

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 29, 2025

FILED

05/29/2026

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. KENNETH C. DAVIS

**Appeal from the Criminal Court for Knox County
No. 125094 Steven W. Sword, Judge**

No. E2024-01785-CCA-R3-CD

The Defendant, Kenneth C. Davis, was convicted by a jury of burglary of a building other than a habitation and received a twelve-year sentence. The Defendant died while his motion for new trial was still pending, which prompted the Defendant's counsel to file a motion to dismiss on the Defendant's behalf, arguing that the common law doctrine of abatement *ab initio* should act to abate the Defendant's entire case from the inception of the prosecution. The trial court denied the motion, relying on the Tennessee Supreme Court's decision in *State v. Al Mutory*, 581 S.W.3d 741 (Tenn. 2019). The Defendant's counsel filed an appeal from that decision pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. On appeal, the Defendant's counsel contends that the trial court erred by relying on *Al Mutory* and declining to apply the doctrine of abatement *ab initio* under these circumstances. Following supplemental briefing, we conclude that this court lacks subject matter jurisdiction under Rule 3 to review the issue as presented. Further, we decline to extend the extraordinary judicial remedy of a writ of certiorari. The appeal is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

KYLE A. HIXSON, J., delivered the opinion of the court, in which JILL BARTEE AYERS and TOM GREENHOLTZ, JJ., joined.

Eric M. Lutton, District Public Defender; Jonathan Harwell, Assistant District Public Defender (on appeal); and Keith Lowe and Halle Hammond (at trial), Assistant District Public Defenders, for the appellant, Kenneth C. Davis.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin L. Barker, Assistant Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha M. Fitzgerald, Robert Debusk, and Jeannine Guzolek, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

Prior to the Defendant's death, a Knox County grand jury had charged him on June 13, 2023, with burglary of a building other than a habitation, a Class D felony. *See* Tenn. Code Ann. § 39-13-1002. The Defendant, thereafter, proceeded to a jury trial. The State's proof at trial established that, on October 10, 2022, the Defendant placed several items of clothing, later valued at \$100.88, inside plastic bags and walked past all points of sale at a Walmart located on Chapman Highway in Knoxville. A Walmart asset protection employee observed this theft and detained the Defendant. This incident was recorded. Previously, the Defendant had been served with a "No Trespass" notice on at least four separate occasions—most recently on May 15, 2021—prohibiting him from the premises of all Walmart properties. The Defendant's motion for judgment of acquittal was denied, and the jury found him guilty as charged.

Following the jury's verdict, the trial court exercised its discretion as thirteenth juror and found that the weight of the evidence supported the finding of guilt. A sentencing hearing was held on November 30, 2023, at the conclusion of which the trial court sentenced the Defendant, as a career offender, to twelve years in the Tennessee Department of Correction. *See* Tenn. Code Ann. §§ 40-35-108, -112. A uniform judgment document was filed on December 4, 2023, which was twice corrected.

On January 2, 2024, the Defendant filed a timely motion for new trial. In the motion, the Defendant raised the following issues:

1. The weight of the evidence was against the jury's verdict.
2. The evidence was insufficient to sustain the Defendant's convictions.
3. The evidence was insufficient to prove that the witnesses called at trial had the authority to trespass [the Defendant] for the period of time claimed. Further, the evidence was insufficient to show that [the Defendant] was, at the time of the offenses, prohibited from entering the business in question.
4. This Court erred in ruling that the indictment charged a burglary under T.C.A. 39-13-1002(a)(3). The indictment in question only cites to T.C.A.

39-13-1002 and the first clause of legal effect is language from T.C.A. 39-13-1002(a)(1).

5. The evidence was insufficient to prove that the business was not open to the public as required by T.C.A. 39-13-1002(a)(1).

6. This Court erred by denying [the Defendant's] request that the jury be instructed as to the elements of the offense required under T.C.A. 39-13-1002(a)(1).

7. The evidence at sentencing was insufficient to show that [the Defendant] was a [career] offender.

8. The sentence, as applied to [the Defendant], violates the Eight[h] Amendment to the United States Constitution as it is both cruel and unusual given [the Defendant's] circumstances.

However, before a hearing or ruling on the Defendant's motion for new trial could take place, the Defendant passed away. Thereafter, counsel for the Defendant filed a motion to dismiss the case, asking for the trial court to apply the doctrine of abatement *ab initio*, thereby abating the judgment of conviction and dismissing the charges against the Defendant. *See State v. Al Mutory*, 581 S.W.3d 741, 743 (Tenn. 2019) (stating that “[t]he effect of abatement *ab initio* is to stop all proceedings *ab initio* (from the beginning) and render the defendant as if he or she had never been charged” (citation modified)); *Carver v. State*, 398 S.W.2d 719, 719-20 (Tenn. 1966) (recognizing that a criminal defendant's death during the pendency of his appeal abated not only the appeal, but all proceedings from the inception of the prosecution). In the motion to dismiss, defense counsel acknowledged the Tennessee Supreme Court's decision in *Al Mutory*, which addressed the continued applicability of the doctrine in Tennessee when a criminal defendant died during an appeal as of right from a conviction, and ultimately, abandoned the doctrine as it related to that situation. *See* 581 S.W.3d at 745-50. However, defense counsel contended that the circumstances present in this instance, a criminal defendant's dying while the motion for new trial was still pending in the trial court, were outside the holding of *Al Mutory* and that the doctrine should still apply in this limited situation. Defense counsel did not seek to pursue the previously filed motion for new trial or request any other relief.

A brief hearing on the motion to dismiss took place, and the trial court entered an order denying the motion on October 29, 2024. In its order, the trial court analyzed the

Tennessee Supreme Court's holding in *Al Mutory* and determined that the same rationale and public policy considerations for abandoning the doctrine in the appellate context also applied in these circumstances, and thus, the doctrine of abatement *ab initio* did not serve to automatically abate the Defendant's judgment of conviction and dismiss the case against him. Then, utilizing the "case-by-case" analysis outlined in *Al Mutory*, *see* 581 S.W.3d at 756, the trial court "concluded [the case] without further action[.]" finding "no basis for continuing the process of hearing the motion for new trial." The trial court reasoned as follows:

The Defendant was not ordered to pay restitution. In any event, he was indigent and the State would likely bear the costs of litigation. The victim was a company that pursued prosecution for offenses committed against the company. The interests of society in condemning a criminal act have been accomplished.

No additional proceedings took place in the trial court.

Thereafter, on December 2, 2024, defense counsel, "pursuant to Rules 3 and 4 of the Tennessee Rules of Appellate Procedure," filed a timely¹ notice of appeal document with this court. The notice indicated that the Defendant, "by and through counsel," was appealing the trial court's October 29, 2024 order denying the motion to dismiss.² The issue initially raised in this appeal is whether the trial court erred by denying the Defendant's motion to dismiss, *i.e.*, whether the doctrine of abatement *ab initio* should still apply in Tennessee when a criminal defendant dies during the pendency of his motion for new trial proceedings in the trial court.

¹ We note that November 28 and 29 of 2024 were both state holidays celebrating Thanksgiving. *See* Tenn. R. App. P. 21(a) (providing rules of time computation regarding state office closures for weekends and holidays).

² The notice was also accompanied by a July 14, 2023 order from the trial court noting the Defendant's indigency status and appointing legal counsel. Because the notice was accompanied by this order, the Appellate Court Clerk's Office deferred the filing fees for this appeal.

II. ANALYSIS

A. *State v. Al Mutory*

To provide some context before proceeding with our analysis, a review of the Tennessee Supreme Court's opinion in *Al Mutory* is in order. As discussed above, in *Al Mutory*, our supreme court held that Tennessee courts would no longer apply the doctrine of abatement *ab initio* in a case where a criminal defendant died while his direct appeal was pending. 581 S.W.3d at 750.

Beginning with a historical narrative, the *Al Mutory* Court noted that the doctrine of abatement *ab initio* was court-made, the origin of which was not entirely clear. *Id.* at 745 (citing *Commonwealth v. Hernandez*, 118 N.E.3d 107, 111 (Mass. 2019) (noting that there is “little or no evidence of [abatement *ab initio*] prior to the late nineteenth century”). “Abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. At common law, a suit, when abated, is absolutely dead.” *Carver*, 398 S.W.2d at 719 (citation omitted). Early on, “many state appellate courts . . . limited abatement to the appeals process only and left intact the convictions of deceased defendants.” *Al Mutory*, 581 S.W.3d at 745 (citations omitted). However, over time, courts, including the Tennessee Supreme Court, “expanded the doctrine of abatement to include criminal prosecutions from their beginning, or *ab initio*.” *Id.* at 745-46 (citations omitted); see *Carver*, 398 S.W.2d at 719-20. “[T]he expansion of abatement of a criminal appeal into abatement *ab initio*” was based upon several justifications: (1) preventing recovery against the defendant's estate of a monetary penalty, as well as the use of the conviction in civil litigation against the estate; (2) the impossibility of punishing a deceased defendant, which is “the [very] purpose of the criminal justice system”; and (3) protecting a criminal defendant's right to a direct appeal from a conviction because “courts view[ed] appeals as of right as a continuation and culmination of the criminal proceedings initiated in the trial court.” *Al Mutory*, 581 S.W.3d at 746-47 (citations omitted); see *Carver*, 398 S.W.2d at 720.

However, over the past few decades, many states have begun to move away from the doctrine of abatement *ab initio*. *Al Mutory*, 581 S.W.3d at 748. “Two changes to the legal landscape” during this time period have provided the impetus for this shift: (1) the imposition of restitution and (2) a recognition of victims' rights. *Id.* In *Al Mutory*, the Tennessee Supreme Court likewise relied upon on these two developments as the basis for its rationale in reaching its conclusion “that the doctrine of abatement *ab initio* must be abandoned [in Tennessee] because it is obsolete, its continued application would do more

harm than good, and it is inconsistent with the current public policy of this State, as reflected in the constitution, in statutes, and in recent judicial decisions.” *Id.* at 750. The court explained that “[c]hanges to Tennessee law in the arena of victims’ rights [had] expanded the purpose of the criminal justice system well beyond the ‘cardinal principle[]’ of ‘punishment.’” *Id.* (quoting *Carver*, 398 S.W.2d at 720). The court further reasoned that continued application of the doctrine would “prioritize[] the reputation of a deceased criminal and the financial interests of the criminal’s estate over society’s interest in the just condemnation of a criminal act and a victim’s right to restitution” and would force victims “to re-litigate matters in civil law suits that were already resolved during deceased defendants’ criminal trials.” *Id.*

The *Al Mutory* Court then discussed the approach to implement in Tennessee as a replacement for abatement *ab initio*, noting that other states which had decided to abandon the doctrine differed greatly in their respective methodologies moving forward. *Id.* at 751-56. After discussing the various rationales for these different methodologies, the *Al Mutory* Court declined to adopt in Tennessee “a straightforward ‘dismiss as moot’ approach that would require the [automatic] dismissal of every criminal appeal from a conviction upon the death of the defendant, regardless of whether the defendant or the State brought the appeal.” *Id.* Instead, the *Al Mutory* Court contemplated that, in certain circumstances, a criminal appeal might continue after the defendant’s death. *Id.* at 755. The *Al Mutory* Court instructed that future Tennessee courts, when “faced with this issue, . . . should decide on a case-by-case basis, in light of the record on appeal, and after consideration of the wealth of authorities from other jurisdictions, whether a particular appeal as of right should continue after a defendant’s death.” *Id.* at 756. The court also indicated that the parties should “advance any interest—be it an interest of the defendant’s family, the victim’s family, or society . . . that would benefit from allowing [an] appeal to continue.” *Id.* at 755. The court stated that dismissal of the appeal was the proper resolution in *Al Mutory* for the following reasons:

[T]he defendant was not fined or ordered to pay restitution. Nor have we received any notice of a pending wrongful death action against the defendant or any probate matter related to this case. Neither the defendant’s attorney nor the State has raised post-judgment “facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action.”

Id. (quoting Tenn. R. App. P. 14). Thus, although the *Al Mutory* Court left open “the possibility that a future appeal” might warrant consideration and be allowed to proceed,

the majority of appeals following a criminal defendant's death would likely be dismissed as moot through application of this approach. *Id.*

The *Al Mutory* Court also suggested that the Advisory Commission on the Rules of Practice and Procedure should develop a procedure to apply if a defendant dies during the course of an appeal. 581 S.W.3d at 755-56. But, as of yet, no such procedure has been developed.

B. Initial Briefing on the Merits

We now turn to outline the parties' appellate arguments. Defense counsel argues that the trial court erred in ordering the case concluded without further action, rather than granting the motion to dismiss the case from the beginning due to the Defendant's death while his motion for new trial was pending. According to defense counsel, *Al Mutory's* holding was limited to cases on direct appeal and should not be extended to these circumstances given that a judgment of conviction is not final in the trial court until the motion for new trial has been resolved. In making this argument, defense counsel cites *State v. Mixon*, which holds, "A judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed. If a post-trial motion is timely filed, the judgment becomes final upon entry of an order disposing of the post-trial motion." 983 S.W.2d 661, 670 (Tenn. 1999) (first citing Tenn. R. App. P. 4(c); and then *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)). Defense counsel further notes that "a trial court's ruling on the motion for new trial ordinarily concludes the trial court's jurisdiction over the case." Then, defense counsel concludes that, because the Defendant's judgment of conviction was not final in the trial court at the time of the Defendant's death, the doctrine of abatement *ab initio* was still applicable under these circumstances to abate the entire case against the Defendant from the inception of the prosecution.

In a footnote at the end of the Defendant's principal brief, defense counsel clarifies the request for relief, stating that he is not seeking for the Defendant to "be granted the right to appeal under the limited circumstances outlined in" *Al Mutory*. Rather, according to defense counsel, "the claim here is that, as the judgment was not yet final in the trial court, the judgment and the entirety of the case should be dismissed. No final judgment should ever enter and no appeal should ever occur." Defense counsel asserts that "[t]his case ha[s] not yet reached the appellate stage" because "until the pending motion for new trial is denied, there is no possibility of appeal on the substantive issues raised in that motion—there is no ruling yet on those issues that could be appealed."

In response, the State argues that the trial court properly denied the Defendant's motion to dismiss because the doctrine of abatement *ab initio* was abandoned in its entirety by the Tennessee Supreme Court in *Al Mutory*. Moreover, while the State concedes, under the precedent in *Mixon*, that "the judgment here was not yet final when [the] Defendant died because the motion for new trial stayed its finality," the State asserts that *Al Mutory*'s logic, nonetheless, applies here. The State, concurring with the trial court, submits that

[t]he same reasoning and public policy for not dismissing a case due to the death of a defendant in the middle of an appeal would logically apply to a case where a conviction and sentence had been entered by the trial court, the execution of which was temporarily stayed pending a motion for new trial.

Accordingly, the State concludes that the Defendant's conviction should not be abated after a jury convicted him, he was sentenced, and a uniform judgment document was entered.

In a reply brief, defense counsel "suggests that it is contrary to the public interest to hold that the death of the [Defendant] is itself an action sufficient to take a non-final judgment in the trial court and render it a final judgment." Defense counsel emphasizes that the Defendant's death would effectively function the same as a denial of his motion for new trial claims on the merits, which should not be the result. "Rather, because [the Defendant] died prior to resolution of the motion for new trial, final judgment in the trial court can never enter and the charges against him must be dismissed."

C. Supplemental Briefing on Subject Matter Jurisdiction

As noted above, defense counsel has filed a Rule 3 notice of appeal on behalf of the deceased Defendant challenging only the trial court's ruling on the motion to dismiss. *See generally* Tenn. R. App. P. 3 (outlining the availability of an appeal as of right in civil and criminal actions and describing the proper method of initiation). This court is obligated to consider subject matter jurisdiction, regardless of whether the issue is presented by the parties. Tenn. R. App. P. 13(b) (stating that this court is required to "consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review"); *State v. Bristol*, 654 S.W.3d 917, 926 (Tenn. 2022) ("It is well settled that an appellate court *must* consider subject-matter jurisdiction, regardless of whether that issue was presented by the parties or addressed below.").

As relevant here, Rule 3(b) of the Tennessee Rules of Appellate Procedure limits subject matter jurisdiction over appeals as of right by criminal defendants to the following circumstances:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals . . . on a plea of not guilty The defendant may also appeal as of right from an order denying or revoking probation; an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; an order or judgment pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure; from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceedings; from a final order on a request for expunction; and from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure.

“Generally, a criminal defendant has the right to appeal a final judgment.” *State v. Cavin*, 671 S.W.3d 520, 526 (Tenn. 2023) (citing Tenn. R. App. P. 3(b)). In other words, “Rule 3 appeals . . . may be taken only from final judgments.” *State v. Maddox*, 603 S.W.2d 740, 741 (Tenn. Crim. App. 1980). “Of course, the requirement of a *final* criminal conviction judgment emanates from Tennessee Code Annotated section 16-5-108 as much as it does from Rule . . . 3(b).” *State v. Comer*, 278 S.W.3d 758, 761 (Tenn. Crim. App. 2008), *overruled on other grounds by State v. Gevedon*, 671 S.W.3d 537, 541-43 (Tenn. 2023). For our purposes, Code section 16-5-108(a)(1) provides that “[t]he jurisdiction of the court of criminal appeals shall be appellate only, and shall extend to review of the final judgments of trial courts in . . . [c]riminal cases, both felony and misdemeanor.”

“To be appealable, a judgment must be final—that is, it must decide and dispose of the *whole* merits of the case leaving nothing for the further judgment of the [trial] court.” *Cavin*, 671 S.W.3d at 526 (citation modified) (quoting *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 460 (Tenn. 1995)). “In other words, . . . a judgment is final if it decides the controversy between the parties on the merits and fixes their rights so that, if the judgment is affirmed, nothing remains for the trial court to do but to proceed with its execution.” *Comer*, 278 S.W.3d at 761 (quoting *Davis v. State*, No. 02C01-9804-CC-00104, 1998 WL 726533, at *1 (Tenn. Crim. App. Oct. 16, 1998)).

Despite the parties’ arguments relative to the lack of finality of the Defendant’s judgment of conviction in the trial court at the time of his death, and the fact that subject

matter jurisdiction acquired under Rule 3(b) in this instance requires a final judgment of conviction, neither party specifically addressed subject matter jurisdiction in their principal briefs. Nonetheless, the parties' statements in this regard garnered this court's attention, given that our consideration of subject matter jurisdiction is mandatory. Accordingly, this court requested and received supplemental briefing on the issue from both parties. *See Bristol*, 654 S.W.3d at 927-28 (instructing that, "when an appellate court considers an issue that has not been properly presented, it must give the parties fair notice and an opportunity to be heard on the dispositive issues"; and concluding that "supplemental briefing ordinarily will be the best way to test a notion of the court's own invention" (citations modified)). With supplemental briefing now complete, the issue of subject matter jurisdiction is properly before us for our review.

Defense counsel presents three alternative arguments for this court to acquire subject matter jurisdiction over the appeal: (1) the trial court's order is a final judgment for Rule 3(b) purposes; (2) this court should suspend the finality requirement of Rule 3(b) under its discretionary authority granted by Rule 2 of the Tennessee Rules of Appellate Procedure; or (3) the appeal should proceed under the common law writ of certiorari. We will address each argument and the State's response in turn.

D. Rule 3 Appeal

Relative to an appeal as of right pursuant to Rule 3(b), it is defense counsel's position "that the instant case falls under the language of Rule 3, in particular as he is appealing from a 'judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals . . . on a plea of not guilty.'" Defense counsel reasons that

Rule 3, as a general matter, provides for appeals from the lower courts in cases where the trial court has issued its last decision. . . . This provides a contrast with appeals under Rule 9 or Rule 10, which are interlocutory in nature, meaning an appeal from an order that is "interim or temporary; not constituting a final resolution of the whole controversy." "Interlocutory," BLACK'S LAW DICTIONARY (12th ed. 2024).

According to defense counsel, "there is nothing more for the trial court to do" as "[t]here are no lingering issues on which the trial court will rule in the future," particularly given that the trial court "concluded [the case] without further action." Defense counsel

concludes that this is “not an interlocutory appeal, but rather one from a court’s last ruling in a case,” precisely “what Rule 3 is designed to cover.”

The State concedes that the Defendant has an appeal as of right pursuant to Rule 3(b), relying on the trial court’s statement that the case was “concluded . . . without further action.” However, we are not bound by the State’s concession. *See Clardy v. State*, 691 S.W.3d 390, 409-10 (Tenn. 2024). Before accepting a concession, this court should independently analyze the underlying legal issue to determine whether the concession reflects a correct interpretation of the law. *See State v. Gomez*, 163 S.W.3d 632, 654 (Tenn. 2005), *vacated on other grounds sub nom, Gomez v. Tennessee*, 549 U.S. 1190 (2007).

Here, prior to the Defendant’s death, a motion for new trial was filed in the trial court, raising substantive issues with his judgment of conviction, including sufficiency of the evidence, a defect in the charging instrument, an omission in the jury instructions, and sentencing issues. At present, Tennessee Rule of Criminal Procedure 33 establishes the framework for new trial motions in criminal cases and allows a trial court to reconsider its judgment and grant a new trial when required by law. *See* Tenn. R. Crim. P. 33(a). The purpose of a motion for new trial is, in part, to “help to ensure that ‘the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict[.]’” *Fahey v. Eldridge*, 46 S.W.3d 138, 142 (Tenn. 2001) (quoting *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983)); *see Ricks v. State*, 882 S.W.2d 387, 393 (Tenn. Crim. App. 1994). This post-verdict procedural mechanism ensures that trial courts have an opportunity to correct errors before appellate intervention, thereby preventing unnecessary appeals. *See Rupe v. Durbin Durco, Inc.*, 557 S.W.2d 742, 748 (Tenn. Ct. App. 1976), *overruled on other grounds by Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn. 1980). Furthermore, the practice of filing a motion for new trial “significantly aids the functions of the appellate courts by limiting and defining the issues for review.” *Fahey*, 46 S.W.3d at 142; *see also* Tenn. R. App. P. 3(e) (stating that, in all cases tried by a jury, certain issues not raised in a motion for new trial are waived on appeal).

A motion for new trial “shall be made . . . within thirty days of the date the order of sentence is entered.” Tenn. R. Crim. P. 33(b). Once a timely motion for new trial is filed, the judgment of conviction is effectively suspended for all intents and purposes, and jurisdiction remains in the trial court until the motion, along with any amendments, has been adjudicated. *See* Tenn. R. App. P. 4(e); *State v. Givhan*, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980); *Thompson v. Hawes*, 162 S.W.2d 71, 78 (Tenn. Ct. App. 1941). Accordingly, this procedure, initiated by the Defendant, effectively suspended the legal

finality of his judgment of conviction until the motion for new trial was ruled upon by the trial court.

Additionally, pursuant to Tennessee Rule of Appellate Procedure 4(c), the timely filing of a motion for new trial tolls the filing period for a notice of appeal document: “[T]he time for appeal for all parties shall run from entry of the order denying a new trial or granting or denying any other such motion or petition.” Therefore, it has often been stated that the judgment, for the subsequent purposes of appeal, is regarded as entered at the time the motion for new trial is denied. *See Green Meadow Park Inc. v. Am. Heritage Life Ins. Co.*, 540 S.W.2d 267, 270 (Tenn. Ct. App. 1976). In this regard, “a trial court’s judgment becomes final thirty days after entry, unless a specified post-trial motion is filed, in which case the judgment becomes final upon entry of the order denying a new trial or granting or denying any other such motion or petition.” *State v. Brown*, 479 S.W.3d 200, 205-06 (Tenn. 2015) (citation modified); *see Mixon*, 983 S.W.2d at 670; *Pendergrass*, 937 S.W.2d at 837.

Defense counsel’s subject-matter jurisdiction argument attempts to meld the finality of the Defendant’s unfortunate death, which led to the trial court’s ruling on the motion to dismiss that concluded the case, with the finality of the Defendant’s judgment for the purposes of appeal under Tennessee Rule of Appellate Procedure 4(c). We must reject this attempt. Different considerations are at play when discussing a final “judgment of conviction” as conferring subject matter jurisdiction to this court via Rule 3(b) versus when that judgment is final for purposes of appeal under Rule 4(c). Here, the Defendant’s criminal conviction has reached its culmination, *i.e.*, the jury has returned its verdict, the trial court has approved the verdict in its role as thirteenth juror, and the trial court has imposed a sentence. A uniform judgment document had been entered. The Defendant’s *judgment of conviction* was final in this sense and was subsequently suspended by his filing a motion for new trial.

Moreover, there is no requirement that a defendant must file a motion for new trial. As discussed above, a motion for new trial functions as an effective appeal to the trial court that allows it the ability to correct the errors that would be alleged on a direct appeal to this court. Unless the motion is granted in some respect, there is no effect on the *judgment of conviction* as previously entered. In consequence, the motion for new trial is not a part of the trial process. *See Cisco v. State*, 28 S.W.2d 338, 338-39 (Tenn. 1930).

By a similar token, Tennessee courts have addressed the applicable meaning of the word “conviction” and noted that the definition depends on the context or procedural

setting in which the term is used. *State v. Vasser*, 870 S.W.2d 543, 545-46 (Tenn. Crim. App. 1993). “Tennessee, like most jurisdictions, [has] recognize[d] two distinct meanings of the term ‘conviction.’” *Rodriguez v. State*, 437 S.W.3d 450, 453 (Tenn. 2014) (citing *Vasser*, 870 S.W.2d at 545). First, “[a] conviction in the ‘general sense’ is the establishment of guilt by a guilty plea or a verdict independent of sentence and judgment.” *Id.* (first citing *Vasser*, 870 S.W.2d at 546; and then citing *Daughenbaugh v. State*, 805 N.W.2d 591, 597 (Iowa 2011) (defining “conviction” in the “general or popular sense” as “the establishment of guilt independent of judgment and sentence”). The “general” meaning of conviction applies when the statutory language denotes a stage of the trial process or is used “in connection with the successive steps in a criminal case[.]” *Vasser*, 870 S.W.2d at 546 (citations omitted). Second, “a conviction in its ‘technical’ sense requires a formal adjudication by a court and the entry of a judgment of conviction.” *Rodriguez*, 437 S.W.3d at 454 (first citing *Vasser*, 870 S.W.2d at 545-46; then citing *Daughenbaugh*, 805 N.W.2d at 597 (“[W]hen the term ‘conviction’ is used in its technical [or] legal sense, it requires a formal adjudication by the court and the formal entry of a judgment of conviction.”); and then citing *Vasquez v. Courtney*, 537 P.2d 536, 537 (Or. 1975) (“The . . . more technical meaning [of ‘conviction’] refers to the final judgment entered on a plea or verdict of guilt.”)). The “technical meaning is used in terms of requiring a ‘judgment of conviction.’” *Vasser*, 870 S.W.2d at 545-46 (quoting Tenn. R. Crim. P. 32(e) (stating that a “judgment of conviction” shall include the plea, the verdict or findings, and the adjudication and sentence)). “In this sense, the judgment provides the legal authority for the executive branch of government to incarcerate a person who is sentenced to confinement.” *Id.* at 546 (citing Tenn. Code Ann. §§ 40-20-101, -23-101).

The motion to dismiss filed on the Defendant’s behalf in the present case, unlike the motion for new trial, did not address the merits of the Defendant’s judgment of conviction at all. The motion to dismiss raised no issues concerning the legitimacy of the determination of the Defendant’s guilt or sentence imposed, or any substantive legal rights and claims related thereto. Rather, the motion concerned the existence of the judgment of conviction itself and whether the court-made common law doctrine of abatement *ab initio* should serve to erase the entire criminal case against the Defendant from its inception—a purely technical claim, untethered from any issues related to the trial process itself.

The denial of a motion to dismiss almost certainly indicates that further matters will ensue. See *SJR Ltd. P’ship v. Christie’s Inc.*, No. W2013-01606-COA-R3-CV, 2014 WL 869743, at *3 (Tenn. Ct. App. Mar. 5, 2014) (“By its nature, ‘[t]he denial of a motion to dismiss does not end a lawsuit or constitute a final judgment’ and is, therefore, not immediately appealable.” (quoting *Richardson*, 913 S.W.2d at 460)). However, this case

provides an uncharacteristic exception based upon the relief sought. In denying the post-trial motion to dismiss filed on the Defendant's behalf, the trial court concluded the case without further action through its application of the *Al Mutory* holding, abandoning the doctrine of abatement *ab initio* and utilizing the "case-by-case basis" test as outlined therein regarding whether the Defendant's case should continue. Thus, the trial court's decision on the motion to dismiss was a final order, in the sense that there were no further proceedings to ensue in the trial court. However, this ruling did not concern *the whole merits of the case* or serve to *affirm* the judgment of conviction in any regard. See *Cavin*, 671 S.W.3d at 526; *Comer*, 278 S.W.3d at 761. Defense counsel basically acknowledges these facts by agreeing that the Defendant's judgment of conviction was in a suspended status due to the filing of a motion for new trial, which had still to be heard, and that this appeal does not involve any substantive issues with that judgment of conviction.

Instead, the trial court's determination, although not explicitly stated as such, effectively dismissed the Defendant's motion for new trial as moot, which resulted in lifting the suspension of the judgment of conviction that had been brought about by the Defendant's filing a motion for new trial. On appeal, defense counsel is neither challenging the dismissal of the motion for new trial as moot nor seeking the same relief as sought on behalf of the deceased defendant in *Al Mutory*, *i.e.*, for the appeal to proceed on the merits. Defense counsel is solely seeking review of the trial court's final order denying the motion to dismiss seeking abatement *ab initio*.

By way of illustration, say a trial court denied a request made on behalf of a deceased criminal defendant for his appeal to proceed under similar circumstances, but also included a request for a ruling on the motion for new trial to occur, whereupon the trial court utilized the case-by-case analysis in *Al Mutory* and found no reason for the case to continue. Then, suppose the *proper party* sought substantive review of that decision in this court. If this court determined that the trial court's decision was in error, then the case would be remanded to the trial court for the appeal to proceed, including the trial court's adjudication of the pending motion for new trial. Instead, under the circumstances presented by this Rule 3 appeal, defense counsel is simply appealing the trial court's denial of his motion to dismiss seeking abatement *ab initio*, instead of raising any substantive issue with the *judgment of conviction*. No matter what conclusion this court came to, there would still be nothing left to adjudicate in the trial court following our determination of whether the *Al Mutory* holding applies in these circumstances. From this appeal as postured, our only options would be to affirm the trial court's decision and leave the conviction in place or reverse the trial court and remand for dismissal of the judgment of conviction. This was, for all intents and purposes, an all-or-nothing tactic, and seemingly

an unstated acknowledgment that there would be no reason—should *Al Mutory* control—to continue the appeal in this case.

As noted above, Rule 3(b) also includes specific circumstances in which a criminal defendant has an appeal as of right besides on a plea of not guilty or on a plea of guilty or nolo contendere: (1) from an order denying or revoking probation; (2) an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; (3) an order or judgment pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure; (4) from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceedings; (5) from a final order on a request for expunction; and (6) from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure. An appeal from the denial of a motion to dismiss seeking abatement *ab initio* is not one of the enumerated circumstances listed in Rule 3(b). *See State v. Lane*, 254 S.W.3d 349, 353 (Tenn. 2008) (applying the maxim of *expressio unius est exclusio alterius* and holding that the defendant had no Rule 3 appeal as of right from a denial of a motion to modify a condition of probation); *State v. Childress*, 298 S.W.3d 184, 186 (Tenn. Crim. App. 2009) (holding that a defendant had no Rule 3 appeal as of right from an order allowing the State to *nolle prosequi* the charges against him).

Neither this court, nor any court, can *sua sponte* rewrite the Rules. This responsibility rests with both the Advisory Commission on Rules of Criminal and Appellate Procedure and the Tennessee Supreme Court, with subsequent approval by General Assembly. *See* Tenn. Code Ann. §§ 16-3-402, -404, -601; *cf. State v. Frausto*, 463 S.W.3d 469, 482-83 (Tenn. 2015) (stating that “[I]ike other procedural rules of general applicability, the Tennessee Rules of Criminal Procedure are laws of this State ‘in full force and effect[,]’” and that a lower court may not ignore or rewrite the clear mandates of the Tennessee Rules of Criminal Procedure (quoting *Tenn. Dep’t of Hum. Servs. v. Vaughn*, 595 S.W.2d 62, 63 (Tenn. 1980))).

Accordingly, Rule 3(b) does not confer subject matter jurisdiction to this court over the appeal as presented. This appeal does not seek any substantive review of the Defendant’s *judgment of conviction*, nor is the final order in this case one of the listed specific circumstances provided for in the Rule.

E. Suspension of Rule 3’s Jurisdictional Requirement

Alternatively, defense counsel asks this court to exercise its discretion to suspend the requirements of Rule 3(b) and allow this appeal to proceed. Defense counsel observes

that Tennessee Rule of Appellate Procedure 2 permits an appellate court to assume jurisdiction in an appropriate case by suspending the jurisdictional requirements of Rule 3. Defense counsel contends that “there is no dispute that the trial court has issued its last decision in this matter,” rather, “[t]he legal dispute is whether that decision was legally correct. . . . To deny review merely because the trial court’s ruling did not align with the specific language of Rule 3(b)—but instead invented a new disposition—would be to insulate this kind of decision from appellate scrutiny forever.” The State does not respond to this argument, holding steadfast to its contention that the Defendant has a Rule 3 appeal as of right in this situation.

Indeed, Rule 2 provides that, “[f]or good cause, including the interest of expediting decision upon any matter,” this court “may suspend the requirements or provisions of any of these rules[.]” Tenn. R. App. P. 2. The primary purpose behind Rule 2 is to empower the appellate courts with the ability “to suspend the requirements or provisions of any of these rules in a particular case[.]” and thereby, “relieve litigants of the consequences of noncompliance with the rules in those circumstances in which it is appropriate to do so.” Tenn. R. App. P. 2, Advisory Comm’n Cmt. Thus, Rule 2 allows an appellate court to assume jurisdiction in an appropriate case by suspending the jurisdictional requirements of Rule 3. *See Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990) (suspending the final judgment requirement of Rule 3(a)). The court must, however, find a good reason for the suspension of the rules. *See* Tenn. R. App. P. 2; *Bayberry Assocs.*, 783 S.W.2d at 559. Moreover, suspension of the finality requirement involves an exercise of judicial discretion that “should be used sparingly and only in the most extenuating circumstances, where justice so demands.” *Baxter v. Rowan*, 620 S.W.3d 889, 892 (Tenn. Ct. App. 2020) (citation modified) (quoting *Williams v. Tenn. Farmers Reassurance Co.*, No. M2010-01689-COA-R3-CV, 2011 WL 1842893, at *6 (Tenn. Ct. App. May 12, 2011)).

Importantly, we note that cases accepting subject matter jurisdiction pursuant to the exercise of discretion afforded by Rule 2 almost exclusively deal with suspension of the *finality* requirement found in Rule 3. *See Levitt, Hamilton, and Rothstein, LLC v. Asfour*, 587 S.W.3d 1, 10 (Tenn. Ct. App. 2019) (collecting cases); *State v. Mallady*, No. M2014-01664-CCA-R3-CD, 2015 WL 4557258, at *7 (Tenn. Crim. App. July 29, 2015). In this instance, the issue is not finality because, as discussed above, both the trial court’s order denying the motion to dismiss and the judgment of conviction are final

following the trial court’s ruling.³ But, the present non-compliance with Rule 3(b)’s grant of subject matter jurisdiction to this court is due to the failure of the appeal to raise any substantive issues with the Defendant’s *judgment of conviction* or present one of the specified circumstances listed for review. This deficiency amounts to far more than simply “noncompliance with the rules,” rather, it amounts to a deficiency of the very substance required to convey subject matter jurisdiction for an appeal *as of right* to this court via Rule 3(b). *See* Tenn. R. App. P. 2, Advisory Comm’n Cmt.

“[W]e will not suspend Rule 3 as a mere convenience[.]” *Levitt*, 587 S.W.3d at 11 (quoting *Williams*, 2011 WL 1842893, at *6). Waiving the jurisdictional tenets of Rule 3(b) in this instance would again amount to this court essentially rewriting the rule to include something that it does not, which we cannot do. *See Lane*, 254 S.W.3d at 353.

In conclusion, we will not utilize Rule 2 to incorporate an appeal from the denial of a motion to dismiss based upon abatement *ab initio* into Rule 3(b) when such is clearly not authorized by the Rule. In the same vein, we will not rewrite Rule 3 to create jurisdiction where none exists.

F. Proper Party to Pursue Appeal

At this juncture, we are constrained to observe that this appeal presents an issue of whether the Defendant’s counsel is the proper party to continue pursuit of this appeal on behalf of the deceased Defendant. The motion to dismiss and this appeal were filed by defense counsel, not by the State or a personal representative of the Defendant or on behalf of the Defendant’s estate. The question of who has authority to pursue a criminal appeal after the defendant dies is separate from the question of whether any decision regarding the doctrine of abatement *ab initio* is correct. *State v. Moeller*, 549 P.3d 1106, 1116 (Kan. 2024). The issue of the appropriate party to continue with the appeal following the Defendant’s death was intertwined with the *Al Mutory* Court’s decision that the appeal in

³ Relative to any grounds possibly permitting an interlocutory appeal, *see* Tennessee Rule of Appellate Procedure 9 (governing discretionary interlocutory appeals for which no final judgment is necessary), and extraordinary appeals, *see* Tennessee Rule of Appellate Procedure 10 (discussing discretionary extraordinary appeals for which no final judgment is necessary), defense counsel concedes that such an appeal is unavailable in this instance. We agree that there was a final resolution of the controversy and that this appeal is not interim in nature. The order of the trial court denying the motion to dismiss was final because there was nothing left to be done following entry of the order, given that any relief available through *Al Mutory* was not being sought. Thus, the trial court’s order rendered the case concluded and effectuated entry of the Defendant’s judgment of conviction due to the motion for new trial’s being rendered moot.

that case was moot and the appropriate disposition was dismissal, but that a future appeal, under the right circumstances, might proceed. *See* 581 S.W.3d at 755.

The majority in *Al Mutory*, in outlining the various dismissal and substitution approaches, surveyed states that allow appeals to continue following the death of a criminal defendant. *See id.* at 752-55. These states, “after weighing issues such as jurisdiction, mootness, and the important role that the right to appeal plays in ensuring the just outcome of a criminal case,” have concluded “that jurisdiction does not end when defendants die.” *Id.* at 752. Some of these states have explicit rules allowing for substitution in a criminal case. *Id.* Others have “rules of appellate procedure allowing substitution that resemble their rules of civil procedure allowing substitution,” and courts in some of these states, though not all, “have determined that their substitution rules of appellate procedure apply to criminal appeals and afford appellate courts jurisdiction even after defendants die during the pendency of appeals as of right from convictions.” *Id.* at 752-53 (collecting cases). The *Al Mutory* Court also mentioned that “[s]ome courts that do not automatically dismiss appeals permit either a personal representative of a deceased defendant or the State to move for an appeal to continue.” 581 S.W.3d at 753 (citations omitted). For example, the majority noted that the Florida Supreme Court has held “that when a defendant dies after judgment but during an appeal, the appellate court may, upon a showing of good cause by the State or a representative of the defendant, determine that the appeal should proceed.” *Id.* (citing *State v. Clements*, 668 So. 2d 980, 982 (Fla. 1996)).

The *Al Mutory* Court then turned to focus on “the issue of mootness,” noting that “many of these courts do not consider the defendants’ deaths to have mooted certain issues raised in the appeal or, alternatively, some of these courts find the appeals moot but hold that, for various reasons, the appeals should continue.” *Id.* “These courts tend to treat appeals involving fines and restitution as viable even after defendants die.” *Id.* at 753-54 (collecting cases). “Other common reasons courts give for allowing these appeals to continue are the collateral consequences to victims, society, and defendants’ families that result from dismissing appeals without regard to claims of error.” *Id.* at 754 (collecting cases). Several states allow appeals to continue “because of other considerations raised in the appeal,” such as when a case “deals with an important issue that is likely to recur,” “alleges a fundamental miscarriage of justice,” or “raises an issue of statewide interest and of the nature that public policy demands a decision, such as those issues that would exonerate the defendant.” *Id.* (citations modified) (collecting cases). “Finally, state courts have allowed appeals as of right from a conviction to continue because they find the right to appeal is far too valuable to be lost at death.” *Id.* at 754-55 (collecting cases).

In ultimately deciding to dismiss the defendant’s appeal as moot, the *Al Mutory* Court observed that neither party had “advanced any interest—be it an interest of the defendant’s family, the victim’s family, or society—that would benefit from allowing this appeal to continue.” *Id.* The *Al Mutory* Court reasoned that “the defendant was not fined or ordered to pay restitution,” and there had been no notice received “of a pending wrongful death action against the defendant or any probate matter related to this case.” *Id.* Additionally, neither party had sought to raise “post-judgment ‘facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action.’” *Id.* (quoting Tenn. R. App. P. 14).

We note that Justice Lee filed a separate opinion in *Al Mutory*, wherein she made a similar observation: “Courts in other states that have eliminated abatement *ab initio* have found that their existing rules of appellate procedure [were] broad enough to allow substitution of a defendant’s personal representative to continue the appeal in a criminal case.” *Id.* at 759 (Lee, J., concurring in part and dissenting in part) (citations omitted). Justice Lee further noted that “[n]othing in the language of our Rule 19 [of the Tennessee Rules of Appellate Procedure] precludes its application in criminal cases.” *Id.* She also commented that federal courts interpret Rule 43 of the Federal Rules of Appellate Procedure, which is similar to our Rule 19(a), to allow substitution in criminal appeals after the death of a defendant. *Id.* (first citing *United States v. Ajrawat*, 738 F. App’x 136, 138 (4th Cir. 2018); and then citing *United States v. Libous*, 858 F.3d 64, 65 n.1 (2d Cir. 2017)).

As relevant here, our rules of appellate procedure provide for substitution of parties in this court on appeal under the following circumstances:

If a party *entitled to appeal* shall die before filing notice of appeal, notice of appeal shall be filed and served *by the deceased party’s personal representative or, if there is no such personal representative, by the deceased party’s counsel of record* within the time prescribed in these rules. After notice of appeal is filed and served, substitution shall be effected in the appellate court in accordance with this subdivision.

Tenn. R. App. P. 19(a) (emphases added). The Advisory Commission’s Comments to Rule 19 state, in pertinent part,

Subdivision (a) is in accord with Federal Rule of Appellate Procedure 43. It authorizes an attorney of record for the deceased to take an appeal *on behalf of successors in interest* if the deceased has no personal

representative. . . .

In accordance with the general spirit of these rules, the omission of an order of substitution is not fatal to an appeal, but may be entered at any time under subdivision (d).

(Emphasis added).

Where Justice Lee differed from the majority, she opined that the case should have been remanded to the trial court because the parties were not given “the opportunity to present evidence based on the new procedure” established as result of the court’s decision to abolish the doctrine of abatement *ab initio*. *Al Mutory*, 581 S.W.3d at 760. She reasoned,

Mr. [Al] Mutory’s conviction did not involve fines or restitution, but we cannot assume there is no pending civil suit, probate proceeding, or some other civil consequence involving Mr. [Al] Mutory’s family or estate. The existence or substance of these facts may be disputed or otherwise not fall under Tennessee Rule of Appellate Procedure 14, which allows for consideration of post-judgment facts by an appellate court.

Id. at 758. Nevertheless, the *Al Mutory* majority did not order party substitution under Rule 19, nor did it remand the case for further development of the record.

In this case, there has never been any request made for substitution of parties pursuant to Rule 19 or any other discussion on the matter. Defense counsel has never noted whether there is a personal representative to act on the Defendant’s behalf or whether he is acting on behalf of the Defendant’s successors in interest. There have been no declarations of a pending civil suit, probate proceeding, or any other civil consequence involving the Defendant’s family or estate. The State has never moved for the appeal to continue, although they seemingly acquiesce to this court acquiring subject matter jurisdiction and addressing the merits of the issue presented by defense counsel. In sum, the participants in this litigation have proceeded as though the case is justiciable even though there is no person or entity serving as the defendant/appellant.

In our view, these circumstances create grave justiciability concerns. Defense counsel formerly served as the Defendant’s legal representative, but the Defendant’s death does not elevate counsel to the role of a party participant with standing to pursue the

decedent's interests. *See generally Case v. Wilmington Trust, N.A.*, 703 S.W.3d 274, 281-92 (Tenn. 2024) (setting forth the requirements for standing in Tennessee). Indeed, how could one possibly ascertain what the decedent's interests are at this point absent the substitution of a personal representative of his family or estate? Additionally, as this case is postured, there exists a real question as to whether there is even a legal controversy for this court to decide. *See Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203 (Tenn. 2009) (defining a justiciable "legal controversy" as one "when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is *between parties* with real and adverse interests") (emphasis added) (citation modified)). The dispute before us is not "between parties" but rather between a party and the former counsel of a deceased party.

We are mindful that the *Al Mutory* Court did not order party substitution under Tennessee Rule of Appellate Procedure 19 before adjudicating the merits of the case. *See* Tenn. R. App. P. 19. Moreover, no Tennessee court has ever addressed whether Rule 19 allows for third party substitution when a criminal defendant dies during the pendency of a direct appeal, as suggested by Justice Lee in her separate opinion. *See Al Mutory*, 581 S.W.3d at 759. To date, the Advisory Commission on the Rules of Practice and Procedure has not officially responded to the Tennessee Supreme Court's suggestion in *Al Mutory* for the development of a procedure to apply if a criminal defendant dies during the course of a direct appeal, much less under the circumstances presented here of a defendant's death in the trial court while a timely-filed motion for new trial awaits adjudication. *See id.* at 755-56; *see generally* Tenn. R. Civ. P. 25.01 (allowing the substitution of the proper parties in the event of a party's death in civil cases).

Despite our concerns regarding the justiciability of this case, we acknowledge that justiciability issues and subject matter jurisdiction are distinct concepts that should not be "unnecessarily scramble[d]." *See SunTrust Bank, Nashville v. Johnson*, 46 S.W.3d 216, 221 (Tenn. Ct. App. 2000). Because we do not have subject matter jurisdiction over the substance of this appeal in accord with our discussion above, it is unnecessary for us to adjudicate whether a legal controversy exists or whether the Defendant's former lawyer is the proper person to have filed a motion to dismiss and continue to pursue adjudication of this claim. However, we caution the parties that, if this appeal proceeds further, such matters may need to be addressed.

G. Writ of Certiorari

Finally, defense counsel contends that, if this court “concludes that there is no right to appeal under the rules of appellate procedure, then [defense counsel] submits this would be an appropriate case for consideration under the common-law writ of certiorari.” According to defense counsel, “the decision of the trial court in denying the motion to dismiss was legally wrong[,]” and “absent this appeal, the conviction will remain intact without [the deceased Defendant] or his counsel being able to attack the validity of that conviction, essentially denying any ‘day in court’ and ensuring the permanent loss of any right.” The State responds that the Defendant is not entitled to relief via writ of certiorari because the trial court’s denial of the Defendant’s motion to dismiss was not fundamentally illegal and did not exceed its jurisdiction or authority.

The common law writ of certiorari has been codified at Tennessee Code Annotated section 27-8-101, which provides,

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

The common law writ of certiorari is an “extraordinary judicial remedy,” *Lane*, 254 S.W.3d at 355 (quoting *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001)), and is limited in application such that it normally may not be used “to inquire into the correctness of a judgment issued by a court with jurisdiction.” *Adler*, 92 S.W.3d at 401 (citing *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978)).

Our supreme court has previously held that a common-law writ of certiorari is appropriate to correct the following types of errors: (1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal’s authority; (5) plain and palpable abuses of discretion; and (6) proceedings where a party has lost a right or interest that may never be recaptured. *Lane*, 254 S.W.3d at 355. Where there is an allegation that the trial court “has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily[,]” and if “there is no other plain, speedy, or adequate remedy,” certiorari

review may be warranted. *Id.* at 354 (first quoting *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2001); and then quoting Tenn. Code Ann. § 27-8-101).

In presenting this request for writ of certiorari review on the Defendant’s behalf, the Defendant’s lawyer first provides the enumerated situations where a writ of certiorari is an appropriate tool for review, which is then followed by an argument of only one paragraph in length, the bulk of which is reproduced above. Defense counsel only identifies as errors that the Defendant was essentially denied his “day in court” and that refusing the writ would “ensur[e] the permanent loss of any right” to the Defendant. But defense counsel neglects to provide any argument supporting these alleged errors by specifying, with appropriate references to the record, how the Defendant was denied his day in court or exactly what right the deceased Defendant would be losing. This argument is likewise not supported with citation to any legal authority.

Accordingly, the Defendant’s brief does not substantially conform to the requirements of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 27(a)(7)(A) (requiring appellate briefs to contain an argument “setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record”). Any claim for review by writ of certiorari is arguably waived, as the Defendant’s issues are not properly designated as issues or supported by argument, citation to authorities, or appropriate references to the record as waived. *See* Tenn. Ct. Crim. App. R. 10(b); *e.g.*, *State v. Lee*, No. W2022-00626-CCA-R3-CD, 2023 WL 1956964, at *12 (Tenn. Crim App. Feb. 13, 2023) (concluding same).

Briefing requirements aside, defense counsel argues that “the decision of the trial court in denying the motion to dismiss was legally wrong,” but this is not a genuine claim that the trial court “has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily.” This is a fairly candid attempt to inquire into the correctness of the trial court’s denial of the deceased Defendant’s post-trial motion to dismiss—something which the writ of certiorari is not designed to do. *See Adler*, 92 S.W.3d at 401; *see also Lane*, 254 S.W.3d at 355 (noting that reviewing courts should not grant the writ to, *inter alia*, “inquire into the intrinsic correctness of the lower tribunal’s decision”) (quoting *Robinson*, 65 S.W.3d at 635)).

Significantly, as discussed in detail above, our concerns regarding the justiciability of this appeal militate heavily against our discretion to employ an extraordinary judicial remedy in this instance. Tennessee law does not permit courts to overlook defects in party

status merely because the underlying issue is novel or important. *See Am. Civ. Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006) (declining to reach “an important issue of state constitutional law” when the plaintiff had failed to establish standing). Defense counsel, as the de facto “party” seeking the writ at this juncture, should have established, as a threshold matter, that the case involved a legal controversy and that he, as decedent’s former counsel, had standing to pursue the writ on the decedent’s behalf. As we have intimated earlier, it is not clear that the law even provides a procedural route to bring this issue before us under these circumstances. *Cf.* Tenn. Code Ann. § 40-32-106(a)(1)(G) (permitting expunction when “[t]he charge has been abated by death, in which case, notwithstanding this subsection (a) to the contrary, a personal representative of the decedent may apply for an order of expunction”).

To the extent that we need to review the actions of the trial court, given the shortcomings we have identified thus far, we find no evidence in the record that the trial court acted in a way that satisfied any of the prerequisites for granting the writ set forth in *Lane*. The trial court was tasked with ruling upon defense counsel’s post-trial motion to dismiss, which requested abatement of the criminal prosecution against the Defendant from its inception. A hearing was held on the motion, during which defense counsel was able to present argument in support of the motion he had filed on the Defendant’s behalf. At that hearing, defense counsel acknowledged the decision of our supreme court in *Al Mutory* but argued that its rationale should not apply in these circumstances. The trial court, in issuing its decision, analyzed our supreme court’s holding in *Al Mutory* and determined that the same rationale and public policy considerations were present here and that, therefore, the doctrine of abatement *ab initio* was likewise inapplicable when a criminal defendant died while his motion for new trial was still pending. Then, utilizing the “case-by-case basis” test as outlined in *Al Mutory*, *see* 581 S.W.3d at 756, the trial court “concluded [the case] without further action[,]” finding “no basis for continuing the process of hearing the motion for new trial.” The trial court reasoned that the victim was a corporation, that the Defendant was not ordered to pay restitution, that the interests of society in condemning a criminal act had been served, and that the State was likely to bear the costs of continued litigation. These were precisely the considerations set forth in *Al Mutory*. *See id.* at 755-56. Accordingly, the record reflects that the trial court faithfully attempted to apply *Al Mutory* to the novel circumstances presented by this case of the Defendant’s death after trial but before resolution of the motion for new trial.

The record in this case does not reflect that the trial court’s ruling on the motion to dismiss was fundamentally illegal, that the proceedings were inconsistent with essential legal requirements, that the Defendant was denied his day in court, that the trial court acted

without authority, that the trial court demonstrated a plain and palpable abuse of discretion, or that the trial court caused the Defendant to lose a right or interest that may never be recaptured. *See Lane*, 254 S.W.3d at 355. For all these reasons, we decline to extend the writ of certiorari.

III. CONCLUSION

Because we are without subject matter jurisdiction to entertain this appeal, the appeal is dismissed.

s/Kyle A. Hixson
KYLE A. HIXSON, JUDGE