading styled "Motion to Vacate Convictions" in 2010, which this court construed as a petition for post-conviction relief. *See Randall Turner v. State*, No. E2011-00110-CCA-R3-PC, slip op. at 1 (Tenn. Crim. App., Knoxville, June 13, 2011) (Memorandum Opinion) (*Turner I*). We affirmed the dismissal of the petition as untimely, concluding that the petitioner had failed to establish entitlement to due process tolling of the statute of limitations for filing a petition for post-conviction relief because his claim of mental incapacity resulting from his taking Risperdal and Wellbutrin was "conclusory" and "unsupported." *Id.*, slip op. at 3.

In 2012, the petitioner filed a petition for habeas corpus relief attacking the legality of his indictments and an unrelated, prior conviction. *Randall Turner v. Bruce Westbrook, Warden*, No. E2012-00093-CCA-R3-HC, slip op. at 1-2 (Tenn. Crim. App., Knoxville, Oct. 24, 2012) (Memorandum Opinion) (*Turner II*). This court affirmed the dismissal of the petitioner's habeas corpus petition, concluding that the indictments contained no defects that would render the judgments void and that the claim related to the prior conviction was not cognizable in a habeas corpus proceeding because the sentence for that conviction had expired. *Id.*, slip op. at 2-3.

The petitioner then filed a pleading styled simply "Petition" in December 2012, followed by a pleading styled "Amended Petition" in January 2013, which petitions alleged that the petitioner was innocent of the crimes, that his guilty plea resulted from coercion by his trial counsel in conspiracy with the State, and that the judge should recuse himself due to a conflict of interests. *Randall Turner v. State*, No. E2013-01515-CCA-R3-PC, slip op. at 2 (Tenn. Crim. App., Knoxville, Mar. 17, 2014) (*Turner III*). The trial court initially dismissed the petition after concluding that the claims raised were the same as those raised in the 2010 petition and that no conflict of interests existed that would

require judicial recusal. *Id.* After the petitioner moved the court to reconsider, the court permitted the petitioner “to clarify and precisely identify his claims.” *Id.* Thereafter, the court again dismissed the petitions, this time construing the petitions as time-barred petitions for post-conviction relief. *Id.*, slip op. at 3. On appeal, this court agreed that the filings should be construed as petitions for post-conviction relief and affirmed the dismissal of the petitions as untimely because they were filed “well-outside the one-year statute of limitations” and because “the petitioner failed to allege an exception to the statute of limitations.” *Id.*

Subsequently, the petitioner filed a petition pursuant to the Post-Conviction DNA Analysis Act of 2001 for testing of certain items of clothing. *Randall Turner v. State*, No. E2013-01565-CCA-R3-PC, slip op. at 3 (Tenn. Crim. App., Knoxville, Apr. 7, 2014) (*Turner IV*). On appeal, this court held that the petitioner failed to demonstrate entitlement to such testing and affirmed the dismissal of the petition. *Id.*, slip op. at 6.

In 2016, the petitioner filed a “Motion to Re-Open Post-Conviction Petition to Correct Manifest Injustice” in which the petitioner argued that his trial counsel conspired with the State and the trial court to coerce his guilty pleas and that his trial counsel was ineffective for failing to notify the trial court of the petitioner’s pending malpractice action against them. *Turner V*, slip op. at 2. The court construed the motion as a petition for post-conviction relief and dismissed it as untimely. *Id.*, slip op. at 2-3. The petitioner then filed a “Motion to Reconsider” with the post-conviction court reasserting his claims and seeking to “revoke his 2003 waiver of post-conviction claims.” *Id.*, slip op. at 3. The post-conviction court, construing the motion as one “to revoke the waiver of post-conviction proceedings,” denied the motion. *Id.* The petitioner appealed, raising four issues: (1) his guilty plea was coerced; (2) his trial counsel was ineffective for failing to disclose the malpractice suit brought by the petitioner; (3) the post-conviction statute of limitations was unconstitutional; and (4) the post-conviction court erred in failing to recuse itself. *Id.* This court “consider[ed] the [p]etitioner’s pleading as both a motion to reopen and a post-conviction relief petition.” *Id.*, slip op. at 4. This court did not reach the merits of the petitioner’s claims because he failed to satisfy the requirements for appealing a motion to reopen and because, construing the pleading as an original petition for post-conviction relief, the notice of appeal was untimely.

The petitioner filed the instant petition for post-conviction relief on January 19, 2018, which petition acknowledges that the petitioner has “made several efforts to appeal his conviction” and that such attempts have been dismissed for untimeliness. The post-conviction court summarized the petitioner’s claims as follows:

(1) that [the trial court] never ruled on his motions to suppress a preliminary-hearing identification and suppress evidence or dismiss the charges with prejudice;

(2) that, since the pleas, he has made several efforts to “appeal” the judgments;

(3) that, on most occasions, his efforts were found to be untimely;

(4) that it is futile to present the same claims again;

(5) that he was prevented from filing timely claims by “mental foggiess” induced by medication and lack of legal aid caused by segregation or inability to interest an inmate legal assistant in his case;

(6) that, as a consequence, the post-conviction statute of limitation violates due process on its face and as applied to him; and

(7) that post-conviction procedures, specifically, the one-year statute of limitation and the pre-petition unavailability of appointments of post-conviction counsel, violate equal protection by treating him differently than the state, which, before prosecution, has a more favorable or no statute of limitation and has well-qualified counsel, differences that he likens to “forcing a man who cannot swim to compete against Michael Phelps in a race for his life.”

The post-conviction court issued an order dismissing the petitioner’s post-conviction petition on January 30, 2018. The court found that the petition was untimely and that the petitioner had failed to “state a statutory exception to the statute of limitations.” As to the petitioner’s claim that the statute of limitations was unconstitutional as applied to him, the post-conviction court concluded, “The petitioner’s long history of *pro-se* filings does not suggest that any ‘mental foggiess’ or lack of legal aid prevents him from requesting relief.” Additionally, the post-conviction court concluded that the post-conviction procedures do not violate equal protection.

In this appeal, the petitioner claims due process tolling of the statute of limitations for filing a petition for post-conviction relief based upon mental impairment stemming from medication, which, he says, “cause[d] him to withdraw his [original, timely post-conviction] petition.” As to his claims for post-conviction relief, the petitioner asserts that he was deprived of the effective assistance of counsel and that his guilty pleas were the product of coercion, ineffective assistance of counsel, and trial court error. The petitioner also requests, in the alternative, that “the court grant [his] motion for Rule 52(b) appeal and vacate[]” his convictions. We understand this to refer to Tennessee Rules of Criminal Procedure Rule 52, which has been deleted but the substance of which is now found in Tennessee Rules of Appellate Procedure 36(b). *See* Tenn. R. Crim. P. 52, Advisory Cmm’n Comments; Tenn. R. App. P. 36(b). Accordingly, we interpret the petitioner’s request for a Rule 52(b) appeal to be an argument for plain error review.

The State contends that the post-conviction court did not err by dismissing the petition as untimely and by finding no due process ground on which to toll the statute of limitations. The State also points out that the petitioner has filed other petitions for post-conviction relief previously and argues that this petition should be barred as a subsequent petition. Finally, the State argues that this petition should not be construed as a motion to reopen nor as a motion to revoke the petitioner’s waiver of his original post-conviction petition.

Because it is unclear whether the petitioner intended the instant petition to be a new post-conviction petition or a motion to reopen his withdrawn petition, we will consider each in turn.

II. Motion to Reopen

Because the petitioner asserts that mental impairment resulting from medication “cause[d] him to withdraw” his initial post-conviction petition, we will first consider the instant petition as a motion to reopen his withdrawn petition.

The grounds for reopening a petition for post-conviction relief are narrow. The relevant portion of the Code provides as follows:

(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a

constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of

subsection (a). If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.

T.C.A. § 40-30-117(a)-(b).

A post-conviction court's denial of a motion to reopen a post-conviction petition does not afford a petitioner an appeal as of right. *See* Tenn. R. App. P. 3(b); *Matthew Dixon v. State*, No. W2015-00130-CCA-R3-PC, slip op. at 7 (Tenn. Crim. App., Jackson, Oct. 21, 2015). Rather, such denial may be challenged on appeal only by the filing of an application for permission to appeal no later than 30 days after the denial by the post-conviction court. T.C.A. § 40-30-117(c); Tenn. Sup. Ct. R. 28, § 10(B). The statute "outlines four requirements for an appeal from a motion to reopen to be considered: (1) the timeliness of filing, (2) the place of filing, (3) the application to be filed, and (4) the attachments to the application." *Graham v. State*, 90 S.W.3d 687, 689 (Tenn. 2002). "In general, the contents of an application for permission to appeal must include the date and judgment from which the petitioner seeks review, the issue which the petitioner seeks to raise, and the reasons why the appellate court should grant review." *Graham*, 90 S.W.3d at 691. Whether a notice of appeal satisfies the requirements of an application for permission to appeal is a matter of substance over form. *Id.* ("[T]he label [on the pleading] is not dispositive of whether this Court may nonetheless treat the filing as an application for permission to appeal."). That being said, we may not suspend the statutory requirements. *Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, slip op. at 10 (Tenn. Crim. App., Jackson, Nov. 7, 2007).

Here, the petitioner filed a notice of appeal accompanied by a document entitled "Appeal from the Final Judgment of Hamilton County Criminal Court at Chattanooga" in which the petitioner restates the claims raised in his petition. Even if this pleading was sufficient to satisfy the substantive requirements of an application for permission to appeal, the petitioner failed to file it within 30 days after the post-conviction court's order denying relief. Although this court granted a waiver of timeliness as to the notice of appeal under the terms of Tennessee Rule of Appellate Procedure 3(b), no such waiver is permitted for an application for permission to appeal the denial of a motion to reopen. *See Timothy Roberson*, slip op. at 10; *see also* Tenn. Sup. Ct. R. 28, § 11(B).

Accordingly, to the extent that the 2018 petition can be construed as a motion to reopen his previous post-conviction petition, this court lacks jurisdiction to consider this appeal.

III. Petition for Post-Conviction Relief

If we construe the instant petition as a new petition for post-conviction relief, the petitioner has likewise failed to establish an entitlement to relief.

As an initial matter, we note that “there is no constitutional duty to provide post-conviction relief procedures.” *Serrano v. State*, 133 S.W.3d 599, 604 (Tenn. 2004) (citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). Post-conviction relief is a statutory creation and, therefore, subject to the discretionary limitations of the legislature. *Serrano*, 133 S.W.3d at 604. “When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.” *Id.* (quoting *Schick v. United States*, 195 U.S. 65, 72 (1904)).

Code section 40-30-106(f) provides for post-conviction relief only when “the claims for relief have not been waived or previously determined.” T.C.A. § 40-30-106(f). “A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented” T.C.A. § 40-30-106(g). Thus, “an issue raised for the first time on appeal is waived.” *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004). Because the issues the petitioner raises in his brief on appeal were not raised in his post-conviction petition, we are precluded from considering the merits of the issues raised in the petitioner’s brief.

Although, as a general rule, plain error review is available on appeal for a claim that is otherwise waived, *see* Tenn. R. App. P. 36(b), our supreme court concluded that a claim waived pursuant to the Post-Conviction Procedures Act precluded plain error review. *State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000) (analyzing the issue under the repealed Act, but stating, “Our holding here, . . . though applying to [the repealed] Act, applies equally to proceedings brought under the Post-Conviction Procedure Act currently in force.”). The Code’s limitation of post-conviction relief to “claims for relief [that] have not been waived or previously determined,” T.C.A. § 40-30-106(f), shields issues raised for the first time on appeal from plain error review, *see West*, 19 S.W.3d at 756. Although *West* analyzed the application of the plain error doctrine in post-conviction proceedings under the former Post-Conviction Procedure Act, repealed in 1995, this court has applied the ruling in *West* to cases brought under the current Act. *See Alfio Orlando Lewis v. State*, No. M2004-01282-CCA-R3-PC, slip op. at 6 (Tenn. Crim. App., Nashville, Mar. 16, 2005) (“The plain error doctrine has no application in post-conviction relief proceedings.”). Therefore, plain error review is unavailable to the petitioner in the present appeal. *See West*, 19 S.W.3d at 756-57.

Waiver notwithstanding, our perusal of the record shows a failure to establish any grounds for due process tolling of the post-conviction statute of limitations. Code section 40-30-102 provides that “a person in custody . . . must petition for post-conviction relief . . . within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken.” T.C.A. § 40-30-102(a). The statute of limitations for filing a post-conviction petition is jurisdictional. *See id.* § 40-30-102(b) (“No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless [certain statutory prerequisites are met].”). Our supreme court has held that “the one-year statutory period is an element of the right to file a post-conviction petition and that it is not an affirmative defense that must be asserted by the State.” *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001) *examined by Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 511-13 (Tenn. 2013). Thus, “it is incumbent upon a petitioner to include allegations of fact in the petition establishing either timely filing or tolling of the statutory period,” and the “[f]ailure to include sufficient factual allegations of either compliance with the statute or [circumstances] requiring tolling will result in dismissal.” *Id.*

As indicated, the petitioner’s first, and only timely, petition for post-conviction relief was withdrawn and thus not resolved on its merits. The withdrawal of the petition, however, did not operate to toll the statute of limitations. *See* T.C.A. § 40-30-109(c); *see also* Tenn. Sup. Ct. R. 28, § 6(C)(8) (“The petitioner may withdraw a petition at any time prior to the hearing without prejudice to any rights to refile, but the withdrawn petition shall not toll the statute of limitations.”). Since then, the petitioner has filed a variety of pleadings designed to collaterally attack his convictions, and the bulk of these filings have, due to the nature of the claims raised, been treated as petitions for post-conviction relief. Because none of these petitions was filed within the statute of limitations period for filing a petition for post-conviction relief, each has been dismissed rather than resolved on the merits of the underlying claims for post-conviction relief. The petitioner’s claim to due process tolling of the statute of limitations based upon mental incapacitation occasioned by his taking Wellbutrin and Risperdal has, however, been considered on its merits and rejected by a court of competent jurisdiction. *See Turner I*, slip op. at 3. The petitioner’s claim to due process tolling in his most recent petition is identical to that raised in *Turner I*, i.e., “that he was prevented from filing his post-conviction proceeding sooner because ‘of the mind impairment medication Risp[er]dal and the adverse effect that Wellbutrin [had] when tak[en] with Risperdal.’” *Id.* In *Turner I*, we concluded that, because the petitioner’s claim of mental incapacity was “unsupported and [wa]s a ‘mere assertion of a psychological problem,’” the petitioner had failed to establish entitlement to due process tolling of the statute of limitations for post-conviction proceedings. *Id.* The petitioner has presented no evidence that would warrant our reconsideration of this issue.

Moreover, even if we were inclined to revisit the petitioner's claim of due process tolling, we would conclude that the petitioner is not entitled to relief. Due process requires the tolling of the one-year statute of limitations when "a petitioner who was incompetent throughout the limitations period would be denied the opportunity to challenge his conviction in a meaningful manner." *Watkins v. State*, 903 S.W.2d 302, 307 (Tenn. 1995). In post-conviction proceedings, such as the one before us now, the applicable standard to determine competency

is whether the prisoner possesses "the present capacity to appreciate [his or her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity." Tenn. Sup. Ct. R. 28, § 11(B)(1). The question is not whether the prisoner is able to care for himself or herself, but whether the prisoner is able to make rational decisions concerning the management of his or her post-conviction appeals.

Reid, 396 S.W.3d at 512-13 (alteration in original);¹ accord *Chris Jones v. State*, No. W2017-00405-CCA-R3-PC, slip op. at 12-13 (Tenn. Crim. App., Jackson, June 27, 2018). At the outset of the inquiry, the court should presume the petitioner competent. *Reid*, 396 S.W.3d at 512 (citing Tenn. Sup. Ct. R. 28, § 11(B)(2); *In re Conservatorship of Groves*, 109 S.W.3d 317, 329-30 (Tenn. Ct. App. 2003)); *Chris Jones*, slip op. at 13. To overcome the presumption of competence, a petitioner "must make a prima facie showing that [he] is incompetent by submitting 'affidavits, depositions, medical reports, or other credible evidence that contain specific factual allegations showing the petitioner's incompetence.'" *Reid*, 396 S.W.3d at 512 (quoting *Holton v. State*, 201 S.W.3d 626, 634 (Tenn. 2006)); *Chris Jones*, slip op. at 13. Due process principles do not require tolling of the statute of limitations "upon the mere assertion of a psychological problem." *Nix*, 40 S.W.3d at 463. "Unsupported, conclusory, or general

¹ Prior to the supreme court's decision in *Reid*, the standard for determining when incompetency required tolling of the post-conviction statute of limitations was whether a petitioner "is unable either to manage his personal affairs or to understand his legal rights and liabilities." *Nix*, 40 S.W.3d at 463. In *Reid*, the supreme court clarified that the *Nix* standard was appropriately applied when it contained a rationality component and was "functionally identical to the standard embodied in [Tennessee Supreme Court Rule] 28, § 11(B)(1)." *Reid*, 396 S.W.3d 478, 514.

allegations of mental illness will not be sufficient to require tolling and prevent summary dismissal” *Id.* at 464.

In the petition under review, the petitioner claimed that his opportunity to seek relief “has been blocked by other [c]ircumstances beyond his control.” Namely, “[f]or a long period of time . . . the [p]etitioner was in a mental state caused by the drugs which made the passage of time and the daily life foggy and uncertain,” which “caused [p]etitioner to fail to file timely [p]etitions.” In support of his claim of mental incapacity, the petitioner exhibited to his petition a letter from the petitioner addressed to “Judge Steelman,” in which the petitioner claimed that he “was on mental health medication that impair[ed] judgment, thinking and mental skill.” The petitioner attached no other evidence to his petition supporting his assertion of mental impairment; however, the petitioner did attach additional exhibits to his brief, including a December 25, 2000 medical report from Erlanger Health System indicating that the petitioner “has bipolar disorder” and was taking “Darvocet, Wellbutrin, [Risperdal] and Cogentin” and a document indicating that Risperidone “can make you tired and affect your judgment, an effect that increases with dosage.”

Because these exhibits were not attached to the petition filed in the post-conviction court, we cannot consider them as part of the record on appeal. *See State v. Matthews*, 805 S.W.2d 776, 783 (Tenn. Crim. App. 1990). However, even if we were to consider these documents, they are insufficient to support tolling of the statute of limitations on due process grounds. The medical report shows that the petitioner was taking certain medications on December 25, 2000. The petitioner pleaded guilty on March 14, 2001, at which point the limitations period for post-conviction relief began to run. The medical report does not establish whether the petitioner continued to take the medication during the limitations period or whether such medication mentally incapacitated the petitioner in any way. The document listing the possible side-effects of Risperidone indicates only that an effect to one’s judgment is a possibility and does not state the possible extent of such impairment or show that the petitioner was so impaired. Therefore, the petitioner failed to allege sufficient facts showing that he was suffering from mental impairment when he decided to withdraw his first post-conviction petition or during the remaining period of limitation.

Because the petitioner has failed to establish sufficient grounds to warrant due process tolling of the post-conviction statute of limitations, the post-conviction court did not err by dismissing the petition as time-barred.

Conclusion

The petition for post-conviction relief, construed as a motion to reopen, a new post-conviction petition, or as a request for plain error review fails to meet the procedural requirements for post-conviction relief. For the foregoing reasons, we affirm the judgment of the post-conviction court.


JAMES CURWOOD WITT, JR., JUDGE

APPENDIX B

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

RANDALL TURNER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

No. 303816

Division III

ORDER

Before the Court are the 19 January 2018 petition of the petitioner for relief from the convictions or effective sentence of life imprisonment without the possibility of parole resulting from his 14 March 2001 guilty pleas in cases 226182, 226183, 226184, and 226329. As grounds, the Court understands him to allege in the petition or an accompanying letter to Judge Steelman, a prosecutor in his case:

- (1) that Judge Meyer never ruled on his motions to suppress a preliminary-hearing identification and suppress evidence or dismiss the charges with prejudice;
- (2) that, since the pleas, he has made several efforts to "appeal" the judgments;
- (3) that, on most occasions, his efforts were found to be untimely;
- (4) that it is futile to present the same claims again;
- (5) that he was prevented from filing timely claims by "mental foginess" induced by medication and lack of legal aid caused by segregation or inability to interest an inmate legal assistant in his case;
- (6) that, as a consequence, the post-conviction statute of limitation violates due process on its face and as applied to him; and
- (7) that post-conviction procedures, specifically, the one-year statute of limitation and the pre-petition unavailability of appointments of post-conviction counsel, violate equal protection by treating him differently than the state, which, before prosecution, has a more favorable or no statute of limitation and has well-qualified counsel, differences that he likens to "forcing a man who cannot swim to compete against Michael Phelps in a race for his life."

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APPENDIX B

SCANNED

He requests that the Court not summarily dismiss the petition before appointing counsel and giving him an opportunity to amend it and that the Court rule on the merits. In support of the request for appointment of counsel, he submits an affidavit of indigence.

The record reflects in part that, on 29 November 2000, Judge Meyer, referencing “continuous pro se motions” from the petitioner, denied the motions and ordered the petitioner to communicate any requests through counsel. On 5 February 2001, all *pro-se* motions that had been refiled were heard and denied, stricken, waived by agreement, or, in the two instances of which the petitioner complains, reserved to trial. On 14 March 2001, before Judge Meyer, the petitioner entered guilty pleas and received an effective sentence of life imprisonment without the possibility of parole.

Thereafter, the petitioner filed one timely post-conviction petition, but, after the appointment of counsel, it was dismissed on his own motion. A summary of his many efforts to obtain post-conviction relief since then appears in *Turner v. State*, No. E2016-01969-CCA-R3-PC, 2017 WL 2895938, *1-2 (Tenn. Crim. App. 7 July), *perm. app. denied*, (Tenn. 7 December).

The petition is not timely under the applicable statute of limitation. *See* T.C.A. § 40 30 102(a) (limiting the time for filing a post-conviction petition, absent a direct appeal, to one year from the date on which the judgment becomes final). Nor does it state a statutory exception to the statute of limitation. *See* T.C.A. § 40 30 102(b) (excepting from the time limit of subsection (a) only claims based on the post-trial recognition of a new, retrospectively applicable constitutional right, new, scientific evidence of actual innocence, or the post-judgment invalidation of a sentence-enhancing

conviction, if the sentence enhanced on the basis of the invalidated conviction was not agreed).

What the petition does is attempt to state a constitutional exception to the statute of limitation. The petitioner first tries to excuse the untimeliness of his post-conviction claims by alleging that the one-year post-conviction statute of limitation, T.C.A. § 40 30 102(a), violates due process on its face. The Court respectfully disagrees.

The Petitioner raises the issue that the Act's one-year statute of limitations violates due process guarantees. *See* U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8. The State, on the other hand, argues that it was within the legislature's power to enact the one-year statute of limitations and that the statute does not violate due process because it provides a reasonable period of time in which post-conviction claims can be asserted.

It is well-established that the identification of the precise dictates of due process requires consideration of both the governmental interests involved and the private interests affected by the official action. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn.1992) (citing *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 42 L.Ed.2d 521, (1975)). With regard to post-conviction proceedings, the governmental interest represented by the statute of limitations is the prevention of the litigation of stale and groundless claims, with the accompanying cost. *Id.* The private interest at stake is a prisoner's opportunity to attack his or her conviction and incarceration on the grounds that he or she was deprived of a constitutional right during the conviction process. *Id.*

Although freedom from bodily restraint and punishment by the State without due process of law is a fundamental right, it is clear that states have no constitutional duty to provide post-conviction relief procedures. *Id.* (citations omitted). Thus, as our supreme court held in *Burford*, the opportunity to collaterally attack constitutional violations which occurred during the conviction process is not a fundamental right entitled to heightened due process protection. *Id.*

It is clear that the State has a legitimate interest in preventing the litigation of stale or fraudulent claims. *Id.* at 208 (citing *Jimenez v. Weinberger*, 417 U.S. 628, 636, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974)). The State may therefore "erect reasonable procedural requirements for triggering the right to an adjudication, such as statutes of limitations, and [the] [S]tate may terminate a claim for failure to comply with a reasonable procedural rule without violating due process rights." *Id.* (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). Before a state may terminate a claim for failure to comply

with procedural requirements such as statutes of limitations, however, due process requires that potential litigants be given an opportunity to present claims at a meaningful time and in a meaningful manner. *Id.*

As was the case in *Burford*, when our supreme court considered the constitutionality of the three-year statute of limitations, the question before us is “whether the [S]tate’s policy as reflected in the statute affords a fair and reasonable opportunity for ... bringing ... suit.” *Id.* (quoting *Pickett v. Brown*, 638 S.W.2d 369, 376 (Tenn.1982), *rev’d on equal protection grounds*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983)). The test is whether the time period provides a petitioner a reasonable opportunity to have the claimed issue heard and determined. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 93, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Having considered the private and governmental interests at stake, we conclude that the one-year statute of limitations contained in Tennessee Code Annotated section 40–30–202 provides a reasonable opportunity for the presentation of post-conviction claims. *218 *Cf. Burford*, 845 S.W.2d at 208 (concluding that the three-year statute of limitations provided a reasonable opportunity for the presentation of post-conviction claims). Accordingly, we believe that the one-year statute of limitations on petitions for post-conviction relief does not violate the due process guarantees of the United States and Tennessee Constitutions.

Carothers v. State, 980 S.W.3d 215, 217-8 (Tenn. Crim. App. 1997).

The petitioner also tries to excuse the untimeliness of his post-conviction claims by alleging that the one-year post-conviction statute of limitation violates due process as applied to him, because of his state of “mental foggiess” induced by medication and lack of legal aid caused by segregation and inability to interest an inmate legal assistant in his case. Again, the Court respectfully disagrees.

Due process precludes strict application of “procedural requirements such as statutes of limitation” effectively to deny a potential litigant an opportunity to present his claim(s) “at a meaningful time and in a meaningful manner.” *State v. McKnight*, 51 S.W.3d 559, 563 (Tenn. 2001) (quoting *Seals v. State*, 23 S.W.3d 272, 277-78 (Tenn. 2000)). The petitioner’s long history of *pro-se* filings does not suggest that any “mental foggiess” or lack of legal aid prevents him from requesting relief.

In any event, the petitioner had the usual opportunity to present any claim arising from the pre-plea reservation of two of his *pro-se* motions, any such claim arising before the commencement of the limitation period. Not only did the petitioner have such an opportunity, but he did file one timely post-conviction petition before moving, after appointment of counsel, to dismiss it, presumably, because he did not wish, after all, to face the death penalty again.

Although mental incompetence may excuse non-compliance with the post-conviction statute of limitations, vague allegations of “mental foggiess” induced by medication do not suffice. As the Court of Criminal Appeals remarks in an opinion affirming the summary dismissal of the petitioner’s untimely, 2010 request for post-conviction relief:

We recognize that our courts have applied principles of due process of law to allow certain petitioners to overcome a statute-of-limitations bar. *See, e.g., Burford v. State*, 845 S.W.2d 204, 208 (Tenn.1992) (“[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.”). However, when, as is the case here, mental or psychological incompetence is claimed as the basis for a due process tolling of a postconviction statute of limitations, “due process requires tolling of the post-conviction statute of limitations only if a petitioner shows that he is unable either to manage his personal affairs or to understand his legal rights and liabilities.” *State v. Nix*, 40 S.W.3d 459, 463 (Tenn.2001). Moreover, due process principles do not require tolling of the statute of limitations “upon the mere assertion of a psychological problem.” *Id.* “Unsupported, conclusory, or general allegations of mental illness will not be sufficient to require tolling and prevent summary dismissal.” *Id.* at 464.

The petitioner claims that he was prevented from filing his post-conviction proceeding sooner because “of the mind impairment medication Rispderdal and the adverse effect that Wellbutrin [had] when tak[en] with Risperdal.” In his brief, he asserted, “Even after years after not taking those medications, [he] was still having problem[s] that [were] preventing him from articul[at]ing to the court his claims in any meaningful manner.” In any event, the “Motion to Vacate Convictions” states only a conclusory basis for due process tolling. The claim was

unsupported and is a “mere assertion of a psychological problem” that warranted summary dismissal of the motion as being barred by the statute of limitations for post-conviction proceedings.

Turner v. State, No. E2011-00110-CCA-R3-PC, 2011 WL 2416927, *1-2 (Tenn. Crim. App. 13 June), *perm. app. denied* (Tenn. 21 September). *See also Reid v. State*, 197 S.W.3d 694, 702-3 (Tenn. 2006) (requiring a petitioner to make a threshold showing of incompetence by submitting a pleading alleging the incompetence and attaching “affidavits, depositions, medical reports, or other credible evidence that contain specific factual allegations demonstrating either the petitioner’s inability to manage his or her personal affairs or the petitioner’s inability to understand his legal right and liabilities”).

Nor is lack of legal aid caused by segregation or inability to interest an inmate legal assistant in one’s case an excuse for non-compliance with the statute of limitations. *See Taylor v. State*, No. W2014-00683-CCA-R3-PC, 2014 WL 6491076, *3 (Tenn. Crim. App. 20 November) (rejecting a claim that segregation in prison excuses non-compliance with the post-conviction statute of limitations). *See also Jones v. State*, No. W2016-00197-CCA-R3-PC, 2017 WL 1011619, *4 (Tenn. Crim. App. 14 March) (rejecting a claim that personal ignorance of post-conviction procedure excuses non-compliance with the post-conviction statute of limitations) (citations omitted).

Finally, the petitioner seems to try to excuse the untimeliness of his post-conviction claims by alleging that post-conviction procedures, specifically, the one-year statute of limitation and the pre-petition unavailability of appointments of post-conviction counsel, violate equal protection by treating him differently than the state, which, before prosecution, has more favorable or no statute of limitation and has well-qualified counsel. Assuming *arguendo* that a violation of equal protection excuses the untimeliness of post-

conviction claims, the Court respectfully disagrees that Tennessee post-conviction procedures violate equal protection.

On appeal, the petitioner argues that “the major time difference between [statutes of limitations applicable to] certain civil litigants and [the statute applicable to] a criminal defendant involved in post-conviction [proceedings]” violates the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution. Both the United States and Tennessee constitutions guarantee to citizens the same basic right to equal protection of the laws. *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412-413 (Tenn.1995); *State v. Crain*, 972 S.W.2d 13, 15 (Tenn.Crim.App.1998). See also *Evan v. Steelman*, 970 S.W.2d 431, 435 (Tenn.1998) (“[t]his court has traditionally utilized the framework developed by the United States Supreme Court for analyzing equal protection claims”). Essentially, both the state and federal constitutions require that all persons similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). In other words, “things which are different in fact or opinion are not required by either constitution to be treated the same.” *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn.1988). Thus, a legislative classification which does not affect fundamental rights nor proceed along suspect lines will be accorded “a strong presumption of validity” and will be sustained “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 319-320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). See also *Evans*, 970 S.W.2d at 435; *State v. Robinson*, No. 01C01-9612-CC-00536, 1999 WL 16802, at *2 (Tenn.Crim.App. at Nashville), *perm. to appeal granted*, (Tenn.1999).

The challenged statute of limitations implicates neither a fundamental right nor a suspect class. The opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right. *Burford*, 845 S.W.2d at 207; *Carothers*, 980 S.W.2d at 217. Additionally, prisoners are not a suspect class. See, e.g., *Benjamin v. Jacobson*, 172 F.3d 144, 165 (2nd Cir.1999); *Carson v. Johnson*, 112 F.3d 818, 821-822 (5th Cir.1997); *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir.1998), *cert. denied*, U.S., 525 U.S. 1139, 119 S.Ct. 1028, 143 L.Ed.2d 38 (1999); *United States v. Vahovick*, 160 F.3d 395, 398 (7th Cir.1998); *Murray v. Dosal*, 150 F.3d 814, 818 (8th Cir.1998), *cert. denied*, U.S., 526 U.S. 1070, 119 S.Ct. 1467, 143 L.Ed.2d 551 (1999); *Mayner v. Callahan*, 873 F.2d 1300, 1302 (9th Cir.1989). Accordingly, the burden is upon the petitioner to negate every conceivable basis which might support the legislation, “whether or not the basis has a foundation in the record.” *Heller*, 509 U.S. at 320-321, 113 S.Ct. at 2643. The petitioner has not carried this burden.

The Court concludes that the subject petition is untimely under T.C.A. § 40 30 102(a) and does not state an exception to the statute of limitations. The petitioner has thirty days from the entry of this order to file, in the Court of Criminal Appeals, a notice of appeal.

The Court therefore ORDERS:

- (1) that the subject petition be dismissed and
- (2) that the petitioner, the district attorney general, the state attorney general and reporter, and the department of correction be promptly provided with a copy of this order.

SO ENTER on this 29 day of January, 20 18.

Randall Turner
WTSP - Site 2
P.O. Box 1150
Hennery, TN. 38041



Don W. Poole, Judge

Coleman v. Thompson, *supra*, left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, "initial-review collateral proceedings." *Coleman* had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because "in [these] cases ... state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.*, at 755, 111 S.Ct. 2546. As *Coleman* noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective-assistance claim, *id.*, at 756, 111 S.Ct. 2546 (emphasis deleted; internal quotation marks omitted), and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. See *id.*, at 755, 111 S.Ct. 2546; *Douglas v. California*, 372 U.S. 353, 357, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (holding States must appoint counsel on a prisoner's first appeal).

This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Martinez v. Ryan, 566 U.S. 1, 8-9 (2012).

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

03/27/2019

Clerk of the
Appellate Courts

RANDALL TURNER v. STATE OF TENNESSEE

**Criminal Court for Hamilton County
No. 303816**

No. E2018-00520-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Randall Turner and the record before us, the application is denied. Further, the petition for writ of certiorari and a motion for a Rule 52B appeal filed by Randall Turner are also denied.

PER CURIAM

APPENDIX C

**Additional material
from this filing is
available in the
Clerk's Office.**