

IN THE SUPREME COURT OF TENNESSEE

ANDRE TERRY,

Appellant,

v.

STATE OF TENNESSEE,

Appellee.

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Case No. E2023-00684-SC-R11-PC

**BRIEF OF AMICUS CURIAE HORWITZ LAW, PLLC IN
SUPPORT OF APPELLANT OR, ALTERNATIVELY, IN
SUPPORT OF DESIGNATING THE COURT OF CRIMINAL
APPEALS' OPINION "NOT FOR CITATION"**

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III. INTRODUCTION

The Court of Criminal Appeals’ erroneous jurisdictional ruling below—which is based on an argument that the Court of Criminal Appeals *sua sponte* ordered the State to present after the State failed to raise the argument itself—confuses claims-processing rules with jurisdictional defects. It also contravenes this Court’s precedent and two previous Court of Criminal Appeals decisions on the same point. *See Sexton v. State*, 151 S.W.3d 525, 530 (Tenn. Crim. App. 2004) (“Although the comprehensive petition in the present case was not verified under oath, we do not believe the circumstances justified limiting the petitioner’s claims. . . . We conclude that the circumstances justify the petitioner’s claims being heard on their merits.”); *Timberlake v. State*, No. W2008-00037-CCA-R3-PC, 2009 WL 302294, at *2 (Tenn. Crim. App. Feb. 5, 2009) (“[t]he State, however, ignores the fact that we went on [in *Sexton*] to conclude that the post-conviction court should have allowed the petitioner the opportunity to verify her amended petition under oath instead of ruling it invalid due to lack of verification”).

By converting a non-jurisdictional claims-processing defect that permits dismissal into a jurisdictional defect that precludes review, the Court of Criminal Appeals’ ruling will have catastrophic consequences for defendants with viable post-conviction claims. Those consequences will be borne most heavily by wrongfully convicted defendants, many of whom will be forever barred even from having their claims *considered* if the Court of Criminal Appeals’ erroneous jurisdictional ruling stands. Unsurprisingly, then, the Court of Criminal Appeals’ erroneous jurisdictional ruling is out-of-step with “virtually every court to consider

the question” presented here. *See Hughley v. Gov't of Virgin Islands*, 61 V.I. 323, 334–35 (2014) (“Unquestionably, the verification requirement codified in section 1302(3) represents a mere claims-processing rule. . . . Perhaps most importantly, virtually every court to consider the question has held that, when a statute requires that a complaint be verified by oath, the verification requirement is a non-jurisdictional claims processing rule.”) (collecting cases).

For these reasons, this Court should reverse the Court of Criminal Appeals’ opinion in part. Alternatively, it should designate the opinion “Not for Citation.”

IV. STANDARD OF REVIEW

“Since a determination of whether subject matter jurisdiction exists is a question of law, [this Court’s] standard of review is de novo, without a presumption of correctness.” *See Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *see also Abdur'Rahman v. State*, 648 S.W.3d 178, 187 (Tenn. Crim. App. 2020) (“Whether a court has subject matter jurisdiction is a question of law, and our review is de novo with no presumption of correctness.”).

V. FACTS AND PROCEDURAL HISTORY

A. THE COURT OF CRIMINAL APPEALS’ *SUA SPONTE* INSTRUCTION THAT THE PARTIES ARGUE A WAIVED ISSUE.

“The pro se petition at issue here did not contain Petitioner’s signature and verification, nor did it contain any factual allegations in support of Petitioner’s claims.” *Terry v. State*, No. E2023-00684-CCA-R3-PC, 2024 WL 2698932, at *5 (Tenn. Crim. App. May 24, 2024). Given those failures—and paired with the Panel’s mistaken belief that those

defects presented a *jurisdictional* barrier to adjudicating Mr. Terry’s post-conviction petition—Part I of the “Analysis” section of the Court of Criminal Appeals’ opinion below states: “we must consider whether the post-conviction court had jurisdiction to consider the post-conviction petition at issue here.” *Id.* at *4.

“[T]he parties did not raise or address this issue in their initial briefs[,]” though. *Id.* Normally, such a failure would result in waiver. *See* Tenn. R. App. P. 13(b) (“Review generally will extend only to those issues presented for review.”); *see also State v. McMillan*, No. E2020-00610-CCA-R3-CD, 2022 WL 855262, at *10 (Tenn. Crim. App. Mar. 23, 2022) (explaining waiver rules). Because the Court of Criminal Appeals incorrectly believed that a jurisdictional defect was implicated by Mr. Terry’s failure to comply with Tenn. Code Ann. § 40-30-104(e), though, *see Terry*, 2024 WL 2698932, at *4 (“The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review[.]”) (quoting Tenn. R. App. P. 13(b)), the Court of Criminal Appeals *sua sponte* “ordered supplemental briefing” on the issue rather than treat it as waived. Thus, the Court of Criminal Appeals *sua sponte* invited—and directed—the State to raise an argument on an issue that the State neglected to raise itself.

B. THE COURT OF CRIMINAL APPEALS’ ERRONEOUS JURISDICTIONAL RULING AND ITS ALTERNATIVE MERITS RULING.

After considering the initially unraised argument that the Court of Criminal Appeals *sua sponte* instructed the State to raise, the Court of Criminal Appeals credited the argument that it devised *sua sponte* and

ruled that “because the pro se petition was a nullity though timely filed because of its deficiencies, and the amended petition did not cure its defects because it was untimely filed, the post-conviction court did not have jurisdiction to consider this petition.” *Id.* at *5. As detailed below, this ruling was incompatible with controlling caselaw from both this Court and the Court of Criminal Appeals. It also materially misapprehended the difference between non-jurisdictional claims-processing rules, on the one hand, and jurisdictional defects, on the other, which are not the same thing.

Perhaps sensing the jurisdictional error in its ruling—and *despite asserting that it lacked jurisdiction to adjudicate Mr. Terry’s post-conviction claims*—the Court of Criminal Appeals then went on to address the merits of Mr. Terry’s claims and issue an (apparently advisory, in the Panel’s view) alternative ruling that “Petitioner Would Not Be Entitled to Relief on the Merits” anyway. *See id.* at *6–8.

C. AMICUS CURIAE’S MOTION TO INTERVENE.

After discovering the Court of Criminal Appeals’ erroneous jurisdictional ruling and recognizing the catastrophic effects that it would have on its clients’ and prospective clients’ otherwise meritorious post-conviction claims if permitted to stand, amicus curiae here moved to intervene permissively below. *See Ex. 1, Mot. of Horwitz Law, PLLC for Leave to Intervene.* As grounds, amicus curiae noted that the issue that the Criminal Court of Appeals had adjudicated erroneously was frighteningly important and that—given the Panel’s alternative merits ruling against Mr. Terry—Mr. Terry lacked meaningful incentives to challenge it himself.

On June 25, 2024, the Court of Criminal Appeals denied amicus curiae’s motion as “entirely without legal authority as Horwitz [Law] lacks standing.” See Order (Jun. 25, 2024), Case No. E2023-00684-CCA-R3-PC. Unfortunately, this ruling did not exactly bolster confidence in the Court of Criminal Appeals’ understanding of important jurisdictional issues, as it is elementary that “a party seeking to intervene need not possess the standing necessary to initiate a lawsuit.” *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991); see also *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (“an intervenor need not have the same standing necessary to initiate a lawsuit.”) (citing *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *Purnell*, 925 F.2d at 948). Indeed, intervenors do not even need “a specific legal or equitable interest” to intervene. *Grutter*, 188 F.3d at 398 (cleaned up). Instead, to intervene, intervenors need only demonstrate that “they have a substantial interest in the subject matter of this litigation.” *Id.* (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990)). Further, given that only one party to a case needs standing for a court to reach an issue, see *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016) (“When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable”)—and given that both of the Parties had such standing here—no standing defect plausibly prohibited amicus curiae’s intervention, even if there may have been non-jurisdictional grounds to deny it.

Without any such claim being raised by any party, though, the

Court of Criminal Appeals raised an erroneous jurisdictional argument against amicus curiae sua sponte. *See* Order (Jun. 25, 2024), Case No. E2023-00684-CCA-R3-PC. Afterward, it improperly denied amicus curiae’s motion to intervene based solely on a perceived jurisdictional defect that did not exist. *Id.*

D. THE APPELLANT’S RULE 11 APPLICATION.

After the Court of Criminal Appeals denied amicus curiae’s motion to intervene, the Appellant—whom the Court of Criminal Appeals had relieved of his counsel by this point—timely applied for Rule 11 review *pro se*. *See* Appellant’s Rule 11 App. (Jul. 15, 2024). Though amicus curiae is not complaining (because the arguments presented in Mr. Terry’s *pro se* Application are meritorious), amicus curiae notes that the Appellant’s *pro se* Rule 11 Application substantially plagiarizes the motion to intervene that amicus curiae filed below. *Compare id., with Ex. 1.*

Of significance here, Mr. Terry’s Rule 11 Application does not challenge the Court of Criminal Appeals’ alternative merits ruling against him. Appellant’s Rule 11 App. at 2. Instead, it contests the Court of Criminal Appeals’ erroneous jurisdictional ruling alone. *Id.* As a result, even though Mr. Terry will not significantly benefit from reversal here given the Court of Criminal Appeals’ alternative merits ruling against him, intervention apparently is no longer necessary, as Mr. Terry has continued pressing the argument that the Court of Criminal Appeals’ jurisdictional ruling was wrong despite the limited benefits that prevailing on that argument will afford him.

VI. ARGUMENT

A. THE COURT OF CRIMINAL APPEALS' ERRONEOUS JURISDICTIONAL RULING CONTRAVENES CONTROLLING PRECEDENT.

The Court of Criminal Appeals has twice considered whether a petitioner's non-compliance with Tennessee Code Annotated section 40–30–104(e) presents a jurisdictional defect. Both times, the Court of Criminal Appeals held that the answer was no. Inexplicably, though, neither previous decision was cited in the Panel's opinion below. Thus, the Panel's decision neither attempted to reconcile its ruling with existing precedent nor overruled existing precedent.

The Court of Criminal Appeals' first decision addressing the question presented here was *Sexton v. State*, 151 S.W.3d 525, 530 (Tenn. Crim. App. 2004). In *Sexton*, the Court of Criminal Appeals noted “the requirement under T.C.A. § 40–30–104(e) that allegations of a petition and any amendments be verified under oath is not satisfied by counsel's certification.” *Id.* It also held that, “[w]hether prepared by a petitioner or by counsel, the petition and its amendments must be verified under oath.” *Id.* Notwithstanding these requirements, however, *Sexton* held that non-compliance was *not* a jurisdictional defect, stating:

Although the comprehensive petition in the present case was not verified under oath, we do not believe the circumstances justified limiting the petitioner's claims. The trial court did not notify the petitioner of its concerns until the evidentiary hearing. Moreover, the trial court noted that the petitioner's previous pleadings had been verified under oath. The trial court easily could have allowed the petitioner to verify the comprehensive petition. In any event, it took sworn testimony from the petitioner and her trial attorneys relative to the petitioner's claims. **We**

conclude that the circumstances justify the petitioner's claims being heard on their merits.

Id. (emphases added).

The Court of Criminal Appeals' next decision on the point was *Timberlake v. State*, No. W2008-00037-CCA-R3-PC, 2009 WL 302294, at *2 (Tenn. Crim. App. Feb. 5, 2009). There, the State raised the exact argument that the Court of Criminal Appeals ordered the State to argue below: that a deficient petition is a jurisdictional nullity. The *Timberlake* court rejected the argument without difficulty. In so doing, it noted: "The State, however, ignores the fact that [in *Sexton*] we went on to conclude that the post-conviction court should have allowed the petitioner the opportunity to verify her amended petition under oath instead of ruling it invalid due to lack of verification[.]" *Id.* Thus, *Timberlake* held that: "We conclude, therefore, that the post-conviction court erred by summarily dismissing the petition based on the petitioner's failure to verify it under oath." *Id.* at *3.

This Court has weighed in on the question presented here, too. In its September 3, 2019 per curiam order in *Maxwell v. State*, Case No. W2018-00318-SC-R11-PC, this Court addressed a petition that the State had "moved to dismiss" in the trial court on the basis that it "failed to meet the requirements of Tennessee Code Annotated sections 40-30-104(c), (d), (e), (f), and (g)." *Id.* at 1. Afterward, "Maxwell, through his counsel, neither filed a response to the motion to dismiss nor took any other action to remedy the alleged defects." *Id.* The trial court then granted the State's motion and "dismissed the petition because it did not contain Maxwell's signature verifying, under oath and subject to the

penalty for perjury, that the contents of the petition are true and correct.”
Id.

Upon review, this Court reinstated the trial court’s dismissal. As grounds, it noted that:

The legislature “may set up reasonable procedural requirements,” and post-conviction claims “*may* be terminated for failure to comply with a reasonable procedural rule.” *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000) (internal citation omitted). Those requirements are contained in Tennessee Code Annotated section 40-30-104.

Id. at 2 (emphasis added).

Given this context, *Maxwell*—which observes that termination is permissible but non-mandatory—was not a jurisdictional ruling. Instead, the case affirmed a dismissal that the trial court had ordered *after the State expressly invoked its rights to procedural compliance and sought relief based on them.*

B. TENN. CODE ANN. § 40-30-104(e) IS A NON-JURISDICTIONAL CLAIMS-PROCESSING RULE.

Maxwell—which correctly observed that a procedurally deficient petition “may” be dismissed for procedural non-compliance—fell neatly within a long tradition of jurisprudence that holds that “non-jurisdictional rules must be enforced when the beneficiary stands on its rights.” *AsymaDesign, LLC v. CBL & Assocs. Mgmt., Inc.*, 103 F.4th 1257, 1259 (7th Cir. 2024). “The Supreme Court calls these requirements ‘claims-processing rules.’” *Id.*; see also *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (noting the “distinction between truly jurisdictional rules, which govern ‘a court’s adjudicatory authority,’ and nonjurisdictional

‘claim-processing rules,’ which do not.”). The significance of the distinction between the two is that while a jurisdictional rule outright precludes a court from reaching the merits of a claim, *see id.*, “an objection based on a mandatory claim-processing rule may be forfeited ‘if the party asserting the rule waits too long to raise the point.’” *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 549 (2019) (cleaned up).

Tenn. Code Ann. § 40-30-104(e), for its part, is a claims-processing rule. It is easy to tell, because the actual jurisdictional limitations established by the Post-Conviction Procedure Act are set forth in an altogether different section of the statute that is helpfully titled “Limitations of actions.” Tenn. Code Ann. § 40-30-102. Thus, a petitioner’s failure to comply with Tenn. Code Ann. § 40-30-104(e)—or (b), or (c), or (d), or (f), for that matter—is not a *jurisdictional* barrier to commencing a post-conviction proceeding, which the Post-Conviction Procedure Act makes clear “is commenced” merely “by filing, with the clerk of the court in which the conviction occurred, a written petition naming the state as the respondent.” *See* Tenn. Code Ann. § 40-30-104(a). Instead, such non-compliance is simply a violation of a claims-processing rule that “*may*” result in dismissal if the State stands on its rights and seeks relief. *See* Order, *Maxwell*, Case No. W2018-00318-SC-R11-PC (Sep. 3, 2019) (emphasis added). By the same token, the State’s failure to timely stand on its rights in response to a petitioner’s non-compliance with Tenn. Code Ann. § 40-30-104(e) results in forfeiture. *See Fort Bend Cnty., Texas*, 139 S. Ct. at 1849; *cf. Sexton*, 151 S.W.3d at 530; *Timberlake*, 2009 WL 302294, at *2–3.

Other jurisdictions apply this reasoning when evaluating claims-processing rules like § 40-30-104(e). *See Hughley*, 61 V.I. at 334 (2014). Indeed, it appears that “virtually every court” to consider the issue does. *Id.* at 334–35. As the Supreme Court of the Virgin Islands has noted:

Unquestionably, the verification requirement codified in section 1302(3) represents a mere claims-processing rule. Neither section 1302 nor any other provision of the local Virgin Islands habeas corpus statute provides for dismissal if a prisoner files an unverified petition. Perhaps most importantly, virtually every court to consider the question has held that, when a statute requires that a complaint be verified by oath, the verification requirement is a non-jurisdictional claims processing rule. *See, e.g., Ex parte Collier*, 64 So.3d 1045, 1050 (Ala. 2010) (“Although § 15–21–4, Ala.Code 1975, provides that a petition for a writ of habeas corpus must be verified by the oath of the applicant ... this mandatory verification requirement has not been interpreted to be a jurisdictional prerequisite.”) (quoting *Smith v. State*, 918 So.2d 141 (Ala. Crim. App. 2005)) (internal quotation marks omitted); *Miles v. State*, 91 P.3d 588, 590 (Nev. 2004) (“We note that many jurisdictions agree with the general principle that an inadequate verification does not divest the ... court of jurisdiction to consider a habeas petition ... Under Nevada’s post-conviction statutory scheme, an inadequate verification is an amendable, not a jurisdictional, defect.”); *Taylor v. McKune*, 962 P.2d 566, 570 (Kan. Ct. App. 1998) (“We have noted Taylor’s petition was initially filed with no verification.... [N]one of the deficiencies or omissions deprive the district court of jurisdiction.”); *Freeman v. State*, 783 P.2d 324, 325 (Idaho Ct. App. 1989) (“The propriety of the summary dismissal in this case turns on the issue of whether verification of a petition for habeas corpus is a jurisdictional requisite ... or whether verification is a procedural requirement which may be waived if not timely noted by the trial court or raised as a defense by the respondent. We think the latter to be the better reasoned view.”); *In re Linda D.*, 83

Cal. Rptr. 544, 546 (Cal. Ct. App. 1970) (“These jurisdictional objections have no merit on this appeal. Appellant did not challenge the unverified petition in the court below.... It is the rule that failure to verify a petition ... is a defect in the pleading which does not go to the court's jurisdiction and must be raised prior to the hearing or it is waived.”). . . . [Unlike time-limitation rules], the failure to verify a habeas corpus petition may be easily rectified by permitting the prisoner to amend his petition. *See Brooks*, 58 V.I. at 429 (“Here, it is not clear what prejudice any party would suffer from a petitioner's correction of the caption early in the proceedings, which further suggests that the Legislature would not have made this factor a jurisdictional requirement.”); SUPER. CT. R. 8 (“The court may amend any process or pleading for any omission or defect therein...”). Thus, since section 1302(3) does not codify a jurisdictional defect, and its enforcement does not implicate any judicial interests beyond those of the parties, see *Simon*, 58 V.I. at 629, the Superior Court committed error when it denied Hughley's habeas corpus petition on this basis.

Id.

The Court of Criminal Appeals' decision in *Vaughn v. State*, No. W2021-00354-CCA-R3-PC, 2022 WL 1618435, at *7 (Tenn. Crim. App. May 23, 2022), *appeal denied* (Sept. 29, 2022), does not compel a different outcome, either. Two reasons support this conclusion.

First, like *Maxwell*, the dispute in *Vaughn* arose in the context of a case in which the State had filed in the trial court a “motion to dismiss” for non-compliance with Tenn. Code Ann. § 40-30-104(e). *Id.* That means that the State stood on its rights, and as noted above, “non-jurisdictional rules must be enforced when the beneficiary stands on its rights.” *AsymaDesign, LLC*, 2024 WL 2813827, at *2.

Second, to the extent that the Court of Criminal Appeals'

unreported decision in *Vaughn* can be read to conflict with this Court’s precedential ruling in *Maxwell* and the Court of Criminal Appeals’ reported decision in *Sexton*, 151 S.W.3d at 530, *Vaughn*—like the Panel’s decision below—may be disregarded as contrary to both precedential and controlling authority. *See* Tenn. Sup. Ct. R. 4(G)(2) (“Opinions reported in the official reporter, however, shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.”).

C. BECAUSE TENN. CODE ANN. § 40-30-104(e) IS A NON-JURISDICTIONAL CLAIMS-PROCESSING RULE, AND BECAUSE THE STATE FORFEITED ITS OBJECTION TO MR. TERRY’S PROCEDURAL NON-COMPLIANCE, THE COURT OF CRIMINAL APPEALS’ JUDGMENT SHOULD BE SUMMARILY REVERSED.

Because the State neglected to stand on its rights to procedural compliance and only did so after the Court of Criminal Appeals *sua sponte* ordered it to do so, remedying the Court of Criminal Appeals’ erroneous jurisdictional ruling is simple under the circumstances presented by this case. Here, the State unmistakably forfeited its claim for dismissal based on the verification-based claims-processing rule at issue by failing to timely raise the argument. *See Terry*, 2024 WL 2698932, at *4 (“We acknowledge that the parties did not raise or address this issue in their initial briefs.”). Thus, the claim was not preserved, and it should have been deemed forfeited. *See* Tenn. R. App. P. 13(b) (“Review generally will extend only to those issues presented for review.”); *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012) (“issues are properly raised on appeal . . . when they have been raised and preserved at trial and, when appropriate, in the intermediate appellate courts”); *McMillan*, 2022 WL

855262, at *10; *Fort Bend Cnty., Texas*, 139 S. Ct. at 1849.

Given these circumstances, this Court can remedy the Court of Criminal Appeals' error below by summarily reversing the trial court's erroneous jurisdictional ruling, which treated a forfeited, non-jurisdictional claims-processing rule as a preclusive jurisdictional defect. This Court can also remedy that error with minimal disruption to this case by keeping the Court of Criminal Appeals' alternative merits ruling—which Mr. Terry has not challenged in this Court, *see* Appellant's Rule 11 App. at 2—in place.

D. ALTERNATIVELY, THIS COURT SHOULD DESIGNATE THE COURT OF CRIMINAL APPEALS' OPINION “NOT FOR CITATION.”

“If an application for permission to appeal is hereafter denied by this Court with a ‘Not for Citation’ designation, the opinion of the intermediate appellate court has no precedential value.” Tenn. Sup. Ct. R. 4(E)(2). Here, if the Court of Criminal Appeals' opinion is not summarily reversed for the reasons outlined above, then a “Not for Citation” designation is appropriate instead. Several reasons support this conclusion.

First, the Court of Criminal Appeals' erroneous jurisdictional ruling will have massive and deleterious downstream consequences for thousands of litigants each year. If procedural deficiencies in post-conviction petitions are considered *jurisdictional* barriers to review that permanently preclude relief and cannot be cured by amendment even when the State fails to stand on its rights to procedural compliance, then countless defendants—several of whom not only have viable post-conviction claims but are actually innocent of the crimes for which they

have been convicted—will forever forfeit even the *possibility* of review. Thus, if the Court of Criminal Appeals’ erroneous jurisdictional ruling becomes precedential, then a large number of otherwise meritorious post-conviction claims will collapse without a way to cure them. Such a result is incompatible with this Court’s longstanding preference for having controversies determined on their merits. *See Fiske v. Grider*, 106 S.W.2d 553, 555 (Tenn. 1937) (“We have stated repeatedly that it is the policy of this court to have controversies between litigants determined upon their merits.”).

The significance of those consequences alone merits careful attention and thorough briefing. That obviously did not happen in this case, though, where the issue was raised for the first and only time *by the Court of Criminal Appeals*, which *sua sponte* ordered the Parties to brief it when they had not done so initially. Thus, a “Not for Citation” designation is warranted here so that the issue can be properly briefed and argued, in the normal course, by parties who are interested in raising it if and when it reemerges.

Second, the adjudicative process was apparently compromised below. Given that the adverse authority bearing on the Court of Criminal Appeals’ erroneous jurisdictional ruling was controlling, the State’s attorneys had professional obligations to disclose it. *See* Tenn. Sup. Ct. R. 8, RPC 3.3(a)(2) (“A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]”). Based on the fact that neither the Court of

Criminal Appeals’ opinion in *Sexton*, 151 S.W.3d at 530, nor the Court of Criminal Appeals’ opinion in *Timberlake*, 2009 WL 302294, at *2–3, was cited in the Panel’s opinion, though, it does not appear that that happened. The apparent non-compliance compromised the Court of Criminal Appeals’ deliberative process and produced an erroneous outcome. Fortunately, though, this Court can remedy the broader and far-reaching consequences of that erroneous outcome through a “Not for Citation” designation here.

Third, the Court of Criminal Appeals’ opinion has obvious problems even on its own terms. As this Court has explained: “The courts of this State have no right to render an advisory opinion.” *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961). Even so, after determining that it lacked jurisdiction to adjudicate Mr. Terry’s post-conviction petition, the Court of Criminal Appeals went on to rule that “Petitioner Would Not Be Entitled to Relief on the Merits” anyway. *See Terry*, 2024 WL 2698932, at *6–8. At best, this reflects the Court of Criminal Appeals’ (correct) concern that its jurisdictional ruling was unsupportable and would not survive later review. At worst, it reflects the Court of Criminal Appeals’ fundamental misunderstanding about what the absence of jurisdiction means. Regardless, though, even accepting the Court of Criminal Appeals’ opinion on its own terms and treating its jurisdictional ruling as correct, the Court of Criminal Appeals issued an improper advisory opinion in Mr. Terry’s case that it had “no right to render[.]” *State ex rel. Lewis*, 347 S.W.2d at 537.

Mr. Terry himself does not now challenge the Court of Criminal

Appeals' alternative merits ruling. *See* Appellant's Rule 11 App. at 2. That creates real problems and limits this Court's ability to review it. Thus, even if this Court were to agree with the Court of Criminal Appeals' erroneous jurisdictional ruling, it would have no easy way to then remedy the balance of the Court of Criminal Appeals' improper merits ruling, which is advisory *on its own terms*. Further, as there is no apparent way to declare only part of an intermediate appellate court's opinion "Not For Publication" or "Not For Citation," designating the Court of Criminal Appeals' entire opinion as non-citable is appropriate.

VII. CONCLUSION

For the foregoing reasons, this Court should **REVERSE IN PART** by reversing the Court of Criminal Appeals' erroneous jurisdictional ruling while keeping the Court of Criminal Appeals' unchallenged merits ruling in place. Alternatively, the Court of Criminal Appeals' opinion should be designated "Not for Citation."

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-VI) contains 4,454 words pursuant to § 3.02(a)(1)(c), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I certify that on this the 16th day of July, 2024, a copy of the foregoing was served via the Court's e-filing system, via email, or via USPS mail, postage prepaid, upon:

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