IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	§	
	§	
Respondent-Appellee,	§	
	§	
v.	§	M2017-01975-CCA-R3-CO
	§	
	§	Williamson County Circuit Court
KENDALL EARLY SOUTHALL,	§	1992-CR-916; 1992-CR-1013; 1992-
	§	CR-1045; 1994-CR-2571; 1995-CR-
Petitioner-Appellant.	§	2701; 2001-CR-7691; 2002-CR-8614

REPLY BRIEF OF APPELLANT KENDALL E. SOUTHALL

DANIEL A. HORWITZ, ESQ.
LAW OFFICE OF DANIEL A. HORWITZ
1803 BROADWAY, SUITE #531
NASHVILLE, TN 37203
(615) 739-2888
daniel.a.horwitz@gmail.com

Counsel for Petitioner-Appellant
Kendall Early Southall

Date: May 11, 2018

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III. STATEMENT REGARDING CITATIONS

Citations to the technical record are abbreviated as "R. at (page number)." All citations are footnoted throughout Appellant's brief unless a citation in the body of the brief improves clarity.

IV. INTRODUCTION

The Petitioner, Mr. Kendall Southall, has appealed the trial court's denial of his motion to terminate court costs arising from several decades-old cases. After as many as twenty-four (24) years of inactivity, the Williamson County Circuit Criminal Court Clerk abruptly attempted to collect the costs at issue following Mr. Southall's successful efforts to defend against a civil forfeiture action initiated by the Williamson County District Attorney.[1]

To the best of Mr. Southall's recollection, all of his court costs, taxes, and fines "were paid more than fifteen years ago, and in some cases, nearly twenty-five years ago."[2] Regardless, however, even if they were not, the Clerk's collections actions are foreclosed by the applicable 10-year statute of limitations.

In a Memorandum Order, the trial court denied Mr. Southall's *Motion to Terminate* for only a single reason: that there was "no currently pending civil

[1] *See* R. at 92. The fact that the Clerk's collections actions followed Mr. Southall's successful civil forfeiture challenge is in the record, and it was not contested in the proceedings before the trial court. *See id.* For the Court's convenience, the judgments from the forfeiture actions are also attached to Mr. Southall's Principal Brief.

In response, the Respondent has insisted that this Court cannot consider the forfeiture settlements. *See* Brief of Appellee, p. 2, n. 4. However, the Respondent fails to acknowledge that the existence of the forfeiture settlement agreement is independently in the record and was uncontested. *See* R. at 92. The Respondent further fails to address the rule—plainly set forth in Mr. Southall's Principal Brief—that this Court may take notice of public records of legal judgments, because "[c]ourt records fall within the general rubric of facts readily and accurately determined." *State v. Nunley*, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999). *See also State v. Ballard*, No. M1998-00201-CCA-R3-CD, 2000 WL 1369508, at *7 (Tenn. Crim. App. Sept. 22, 2000) ("public and court records can be the subject of judicial notice") (citing Neil P. Cohen et al., TENN. L. OF EVID. § 201.3, at 43 (Michie, 3d ed. 1995)).

[2] R. at 91.

action to collect a judgment from Mr. Southall for his unpaid taxes, costs, and/or fines,"[3] and that "the ten year statute of limitations for collecting on civil judgments, Tenn. Code Ann. § 28-3-110(a) . . . [,] may not properly be asserted unless a civil action is currently pending."[4] Because the record makes clear that multiple civil actions to collect on judgments against Mr. Southall were pending, however, Mr. Southall contends that the trial court's Order must be reversed.[5] Mr. Southall has further noted that reversal is required because:

(1) Respondent waived any claim to an exemption from the 10-year statute of limitations under Tenn. Code Ann. § 28-1-113 by failing to timely raise it;[6] and

(2) Tenn. Code Ann. § 28-1-113 does not exempt "the Court Clerk of Williamson County Circuit Criminal Court" from the applicable 10-year statute of limitations for several independent reasons.[7]

In response, the Respondent raises four arguments:

First, the Respondent reargues its claim that "whatever the Court may think of [Mr.] Southall's statute of limitations defense," this Court lacks the authority to adjudicate it.[8] For its second bite at the apple, however, Respondent materially

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[3] R. at 127.

[4] R. at 127.

[5] Appellant's Principal Brief, Section IX-A(2), pp. 15-18.

[6] Appellant's Principal Brief, Section IX-C, pp. 21-24.

[7] Appellant's Principal Brief, Section IX-D, pp. 24-41.

[8] Brief of Appellee, p. 6.

alters its previous position on the matter, and it now concedes that the argument is not one of subject matter jurisdiction. Instead, Respondent argues, although this Court would have jurisdiction to adjudicate Mr. Southall's appeal if it had been titled a Writ of Certiorari, *see* Brief of Appellee, p. 7 ("an extraordinary writ is the only avenue into this Court"), because Mr. Southall filed a Notice of Appeal instead, Mr. Southall's appeal must be dismissed. *But see Estate of Doyle v. Hunt*, 60 S.W.3d 838, 842 (Tenn. Ct. App. 2001) ("A [] court is not bound by the title of a pleading, but rather the court is to give effect to the pleading's substance and treat it according to the relief sought therein.") (citations omitted); Tenn. R. App. P. 3(a) ("[i]n civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right").

Second, Respondent posits that even though "the Williamson County Circuit Court clerk issued writs of execution" to collect on judgments "in five cases,"[9] the writs cannot "comfortably" be characterized as "actions."[10] *But see* R. at 106 (in which the Respondent comfortably references "the circuit criminal court clerk's actions of attempting to collect on the fines, costs and taxes, as assessed in the above referenced cases"); R. at 124 (where Respondent comfortably contends that "the actions of the criminal court clerk to collect fines, fees and costs as assessed in criminal cases in state court, is [sic] also a government function"); *id.* (where Respondent again references "the actions of the criminal court clerk to collect said

[9] Brief of Appellee, p. 2.

[10] Brief of Appellee, p. 8.

fines, fees and costs from the defendant. . . ."). *See also Cantrell v. Tolley*, No. W2010-02019-COA-R3CV, 2011 WL 3556988, at *1 (Tenn. Ct. App. Aug. 11, 2011) (referring to a clerk's issuance of a writ of execution as an "action").

Third, Respondent argues that even though it failed to cite Tenn. Code Ann. § 28-1-113 in its first pleading, and even though Respondent's Sur-Reply brief expressly refers to Tenn. Code Ann. § 28-1-113 as a "further" argument supporting its position,[11] Respondent's defense under Tenn. Code Ann. § 28-1-113 was not waived because it was "squarely raised" in the first instance.[12]

Fourth, Respondent argues that even though the belated collections actions at issue were initiated by a county-level clerk for the purpose of collecting money, the actions "still promote[] state interests" and should be exempt under Tenn. Code Ann. § 28-1-113 as a result. *But see* Tenn. Code Ann. § 28-1-113 (providing an exemption when an action is brought "by the state of Tennessee," not when an action "promotes state interests"); *Anderson Cty. Bd. of Educ. v. Nat'l Gypsum Co.*, 821 F.2d 1230, 1233 (6th Cir. 1987) (holding that "[t]aken as a whole, [Tennessee's] cases can be read to require that some state interest recognized by state legislation must be at stake beyond that of simply having more money in the hands of a subordinate body" for Tenn. Code Ann. § 28-1-113 to apply).

For the reasons that follow, all of the Respondent's claims lack merit.

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[11] R. at 120.

[12] Brief of Appellee, p. 11.

V. ARGUMENT

A. THE RESPONDENT'S CLAIM THAT MR. SOUTHALL'S APPEAL MUST BE DISMISSED BECAUSE IT WAS NOT TITLED A WRIT OF CERTIORARI IS BASELESS.

The Respondent first argues that Mr. Southall's appeal must be dismissed because "there is no appeal as of right from the denial of 'a motion to terminate costs' filed in a court of conviction."[13] The claim was previously raised during motion practice before this Court, when the Respondent characterized it as a defect of jurisdiction.[14]

In its briefing, however, the Respondent now takes a materially different position. No longer does Respondent claim that this Court lacks jurisdiction to hear Mr. Southall's appeal. To the contrary, the Respondent now candidly concedes that it does.[15] Nonetheless, Respondent submits that "an extraordinary writ is the only avenue into this Court," and Respondent further specifies that review may only be had via certiorari.[16] Because Mr. Southall's Notice of Appeal was filed under Tenn. R. App. P. 3(a) instead of being called a writ of certiorari, though, Respondent contends that "he has no right of appeal,"[17] and that Mr.

[13] Brief of Appellee, p. 4.

[14] *See* Appellee's Feb. 23, 2018 Motion to Dismiss Appeal, p. 4 ("This appeal should be dismissed for lack of jurisdiction.").

[15] Brief of Appellee, pp. 6-7 (arguing that review may be had via certiorari).

[16] Brief of Appellee, p. 7.

[17] *Id.* at 4.

Southall's appeal "should be dismissed"[18] as a consequence.

Respondent continues to misconstrue the relevant caselaw on the matter, all of which was developed during litigation against *pro se* defendants who—unlike Mr. Southall—sought review under Tenn. R. App. P. 3(b), governing criminal actions, instead of under Tenn. R. App. P. 3(a), which governs civil actions.[19] Regardless, though, even if Respondent were correct that Mr. Southall should have sought this Court's review via certiorari, dismissal would be improper. Instead, the proper remedy would be for this Court to convert Mr. Southall's appeal into a petition for certiorari and adjudicate it.

1. Pleadings must be treated according to the relief sought, not their title.

Assuming, for the sake of argument, that Respondent is correct that certiorari is the proper vehicle for appeal, the relief that Respondent demands—dismissal of Mr. Southall's appeal—is plainly improper. Respondent's claim that this Court cannot hear this case because Mr. Southall's Notice of Appeal was not called a "writ of certiorari" is foreclosed by a wealth of authority that commands that *the relief sought* by a pleading—rather than *the title assigned to it*—controls its treatment. *See, e.g., Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn. 1995) ("the trial court should have treated the petition as one for a writ of certiorari. It is well settled that a trial court is not bound by the title of the pleading, but has the

[18] *Id.* at 7.

[19] *See generally* Appellant's Feb. 26, 2018 Response in Opposition to Appellee's Motion to Dismiss.

discretion to treat the pleading according to the relief sought."); *Doyle*, 60 S.W.3d at 842 ("A trial court is not bound by the title of a pleading, but rather the court is to give effect to the pleading's substance and treat it according to the relief sought therein."); *Hill v. Hill*, No. M2006-01792-COA-R3CV, 2008 WL 110101, at *3 (Tenn. Ct. App. Jan. 9, 2008) (same).

Accordingly, even if Mr. Southall should have sought review in this Court via certiorari, dismissing his appeal would not be the appropriate remedy. Instead, the proper course of action would be to convert his appeal into a petition for a writ of certiorari and adjudicate it. *Norton*, 895 S.W.2d at 319; *Doyle*, 60 S.W.3d at 842; *Hill*, 2008 WL 110101, at *3. *Cf. Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983) ("where, as here, the plaintiff mistakenly employs the remedy of certiorari the court may treat the action as one for declaratory judgment and proceed accordingly, rather than dismiss the action").

Unlike dismissal on technical grounds, this sensible solution also effectuates the judiciary's longstanding preference for resolution of disputes on their merits. *See, e.g., Henley v. Cobb*, 916 S.W.2d 915, 916 (Tenn. 1996) ("it is well settled that Tennessee law strongly favors the resolution of all disputes on their merits"); *Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991) ("it is the general rule that courts are reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits"). *Cf.* Tenn. R. App. P. 17 (providing that if an appeal is improperly filed in the wrong court, the case should not be dismissed, but "transferred to the proper

court" instead). And notably, the Respondent has similarly availed itself of this longstanding, common-sense remedy in appeals that have reached this Court through atypical procedural postures. *See, e.g.*, *State v. Whitson*, No. E2010-00408-CCA-R3CD, 2011 WL 2555722, at *1 (Tenn. Crim. App. June 28, 2011) (holding that "[t]he State has no right to appeal via the Tennessee Rules of Appellate Procedure," but "review[ing] the State's claims . . . via the common law writ of certiorari" instead and granting the State relief). Consequently, even if the instant appeal should have been filed as a writ of certiorari as Respondent insists, the proper remedy is not to dismiss Mr. Southall's appeal based on its title, but to adjudicate it based on its content. *Norton*, 895 S.W.2d at 319; *Doyle*, 60 S.W.3d at 842; *Hill*, 2008 WL 110101, at *3; *Fallin*, 656 S.W.2d at 342.

2. Tennessee Rule of Appellate Procedure 3(a) provides the appropriate vehicle for appeal.

The Respondent's claim that "an extraordinary writ is the only avenue into this Court"[20] is also wrong. As Respondent concedes, notwithstanding its prior rejection of appeals filed under Tenn. R. App. P. 3(b), this Court has previously accepted review of and adjudicated the very claim that Mr. Southall raises in this case. *See Lewis v. State*, No. E2014-01376-CCA-WR-CO, 2015 WL 1611296, at *1 (Tenn. Crim. App. Apr. 7, 2015) (accepting jurisdiction and adjudicating a criminal defendant's appeal of a denial of a motion to dismiss costs, but denying relief because the respondent had not sought to collect them). Respondent places *Lewis*

[20] Brief of Appellee, p. 7.

on different footing because "Lewis filed a petition for a writ of certiorari,"[21] which generally may not be issued when another avenue for appellate review is available. Notably, however, the appropriate vehicle for appellate review does not appear to have been contested in *Lewis.* Further, no previous defendant—including Lewis—has ever sought review in this Court pursuant to Tenn. R. App. P. 3**(a)**,[22] which actually provides the proper basis for appeal given the subject matter of this case.

Tenn. Code Ann. § 40-24-105(a) establishes that this case is to be treated as a civil action. *See id.* (instructing that all taxes, costs, and fines that arise out of criminal cases are collectable as civil judgments). *See also* Tenn. Op. Att'y Gen. No. 06-135 (Aug. 21, 2006) (providing that criminal court cost collections actions are "governed by Rule 69 of the Rules of Civil Procedure"). Accordingly, Tenn. R. App. P. 3(a) provides the appropriate vehicle for review. *See id.* (establishing that "[i]n civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right").

Presumably, because every prior case on the matter—including *Lewis*—that

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[21] Brief of Appellee, p. 6.

[22] Respondent's briefing cites several cases in which defendants have sought to appeal under Tenn. R. App. P. 3**(b)**. *See* Brief of Appellee, p. 5. These cases are all inapposite. As Mr. Southall has previously explained:

> [C]ivil standards govern the instant action. *See* Brief of Appellant, Section V, p. x (noting that Appellant's appeal is governed by civil standards of review). As such, jurisdiction for this appeal lies pursuant to Tenn. R. App. P. 3**(a)**, which provides that: "In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right." *Id.*

Appellant's Feb. 26, 2018 Response in Opposition to Appellee's Motion to Dismiss, pp. 1-2 (emphasis added).

has been cited by the Respondent involved a *pro se* litigant,[23] no prior defendant has ever made this straightforward argument. Accordingly, none of this Court's prior cases on the subject is controlling. *See, e.g., State v. Nashville Baseball Club*, 154 S.W. 1151, 1155 (Tenn. 1913) ("It is a familiar principle that stare decisis only applies with reference to decisions directly upon the point in controversy" and "only arises in respect of decisions directly upon the points in issue.") (quotation omitted); Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85, 100 (2008) ("It is a common principle of stare decisis that the doctrine does not apply to arguments that were never considered in previous decisions. Indeed, the Tennessee Supreme Court adopted this principle almost one hundred years ago, when it struck down a statute as unconstitutional, even though the same statute had previously been upheld against a similar constitutional challenge, because the new challenge relied on a new argument.").

In sum: as a civil action, Tenn. R. App. P. 3(a) is the appropriate vehicle for review, and it makes Mr. Southall's appeal available as of right. *See id.* As such, certiorari is not "the only avenue into this Court,"[24] or even the proper avenue at

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[23] *See* Brief of Appellee, p. 5 (citing *State v. Johnson*, 56 S.W. 3d 44, 44 (Tenn. Crim. App. 2001) ("Christopher Joseph Johnson, pro se."); *State v. Hegel*, No. E2015-00953-CCA-R3-CO, 2016 WL 3078657 (Tenn. Crim. App. May 23, 2016) ("James Frederick Hegel, pro se"); *Boruff v. State*, No. E2010-00772-CCA-R3CO, 2011 WL 846063 (Tenn. Crim. App. Mar. 10, 2011) ("Douglas Boruff, pro se"); *Hood v. State*, No. M2009-00661-CCA-R3-PC, 2010 WL 3244877 (Tenn. Crim. App. Aug. 18, 2010) ("Jonathon C. Hood, Clifton, Tennessee, pro se")); *Lewis v. State*, No. E2014-01376-CCA-WR-CO, 2015 WL 1611296 (Tenn. Crim. App. Apr. 7, 2015) ("Stephen W. Lewis, Wartburg, Tennessee, Pro Se").

[24] Brief of Appellee, p. 7.

all. In the alternative, though, if Respondent is correct, then for the reasons detailed in the preceding section, the proper remedy would not be to dismiss Mr. Southall's appeal, but to convert it into a petition for a writ of certiorari instead.

3. Respondent's claim that certiorari is the proper vehicle for Mr. Southall's appeal was not timely raised.

Respondent's updated claim that Mr. Southall's appeal should have been filed as a writ of certiorari is also an argument over a procedural defect that does not concern this Court's subject matter jurisdiction. Accordingly, the issue is subject to waiver. *See, e.g., Taylor v. State*, No. C.C.A. 4, 1988 WL 109258, at *1 (Tenn. Crim. App. Oct. 19, 1988) ("[A] failure to raise issues at the first opportunity may result in a waiver . . . .").

Notably, the Respondent has already made one attempt at having this appeal dismissed by claiming that this court does not have subject matter jurisdiction to adjudicate it.[25] The Respondent's new argument that this court actually does have subject matter jurisdiction to adjudicate Mr. Southall's appeal—but only if it had been filed as a writ of certiorari—is conspicuously absent from the Respondent's first Motion to Dismiss Mr. Southall's appeal.[26] In other words: recognizing that its first argument on the matter was meritless, the Respondent has now materially changed its position and advances a new claim for the first time in its briefing.

The Respondent's shifting, updated, and materially altered positions

[25] *See* Appellee's Feb. 23, 2018 Motion to Dismiss Appeal.

[26] *See id.*

throughout the course of this case continue to complicate the record of Mr. Southall's appeal and muddle the claims presented. This Court, however, need not tolerate the attempt. *See Taylor*, 1988 WL 109258, at *1. *Cf. Roberts v. Roberts*, No. M2017-00479-COAR3CV, 2018 WL 1792017, at *9 (Tenn. Ct. App. Apr. 16, 2018) ("courts have discretion to rule that [] arguments [are] waived by failure to timely raise and properly support [them]") (citation omitted). Here, because the Respondent's argument that certiorari provides the only vehicle for appellate review was not raised in the Respondent's Feb. 23, 2018 Motion to Dismiss,[27] it was not presented at Respondent's first opportunity (and, in fact, it was specifically omitted from it). Accordingly, the argument should be deemed waived. *See id.*

B. THE COUNTY CLERK'S ACTIONS TO COLLECT ON MR. SOUTHALL'S JUDGMENTS WERE "ACTIONS ON JUDGMENTS."

The Respondent alternatively submits that this case may be resolved on the basis that the Clerk's actions to collect decades-old court costs arising from Mr. Southall's final judgments cannot "comfortably" be regarded as "actions" on those judgments.[28] The claim is meritless.

On November 23, 2016, the Williamson County Circuit Court Clerk initiated five civil actions to collect on Mr. Southall's purportedly outstanding, decades-old judgments.[29] Each Affidavit and Writ of Execution referenced a

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[27] *See* Appellee's Feb. 23, 2018 Motion to Dismiss Appeal.

[28] Brief of Appellee, p. 8.

[29] R. at 56-61; R. at 63-68; R. at 70-75; R. at 77-82; R. at 84-89.

specific final judgment, and each sought to garnish Mr. Southall's wages or execute on Mr. Southall's personalty.[30]

The limitations period for initiating an action to collect on judgments is ten years. *See* Tenn. Code Ann. § 28-3-110(a)(2) ("The following actions shall be commenced within ten (10) years after the cause of action accrued: . . . Actions on judgments and decrees of courts of record of this or any other state or government[.]"). Tenn. Code Ann. § 28-3-110(a)(3) also provides a "catchall" 10-year limitations period for all other cases not expressly provided for. *See id.* ("The following actions shall be commenced within ten (10) years after the cause of action accrued: . . . All other cases not expressly provided for."). Here, because it is undisputed that all of the Clerk's collections actions came more than ten years after Mr. Southall's judgments became final, Mr. Southall has observed that the actions are time-barred.

Attempting to avoid application of the 10-year statute of limitations, the Respondent argues that the Clerk's collections actions cannot "comfortably" be characterized as "actions" under Tenn. Code Ann. § 28-3-110(a)(2) or (a)(3) based on the definition of "action" set forth at Tenn. Code Ann. § 28-1-101.[31] *Id.* ("'Action' in this title includes motions, garnishments, petitions, and other legal proceedings in judicial tribunals for the redress of civil injuries."). This assertion is curious, particularly because the Respondent itself "comfortably"

[30] R. at 56-57; R. at 63-64; R. at 70-71; R. at 77-78; R. at 84-85.

[31] Brief of Appellee, p. 8.

referred to the actions as "actions" several times before the trial court. *See* R. at 106 (referencing "the circuit criminal court clerk's actions of attempting to collect on the fines, costs and taxes, as assessed in the above referenced cases"); R. at 124 (arguing that "the actions of the criminal court clerk to collect fines, fees and costs as assessed in criminal cases in state court, is [sic] also a government function"); *id.* (referring to "the actions of the criminal court clerk to collect said fines, fees and costs from the defendant. . . .").

Regardless of the Respondent's updated terminology on appeal, however, if initiating legal process—in this case, serving five writs of execution—to collect on final judgments of a circuit court does not qualify as taking "[a]ctions on judgments and decrees of courts of record" under Tenn. Code Ann. § 28-3-110(a)(2), then it is not clear what would. Notably, a circuit court clerk's issuance of a writ of execution was quite recently characterized as an "action" by our Court of Appeals. *See Cantrell*, 2011 WL 3556988, at *1 ("no further action was taken until the circuit court clerk issued a writ of execution"). Black's Law Dictionary, too, defines "action" as "[t]he process of doing something; conduct or behavior," "[a] thing done," and "[a] civil or criminal judicial proceeding." *See Action*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Clerk's collections actions in this case comfortably satisfy all of these definitions.[32]

[32] Of note, Tenn. Code Ann. § 28-1-101's definition of "action" does not purport to be exhaustive. The statute broadly states what it ***includes***. *See id.* ("'Action' in this title includes motions, garnishments, petitions, and other legal proceedings in judicial tribunals for the redress of civil injuries."). Its text ***excludes*** nothing. *See id.*

To support its position, however, Respondent specifically insists that the Clerk's actions to collect on Mr. Southall's judgments do not qualify as "actions" because "[t]he collection of revenue redresses no civil injury." *See* Brief of Appellee, p. 8. *See also id.* (arguing that to qualify as an action, "there must be an 'injury' to be 'redressed,'" and that "[t]hose factors are absent here."). However, the Respondent distorts the definition of "action" to a point that renders it unrecognizable. Further, accepting Respondent's restrictive definition of "action" would do violence to every subsequent case involving Tenn. Code Ann. § 28-3-110(a)(2) under any circumstance when the underlying judgment involves money.

As noted, Tennessee's courts have characterized efforts to collect on judgments as "actions" when the collection of money is at issue. *See, e.g., Cantrell*, 2011 WL 3556988, at *1. Indeed, they have done so for more than a century. *See, e.g., McIntosh v. Paul*, 74 Tenn. 45, 47 (1880) ("A scire facias to revive a judgment is so far in the nature of a new action, that any defense may be made which will prevent the revivor."). This is unsurprising, of course, because under any sensible understanding of the term, initiating legal process to collect an outstanding monetary award is an "action" to redress an "injury."

If Respondent's contrary claim that collections actions do not constitute "actions" because "the collection of revenue" is involved were accepted,[33] then Tenn. Code Ann. § 28-3-110(a)(2) would have no apparent function in any case involving, *inter alia*, outstanding money judgments, court costs, attorney's fees, or

[33] Brief of Appellee, p. 9.

any other unpaid monetary award. There is no doubt that Tenn. Code Ann. § 28-3-110(a)(2)'s text does not distinguish between actions to collect, on the one hand, money judgments, court costs, or attorney's fees—which Respondent presumably considers "actions"—and on the other, actions to collect fines, court fees, and litigation taxes, which Respondent does not. *See id.* ("The following actions shall be commenced within ten (10) years after the cause of action accrued: . . . Actions on judgments and decrees of courts of record of this or any other state or government[.]"). Respondent also offers this Court no basis for creating such an extra-statutory distinction. In sum: Respondent's unduly narrow definition of "action" would not only render Code Ann. § 28-3-110(a)(2) superfluous—in any case involving an unpaid monetary award, it would render it meaningless.

Last, Respondent contends—without developing the claim—that the Circuit Court Clerk's collections actions do not qualify as actions for purposes of this case because they were not "'civil' in nature."[34] Respondent acknowledges that it "is true enough" that Tenn. Code Ann § 40-24-105(a) "provides that fines, costs, and litigation taxes may be collected in the same manners as a judgment in a civil action,"[35] which flatly forecloses the claim. Based on the same fruitless argument above, however—the assertion that "the collection of revenue redresses no civil injury"—the Respondent contends that Tenn. Code Ann § 40-24-105(a) has no application in any criminal case.

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[34] Brief of Appellee, p. 8.

[35] *Id.* (quotation omitted).

For the same reasons previously detailed, though—namely, that an action to collect an unpaid monetary award is absolutely an action to redress an injury—this argument is meritless. As Respondent concedes, outstanding cost awards in criminal cases must be collected "in the same manner as a judgment in a civil action." Tenn. Code Ann. § 40-24-105(a). Thus, the Clerk's issuance of multiple writs of execution to collect money and property from Mr. Southall were necessarily civil actions under every available definition. *See* Tenn. Code Ann § 40-24-105(a). *See also* Tenn. Op. Att'y Gen. No. 06-135 (Aug. 21, 2006) (quoting Tenn. Code Ann. § 40-24-105) (noting that in criminal cases, "[l]itigation taxes, court costs, and fines 'may be collected in the same manner as a judgment in a civil action,'" and that "execution of civil judgments is governed by Rule 69 of the Rules of Civil Procedure"). Accordingly, the Respondent's contention that the Clerk's collections actions were not civil in nature may safely be disregarded.

C. RESPONDENT'S "FURTHER" ARGUMENT UNDER TENN. CODE ANN. § 28-1-113—WHICH IT RAISED FOR THE FIRST AND ONLY TIME IN ITS SUR-REPLY BRIEF—WAS NOT PRESERVED.

In his Principal Brief, Mr. Southall observed that "the Respondent waived its claim that Tenn. Code Ann. § 28-1-113 exempts the Williamson County Circuit Criminal Court Clerk from the applicable statute of limitations by raising that claim for the first and only time in [its] Sur-Reply brief."[36] Respondent does not dispute that failing to timely assert this claim would result in its waiver. However,

[36] Appellant's Principal Brief, Section IX-C, pp. 21-24.

Respondent contends that its defense under Tenn. Code Ann. § 28-1-113 was not waived because the claim was "squarely raised" in the first instance.[37]

Respondent claims that even though it failed to cite Tenn. Code Ann. § 28-1-113 in its opening pleading, it "squarely raised" a defense under Tenn. Code Ann. § 28-1-113 by stating that "the collection of fines, costs, and taxes 'is a government function of the State of Tennessee,' and by 'discussing *Nelson v. Loudon County*'"—a seventy-eight-year-old case[38] that also does not cite Tenn. Code Ann. § 28-1-113 but which Respondent submits "cited the then-existing codification of the doctrine."[39] Respondent fails to mention, however, that in addition to failing to develop an argument on the matter in its Motion to Dismiss,[40] Respondent's Sur-Reply brief also expressly referred to Tenn. Code Ann. § 28-1-113 as a "further" authority that supported its position. *See* R. at 120 (stating that "the State would further point out the language of Tenn. Code Ann. § 28-1-113," and then citing several new cases involving the statute). Notably, when the Respondent actually intended to raise a defense under Tenn. Code Ann. § 28-1-113, it also demonstrated that it was more than capable of doing so. Unlike Respondent's Motion to Dismiss,

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[37] Brief of Appellee, p. 11.

[38] *Nelson v. Loudon Cty.*, 144 S.W.2d 791 (Tenn. 1940).

[39] Brief of Appellee, p. 11.

[40] Even if timely mentioned, an argument that is not timely developed is forfeited. *See, e.g., Stone Surgical, LLC v. Stryker Corp.*, 858 F.3d 383, 388 (6th Cir. 2017) ("Ridgeway develops no argument that he did not sign the non-compete and only briefly mentions in his brief that he is not conceding that fact. As a result, Ridgeway has forfeited [the argument].").

for example—which failed to cite Tenn. Code Ann. § 28-1-113 even once—Respondent's Sur-Reply brief cited Tenn. Code Ann. § 28-1-113 on every page.[41]

"[A]n issue is considered waived when the trial court was not presented with an opportunity to consider the issue in the first instance." *Prewitt v. State*, No. W2015-00839-CCA-R3-ECN, 2015 WL 8555268, at *3, n. 2 (Tenn. Crim. App. Dec. 11, 2015) (citing *State v. Bishop*, 431 S.W.3d 22, 43 (Tenn. 2014); *State v. Aguilar*, 437 S.W.3d 889, 899 (Tenn. Crim. App. 2013)). *See also Taylor*, 1988 WL 109258, at *1 ("[A] failure to raise issues at the first opportunity may result in a waiver . . . ."); *Hih v. Lynch*, 812 F.3d 551, 556 (6th Cir. 2016) ("An appellant abandons issues not raised and argued in his initial brief on appeal."). The Government also should not be excused from compliance with waiver rules that it demands of others. *See, e.g., Dancy v. State*, No. 2, 1986 WL 4842, at *1 (Tenn. Crim. App. Apr. 23, 1986) ("the state filed an answer in the form of a motion to dismiss on the grounds that . . . the issues . . . had been waived by failure to raise them at the first opportunity").

As a fallback, the Respondent posits that Mr. Southall "clearly understood the argument," and thus, that Respondent's failure to timely cite the statute upon which it now relies should be excused.[42] This claim is equally misplaced. If the Respondent had "squarely raised" a defense under Tenn. Code Ann. § 28-1-113, then in his materials before the trial court, Mr. Southall would have "squarely responded" that the statute does not apply for all of the fully developed reasons set

[41] *Compare* R. at 103-09, *with* R. at 120-24.

[42] Brief of Appellee, p. 12.

forth in his Principal Brief. Mr. Southall did not do so, however, because the claim was not, in fact, "squarely raised" until the Respondent cited Tenn. Code Ann. § 28-1-113 as a "further" authority that "the State would further point out the language of" in its Sur-Reply brief.[43]

The Respondent's failure to raise its claim under Tenn. Code Ann. § 28-1-113 at the first opportunity deprived Mr. Southall of a fair opportunity to respond to it, and it further deprived the trial court of adequate briefing on the matter. This presumably explains why the trial court did not consider the argument, which its Order does not address.[44] For the same reason, this Court should decline to consider the claim as well.

D. TENN. CODE ANN. § 28-1-113 EXEMPTS ACTIONS BY THE STATE OF TENNESSEE, NOT COUNTY ACTIONS THAT "PROMOTE STATE INTERESTS."

Finally, turning to the merits of its defense under Tenn. Code Ann. § 28-1-113, the Respondent argues that even though the collections actions at issue were initiated by a county-level clerk for the sole purpose of collecting money, the collections actions are exempt from the 10-year statute of limitations because they "still promote[] state interests." *See* Brief of Appellee, p. 13. *See also id.* (arguing that Mr. Southall "cannot succeed because he cannot show that there is no interest of state government that is substantially promoted by the collection of fines, fees, and litigation taxes in a criminal case"). Thus, the Respondent argues, the Clerk's

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[43] R. at 120.

[44] R. at 126-28.

collections actions should be exempt from any statute of limitations by operation of Tenn. Code Ann. § 28-1-113.

Respondent misreads both Tenn. Code Ann. § 28-1-113 and the relevant caselaw. Tenn. Code Ann. § 28-1-113's text only provides an exemption to actions brought "by the state of Tennessee"—not actions by inferior governmental bodies that generally "promote[] state interests." *Id.* Here, the county-level clerk's actions were not actions of "the state of Tennessee," and they served no immediate purpose other than to put more money in the hands of a subordinate body. *See Anderson*, 821 F.2d at 1233 (holding that "[t]aken as a whole, [Tennessee's] cases can be read to require that some state interest recognized by state legislation must be at stake beyond that of simply having more money in the hands of a subordinate body" for Tenn. Code Ann. § 28-1-113 to apply).

The Respondent acknowledges *Anderson*'s holding on the matter, but it contends—without developing an argument to support the assertion—that *Anderson*'s reasoning was "directly refuted" by the Tennessee Supreme Court in *Hamilton Cty. Bd. of Educ. v. Asbestospray Corp.*, 909 S.W.2d 783, 786 (Tenn. 1995), *as clarified on reh'g* (Nov. 20, 1995). However, the Respondent makes no effort to respond to Mr. Southall's detailed and well-supported observation that *Hamilton* represented an "education- and asbestos-specific" opinion that left *Anderson*'s central holding intact.[45] Based on this fact, Mr. Southall has observed that "*Anderson*'s critical distinction between governmental and proprietary

[45] *See* Appellant's Principal Brief, pp. 30-32.

functions not only survived *Hamilton*—it was reaffirmed by it."[46]

According to the Respondent, however, "none of that matters."[47] Specifically, the Respondent claims, the Clerk's sudden efforts to collect Mr. Southall's long-forgotten, decades-old court costs serve a far greater purpose than "simply having more money in the hands of a subordinate body," *Anderson*, 821 F.2d at 1233—even though the clerk "may keep up to 50% of the recovery from an in-house collection procedure, and treat the proceeds as 'fees of the office.'"[48]

Admittedly, there is evidence in the record that the Respondent's renewed interest in collecting the costs at issue was indeed motivated by another purpose.[49] The Respondent does not claim that retaliating against a litigant for exercising a constitutional right "promotes state interests" sufficient to justify exempting county-level clerks from the applicable statute of limitations, however, and of course, it does not. *See generally Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (setting forth elements of a constitutional retaliation claim). Instead, the Respondent submits that "[t]he collection of fines, fees and litigation taxes . . . still promotes state interests in enforcing the criminal law, defraying the costs of

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[46] *Id.* at 32.

[47] Brief of Appellee, p. 13.

[48] *Id.* (citing Tenn. Code Ann. § 40-24-105(d)(1)).

[49] *See* R. at 92; Appellant's Principal Brief, Attachments 1-4 (Forfeiture Settlement Agreements). *See also supra* n. 1 (demonstrating that, despite Respondent's claim to the contrary, the uncontested fact of the forfeiture resolution is in the record, and that this Court may independently take judicial notice of the settlement agreements themselves).

state prosecutions, and offsetting the expense of maintaining a state judiciary."[50]

Respondent's argument is literally too clever by half. *See* Tenn. Code Ann. § 40-24-105(d)(1) ("criminal or general sessions court clerk may retain up to fifty percent (50%) of the fines, costs and litigation taxes collected pursuant to this subsection (d) in accordance with any in-house collection procedure or, if an agent is used, for the collection agent. The proceeds from any in-house collection shall be treated as other fees of the office."). Further, Respondent's position renders nearly a century of jurisprudence on the matter superfluous, because it can ***always*** be said that collecting money serves some greater purpose than "simply having more money in the hands of a subordinate body." *Anderson*, 821 F.2d at 1233.

In *Anderson* itself, for example, the interest involved could have been construed at a higher level of generality and described as "deterring tortious conduct against the State," rather than merely compensating a governmental entity for asbestos removal. *Id.* Similarly, in *City of Knoxville v. Gervin*, 89 S.W.2d 348, 349 (Tenn. 1936), the Court could have characterized the Government's interest not as "enforc[ing] its lien for unpaid street paving assessments," but as an effort to promote the state's interest in aesthetically pleasing neighborhoods. *Cf. Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2017-00190-COA-R3-CV, 2018 WL 527104, at *9 (Tenn. Ct. App. Jan. 23, 2018) ("We consider the protection of residential character to implicate a matter of the public's well-being, and we hold this opinion even to the extent that such protection might be

[50] Brief of Appellee, p. 13.

considered to partially involve the promotion of an aesthetic consideration.").

Our courts have never accepted this invitation, and Tenn. Code Ann. § 28-1-113's text does not permit them to do so. Accordingly, the Respondent's generalized contention that "the enforcement of the criminal law is a core governmental function"[51] and that litigations taxes "fund activities ranging from the operation of the Tennessee corrections institute to the public defender program"[52] does not overcome the reality that the purpose of the Clerk's collections actions in this case is "simply having more money in the hands of a subordinate body." *Anderson Cty. Bd. of Educ. v. Nat'l Gypsum Co.*, 821 F.2d at 1233. Such an interest is insufficient to exempt county-level entities from statutes of limitations. *See id.* Indeed, the Respondent appears to be aware of this inconvenient truth—at least as far as litigation taxes are concerned.[53] Further, no evidence more effectively demonstrates that the Respondent's avowed ethereal goals did not actually animate the Clerk's collections efforts than the fact that the costs at issue went uncollected for as many as twenty-four years. *See* R. at 91.

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[51] Brief of Appellee, p. 10.

[52] Brief of Appellee, p. 11.

[53] *See* Brief of Appellee, p. 11, n. 5. Respondent attempts to downplay this problem by suggesting that Mr. Southall has waived a claim under Tenn. Code Ann. § 67-1-1501, which establishes unmistakably that the collection of litigation taxes is not exempt from statutes of limitations. *Id.* The claim is inapposite, however, as Mr. Southall has consistently claimed that regardless of how the purportedly owed costs are designated, the Respondent's actions represent "actions on judgments" that are also independently be "subject to the 'ten year catch-all limitations period' set forth in Tenn. Code Ann. § 28-3-110(a)(3)." *See* Appellant's Principal Brief, p. 19 (quoting *Misco, Inc. v. U.S. Steel Corp.*, 784 F.2d 198, 204 (6th Cir. 1986)).

VI. CONCLUSION

The Respondent closes by insisting that no statute bars clerks "from collecting [costs and fines] merely because the defendant has avoided paying them for a certain period of time," and it claims that "[t]here is no need for the Court to craft such a rule in favor of this defendant."[54] The Respondent is mistaken. More importantly, the Respondent seriously misconstrues the relevant inquiry, which is not whether a defendant "has avoided paying" courts costs, but whether the Government "has avoided collecting" them—in this case for decades, well after the expiration of the statute of limitations, and without a hint of explanation.

Failing to initiate collections actions for as many as twenty-four years virtually guarantees the problems that have arisen in this case: uncertain memories, lost records, and the appearance of governmental abuse through selective retaliation. The General Assembly has afforded county-level clerks a generous 10-year limitations period to collect on judgments. The Clerk's collections actions in this case were not exempt from that limitations period, but the Clerk failed to initiate them within it. Accordingly, for the foregoing reasons, the Williamson County Circuit Criminal Court Clerk's actions to collect Mr. Southall's decades-old court costs should be terminated as time-barred, and the judgment of the Circuit Court of Williamson County should be **REVERSED**.

[54] Brief of Appellee, p. 15.

Respectfully submitted,

By: ____________________________

Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2018, a true and exact copy of the foregoing was mailed via UPS, postage prepaid, to the following:

James E. Gaylord
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
Jim.Gaylord@ag.tn.gov

By: ____________________________

Daniel A. Horwitz, Esq.