

APPENDIX A

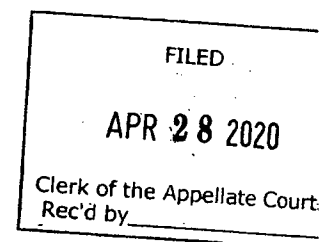
IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 24, 2020

ABRAHAM A. AUGUSTIN v. STATE OF TENNESSEE

Appeal from the Criminal Court for McMinn County
No. 05-553 Andrew M. Freiberg, Judge

No. E2019-01739-CCA-R3-PC



JUDGMENT

Came the Petitioner, Abraham A. Augustin, pro se, and the State, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court for McMinn County; and upon consideration thereof, this court is of the opinion that there is no error in the judgment of the post-conviction court.

It is, therefore, ordered and adjudged by this court that the judgment of the post-conviction court is affirmed, and the case is remanded to the Criminal Court for McMinn County for execution of the judgment of that court and for collection of costs accrued below.

Because it appears to the Court that the Petitioner, Abraham A. Augustin, is indigent, costs are taxed to the State of Tennessee.

JOHN EVERETT WILLIAMS, Presiding Judge
THOMAS T. WOODALL, Judge
ROBERT L. HOLLOWAY, JR., Judge

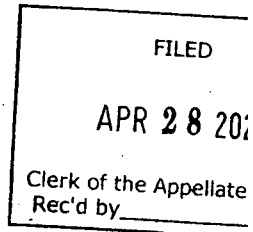
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**Appeal from the Criminal Court for McMinn County
No. 05-553 Andrew M. Freiberg, Judge**

No. E2019-01739-CCA-R3-PC



The Petitioner, Abraham A. Augustin appeals the post-conviction court's summary dismissal of his pro se petition for post-conviction relief. The Petitioner maintains that the statute of limitations should be tolled based on newly discovered evidence. After a review of the record and applicable law, we affirm the post-conviction court's summary dismissal of the petition.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT L. HOLLOWAY, JR., JJ., joined.

Abraham Augustin, pro se, Coleman, Florida.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Assistant Attorney General; and Stephen D. Crump, District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL BACKGROUND

In September of 2006, the Petitioner pleaded guilty to three counts of accessory after the fact of attempted first degree murder. The trial court imposed concurrent sentences of two years for each count. The judgments were entered on September 14, 2006.

On March 1, 2019, the Petitioner filed a petition for post-conviction relief, arguing

that his pleas were not knowingly and voluntarily entered because of trial counsel's ineffectiveness. The Petitioner asserted that trial counsel "failed to research the law to know the elements of First Degree Murder, Attempted First Degree Murder, and any Accessory offenses charged in connection with an Attempted First Degree Murder offense." The Petitioner argued that because the principal, Mr. Marcus Bradford, was not convicted of attempted first degree murder, the Petitioner was actually innocent of the offenses for which he was convicted and, therefore, did not enter a knowing and voluntary plea. The Petitioner also asserted that trial court failed to inform him that he would be deported as a result of his convictions.

On March 7, 2019, the post-conviction court entered an order summarily dismissing the petition as untimely. The post-conviction court noted that the Petitioner was sentenced on September 14, 2006, that the judgments became final on October 14, 2006, that the Petitioner was statutorily required to file a petition for post-conviction relief on or before October 14, 2007, and that the petition was not filed until March 1, 2019. Further, the post-conviction court found that the Petitioner failed to assert a basis upon which to toll the one-year statute of limitations.

The Petitioner filed a motion to reconsider the dismissal of his petition on July 22, 2019. In that motion, the Petitioner asserted that because he was actually innocent of the convicted offenses, he is entitled to tolling of the statute of limitations. The post-conviction court entered an order finding that the Tennessee Rules of Criminal Procedure do not recognize a motion to reconsider. Accordingly, the post-conviction court found that its previous order remained in effect, unaltered and undisturbed. On September 26, 2019, the Petitioner filed a motion requesting that this court accept his late notice of appeal, and this court granted his motion.

ANALYSIS

The Petitioner maintains that he is entitled to tolling of the one-year statute of limitations based on the verdict in Mr. Bradford's trial, which he asserts constitutes newly discovered evidence. He contends that because Mr. Bradford was not convicted of attempted first degree murder, the Petitioner could not have been convicted of accessory after the fact and, therefore, did not enter a knowing and voluntary plea. The State asserts that the post-conviction court did not err because the petition was untimely and does not satisfy a statutory exception or tolling for due process considerations. We agree with the State.

This court reviews a post-conviction court's summary dismissal of a post-conviction petition de novo. See *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002). Post-conviction relief is available to petitioners for any conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A petition

for post-conviction relief is required to be filed “within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final.” T.C.A. § 40-30-102(a). As a general rule, a trial court’s judgment becomes final thirty days after its entry “unless a timely notice of appeal or specified post-trial motion is filed.” *State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001).

The judgments were entered on September 14, 2006, and became final thirty days later. *See* Tenn. R. App. P. 4(a). The Petitioner had until October 14, 2007, to file a petition for post-conviction relief. However, he did not file his petition for post-conviction relief until March 1, 2019, over twelve years after his judgments became final and over eleven years after the expiration of the one-year statute of limitations.

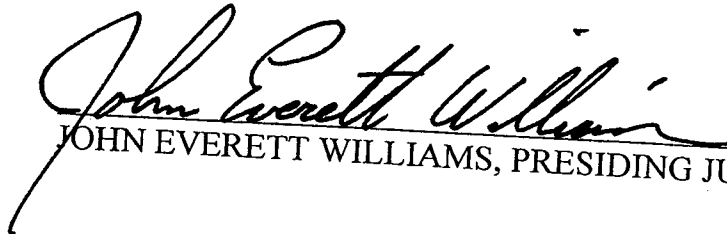
There are three statutory exceptions to the statute of limitations for filing a petition for post-conviction relief. T.C.A. § 40-30-102(b). In order to meet the exceptions, a petitioner must base a claim on a new rule of constitutional law that requires retrospective application, new scientific evidence that establishes actual innocence, or asserts that he is entitled to relief from sentences that were enhanced because of a previous conviction that has subsequently been found to be illegal. T.C.A. § 40-30-102(b). Additionally, due process may necessitate the tolling of the statute of limitations. *See Seals v. State*, 23 S.W.3d 272, 278-79 (Tenn. 2000). “Issues regarding whether due process require[s] the tolling of the post-conviction statute of limitations are mixed questions of law and fact and are, therefore, subject to de novo review.” *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). A 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 stood in his or her way and prevented timely filing.” *Bush v. State*, 428 S.W.3d 1, 22 (Tenn. 2014) (citing *Whitehead*, 402 S.W.3d at 631). In *Whitehead*, our supreme court identified three circumstances that allow for equitable tolling: 1) when the claim for relief arises after the statute of limitations has expired; 2) when a petitioner’s mental incapacities prevent the petitioner from filing prior to the expiration of the statute of limitations; and 3) when attorney misconduct necessitates the tolling of the statute of limitations. *Whitehead*, 402, S.W.3d at 620-21.

The State maintains that the Petitioner waived his claim of tolling based upon newly discovered evidence by failing to include the claim in his post-conviction petition. In the Petitioner’s reply brief, he claims that he raised an equitable tolling argument in his motion to reconsider, which he filed fourteen days after the post-conviction court dismissed his petition. In the reply brief, the Petitioner notes that “circuit court’s clerk of court never docketed the receipt of this document.” The post-conviction court entered its order summarily dismissing the petition on March 7, 2019. On July 22, 2019, the Petitioner filed a motion to reconsider, in which he argued that he was entitled to equitable tolling of the statute of limitations “because he is actually innocent of the

offenses of conviction.” On August 7, 2019, the post-conviction court entered an order finding that it would not reconsider the petition because “[t]he Tennessee [R]ules of Criminal Procedure do not recognize a motion to reconsider.” See *State v. Turco*, 108 S.W.3d 244, 245 n.2 (Tenn. 2003); see also *Calvin Douglas v. State*, No. W2017-00762-CCA-R3-PC, 2018 WL 1151949, at *2 (Tenn. Crim. App. Mar. 2, 2018) (“We note that filing a motion to reconsider after the denial of a post-conviction petition is not proper procedure.”). The post-conviction was correct in its finding that it did not have to consider the Petitioner’s motion to reconsider. Because that motion was the first time that the Petitioner raised the tolling argument, that argument is waived. Regardless of the waiver, the Petitioner has failed to establish a basis for tolling. The Petitioner provides no details regarding the verdict in Mr. Bradford’s trial or when the verdict was rendered. We conclude that such a claim does not justify the filing of a post-conviction petition more than eleven years after the expiration of the statute of limitations. Accordingly, the post-conviction court did not err in summarily dismissing the petition as untimely.

CONCLUSION

Based on the foregoing analysis, we affirm the judgment of the post-conviction court.


JOHN EVERETT WILLIAMS, PRESIDING JUDGE

Appendix B

IN THE CRIMINAL COURT FOR MCMINN COUNTY, TENNESSEE FILED

**ABRAHAM A. AUGUSTIN,
Petitioner,**

RECEIVED
CLERK OF COURT
MCMINN COUNTY
TENNESSEE
SA

vs.

Case No. ~~19-CR-~~ ~~PCR~~
(original case no. 05-553)

**STATE OF TENNESSEE,
Respondent.**

ORDER OF DISMISSAL

This matter came to be heard upon *pro se* Petitioner's pleading titled, "Post-Conviction Motion" (hereafter referred to as "Petition"), and filed with the Clerk of Court on March 1, 2019 in the McMinn County Criminal Court. In an effort to afford a *pro se* litigant extreme deference, this Court has reviewed the substance of Petitioner's claims and treated said pleading as a petition seeking post-conviction relief. The Court, having reviewed the Petition, having taken judicial notice of the record included in the applicable court file in the matter at bar, being fully advised of the issues presented by pleading, and for good cause shown, enters an ORDER denying any relief. The Court further makes the following findings of fact and law in entering an ORDER OF DISMISSAL on said Petition pursuant to Tenn. Code Ann. § 40-30-101 *et seq.*, as said Petition is untimely and fails to satisfy the requirements for an exemption to the statute of limitation bar.

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PROCEDURAL HISTORY

Petitioner, Abraham A. Augustin (hereafter referred to as "Petitioner"), entered a guilty plea in case number 05-553 before the McMinn County Criminal Court on September 11, 2006, and was sentenced by the trial court on September 14, 2006 as follows:

- Count 1 - Guilty plea to the offense of Class E felony accessory after the fact to attempted first degree murder in violation Tenn. Code Ann. § 39-11-411, receiving a two year term to serve in the Tennessee Department of Correction with an attendant assessment of court costs;
- Count 2 - Guilty plea to the offense of Class E felony accessory after the fact to attempted first degree murder in violation Tenn. Code Ann. § 39-11-411, receiving a two year term to serve in the Tennessee Department of Correction with an attendant assessment of court costs; and
- Count 3 - Guilty plea to the offense of Class E felony accessory after the fact to attempted first degree murder in violation Tenn. Code Ann. § 39-11-411, receiving a two year term to serve in the Tennessee Department of Correction with an attendant assessment of court costs.

These offenses were run concurrently with one another for an effective two year sentence with Petitioner classified as a standard offender. Petitioner was represented by retained counsel, Mitchell Bryant of the McMinn County bar, at the time of his guilty plea in September of 2006. Petitioner voluntarily elected to waive his rights to resolve this case by plea short of trial or any appeal as evidenced by the written waiver of rights forms

included in the Clerk of Court file of this matter and entered the same date as Petitioner's entry of guilty pleas on September 11, 2006.

Subsequent to Petitioner's plea and sentencing date of September 14, 2006, defendant was released to probation upon reaching his release eligibility date pursuant to Tenn. Code Ann. § 40-35-501(a)(3). A violation of probation warrant was filed against Petitioner alleging he had violated the terms and conditions of his alternative sentence. Ultimately, this violation of probation warrant filed against Petitioner resulted in a revocation order dated March 17, 2008. Upon revocation, Petitioner was ordered to serve ninety days jail before reinstatement to the original terms of his sentence. Thereafter, Petitioner was discharged from probation and his two year sentence expired by trial court order dated April 28, 2008. The underlying facts of these offenses, and Petitioner's history of supervision, are not relevant to Petitioner's post-conviction claims, nor to this Court in issuing an ORDER OF DISMISSAL.

Petitioner now appears before the Court having filed this present *pro se* Petition for post-conviction relief filed with the Clerk of Court on March 1, 2019. Petitioner challenges at bar, albeit indirectly, his continued detention in the federal prison system on unrelated matters. Petitioner indicates he is a military veteran who is now at risk of deportation to his native Haiti. This Court strongly suspects that Petitioner's aim is to somehow overturn these stale state-level convictions which were likely used against him as part of his current federal incarceration term. If somehow successful, Petitioner could thereafter seek to procure an early release from his current federal detention. Petitioner seeks to collaterally attack this state conviction and sentence, alleging constitutional violation or error by Petition. The alleged ground upon which relief is sought is the claim

that Petitioner received the ineffective assistance of counsel in the trial court which likewise resulted in an “involuntary and unintelligent plea”. Petitioner asserts factual allegations to support the conclusory claim contained in the Petition for relief. Petitioner “Augustin begs this Court to grant an evidentiary hearing to find his plea unconstitutional”.

ANALYSIS

Petitioner’s Petition is untimely and fails to satisfy the requirements for an exemption to the statute of limitations bar.

The Petitioner’s claim before this Court is time-barred. Tenn. Code Ann. § 40-30-102(a) provides, “[] a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part [] within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.” In the instant case, Petitioner entered a plea of guilty and waiver of appeal on September 11, 2006. Thereafter, Petitioner was sentenced on September 14, 2006. Typically, a judgment of conviction entered upon a guilty plea becomes final thirty days after acceptance of the plea agreement and imposition of sentence. *See State v. Green*, 106 S.W.3d 646 (Tenn. 2003). Thus, the Petitioner’s judgments at issue became final on October 14, 2006. Therefore, Petitioner was statutorily required to file a petition seeking post-conviction relief on, or before, October 14, 2007. Petitioner appears now before the Post-Conviction Court having filed for relief in the instant cause on March 1, 2019, well in excess of the strict one year limitation period.

Furthermore, the Petitioner asserts no basis in fact in this Petition upon which the statute of limitation period could possibly be suspended in this case in the interest of justice. Tennessee Courts have repeatedly held that constitutional due process will mandate the tolling of limitation statutes in post-conviction proceedings under certain, limited circumstances. *See generally Seals v. State*, 23 S.W.3d 272 (Tenn. 2000) (*Due process may require the tolling of the statute of limitations set forth in the Post-Conviction Procedure Act to afford a litigant the opportunity for the presentation of claims at a meaningful time and in a meaningful manner*). Additionally, circumstances precluding a defendant from filing a timely application because of a misrepresentation of counsel may toll the limitation period based upon due process considerations. *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001).

Thus, while Tenn. Code Ann. § 40-30-102(b) states that “[n]o court shall have jurisdiction to consider a petition [for post-conviction relief] filed after the expiration of the limitations period”, there are three narrowly proscribed statutory exceptions to this limitations mandate. *Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013). These three exceptions include: (1) claims based on a newly recognized constitutional right that applies retroactively, and that are filed within one year of the ruling recognizing that right; (2) claims based on new scientific evidence that proves that the prisoner is innocent of the offense; and (3) claims seeking relief from a sentence that was enhanced because of a previous conviction that was subsequently held to be invalid. *Id.* Petitioner at bar does not claim any of these three statutory exceptional circumstances apply in his case. Petitioner attempts to claim protections under the opinion pronounced in *Padilla v. Kentucky*, 559 U.S. 356 (2010), by claiming to have never been informed of the

immigration consequences of his plea at bar. However, in *Chaidez v. U.S.*, 568 U.S. 342 (2013), the Supreme Court determined that the *Padilla* ruling could not be applied retroactively because the *Padilla* case applied a new rule to the Sixth Amendment to the United States Constitution. Even taking Petitioner's claim on its face, Petitioner has tarried too long and well in excess of the one year limitations period, however measured.

In addition to these statutory exceptions, our state courts have identified three additional circumstances, to date, in which due process requires tolling the post-conviction statute of limitation. *Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013). The first circumstance involves claims for relief that arise after the statute of limitation has expired. *Id.* The second due process basis for tolling the statute of limitations involves prisoners whose mental incompetence prevents them from complying with the statute's deadline. *Id.* The third circumstance, as noted above, are those precluding a defendant from filing a timely application because of a misrepresentation of counsel. *Id.* However, these tolling remedies must be used sparingly in extreme cases where the failure to invoke principles of equity and due process would lead to unacceptably unjust outcomes. *Id.*

In determining whether strict application of the statute of limitation violates due process under the unique and totality of the circumstances in a given case, precedent instructs courts to utilize a three step inquiry:

- (1) Determine when the limitations period would normally have begun to run;
- (2) Determine whether the grounds for relief actually arose after the limitation period would normally have commenced; and

- (3) Determine if, under the facts of the case and if later-arising grounds exist, a strict application of the limitation period would effectively deny a petitioner a reasonable opportunity to present the claim.

See Smith v. State, 357 S.W.3d 322, 357 (Tenn. 2011); *Seals*, 23 S.W.3d at 277; *Sands v. State*, 903 S.W.2d 297 (Tenn. 1995). Due process principles are flexible and require a balancing test weighing a petitioner's liberty interest against the State's interest in the finality of judgments on a case-by-case analysis. *Smith*, 357 S.W.3d at 357 (citing *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)). Pointedly, the threshold necessary to trigger such tolling is very high, lest the exceptions swallow the rule. *Whitehead v. State*, 402 S.W.3d 615, 632 (Tenn. 2013). This is especially true here in Tennessee, where our General Assembly has expressed its clear intention that the post-conviction filing deadline be construed as strictly as possible. *Id.*

Petitioner, as the proponent, bears the burden of making a *prima facie* showing requiring a due process tolling of the statute of limitation under our Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-101 *et seq.* *See generally State v. Nix*, 40 S.W.3d 459 (Tenn. 2001) (*It is incumbent upon a petitioner to include allegations of fact in the petition establishing either timely filing or tolling of the statutory period*). In the instant case, the Petitioner makes no factual assertions that would warrant anything but a strict application of the one year statute of limitation period applicable in post-conviction cases. *See* Tenn. Code Ann. § 40-30-102. Petitioner makes no tolling claim in this Petition, and the statute of limitation bar prevents consideration of his claims on the merits. Our legislature has made clear that the one year statutory filing requirement is to be strictly enforced, lest the rule be eviscerated and left without purposeful effect. *See* Tenn. Code Ann. § 40-30-101 *et seq.*

By delaying for over eleven years longer than the limitation period allows by statute, Petitioner has relinquished his ability to seek timely post-conviction relief in this case as a matter of law. It was Petitioner's responsibility to pursue this litigation in a timely manner and he failed to do so. Petitioner has not made any *prima facie* showing, legally recognized by precedent, to warrant the tolling of the one year time bar. In taking judicial notice of the file and pleadings impacting Petitioner's case since conviction and sentence, as cited and referred in this ORDER OF DISMISSAL, this Court finds the credible evidence needed to substantiate any claim of due process tolling to be wholly lacking. Petitioner has not made a sufficient, *prima facie* showing of fact necessary to toll the limitations period and, as such, has not met his burden of proof.

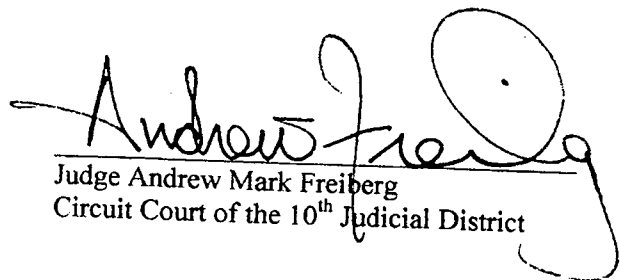
Thus, this Court finds the Petition to be time-barred warranting summary dismissal. Petitioner delayed in excess of eleven years before seeking to file this Petition from the date on which the judgments became final in this case. In affording Petitioner, a *pro se* litigant, extreme deference, this Court also considered the substance of this Petition to determine the potential existence of any late-arising claims. However, no late-arising claims are present at bar as contained in this Petition that implicate a constitutional violation in Petitioner's convictions. While the *Padilla* ruling cannot be applied to Petitioner's benefit retroactively, even that semblance of a late-arising claim was eight years ago. The only circumstance which has changed since conviction appears to be Petitioner's incarceration in a Florida federal prison and an impending immigration deportation. However, time is of the essence in post-conviction matters. See Tenn. Code Ann. § 40-30-102(a). Any *prima facie* showing of mistake of fact would necessarily have to extend and span the entirety of the significant lapse of time the Petitioner delayed

before filing this post-conviction pleading to validly toll the limitations period and to warrant full consideration of the merits of his allegations. *See generally Harris v. State*, 2012 Tenn. Crim. App. LEXIS 183 (Tenn. Crim. App. Mar. 16, 2012) (*Due process did not require tolling of the statute of limitations in T.C.A. § 40-30-102(a) because defendant failed to make a prima facie showing of incompetence during the entire time of delay since his date of conviction*).

In this present post-conviction matter, Petitioner has delayed more than a year from that date his judgments of conviction became final in violation of the strict limitations period applicable in post-conviction cases, even affording the *pro se* litigant every inference and benefit of the doubt. The administration of justice and the integrity of our court system itself demand, in addition to due process and fair treatment under the law, a certain degree of finality to criminal judgments and proceedings. *See generally Harrison v. State*, 394 S.W.2d 713, 717–18 (Tenn. 1964); *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999). This Court finds that the Petitioner's claim is barred by the strictly construed statute of limitations contained in Tenn. Code Ann. § 40-30-102(a). This procedural and summary dismissal at bar has not effectively denied the Petitioner a reasonable opportunity to present a meaningful claim in a meaningful manner. To the contrary, Petitioner has himself relinquished any post-conviction opportunities the law provided him through his own delay. Petitioner is not entitled to relief and this Petition is hereby denied and dismissed.

WHEREFORE, based upon the foregoing legal and factual grounds cited herein, this Court enters an ORDER OF DISMISSAL, finding that said Petition is untimely and fails to satisfy the requirements for an exemption to the statute of limitation bar. Furthermore, no late-arising claim is alleged herein to warrant further proceedings. This matter is hereby dismissed.

So ORDERED and entered this 7th day of March, 2019.


Judge Andrew Mark Freiberg
Circuit Court of the 10th Judicial District

Appendix C

**IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE**

ABRAHAM A. AUGUSTIN v. STATE OF TENNESSEE

**McMinn County Criminal Court
05-553**

No. E2019-01739-SC-R11-PC

Date Printed: 07/17/2020

Notice / Filed Date: 07/17/2020

NOTICE - Case Dispositional Decision - TRAP 11 Denied

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

James M. Hivner
Clerk of the Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ABRAHAM A. AUGUSTIN v. STATE OF TENNESSEE

**Criminal Court for McMinn County
No. 05-553**

No. E2019-01739-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Abraham Augustin and the record before us, the application is denied.

PER CURIAM

FILED

07/17/2020

Clerk of the
Appellate Courts