IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JESSIE DOTSON,	)	
	)	**No. W2019–01059–SC–R11–PD**
Appellant,	)	
	)	**Shelby Co. Criminal Court**
v.	)	**No. 08–07688**
	)	
STATE OF TENNESSEE,	)	**CAPITAL CASE**
	)	**POST-CONVICTION**
Appellee.	)	

ON APPLICATION FOR PERMISSION TO APPEAL FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

When there is no appellate remedy for the Administrative Office of the Courts (AOC) Director and the Chief Justice of this Court vacating a trial court's ruling that expert assistance is necessary to effectuate a capital post-conviction petitioner's constitutional rights, are the state and federal constitutional guarantees of due process, equal protection, freedom from cruel and unusual punishment, and the right to a full and fair post-conviction proceeding violated since capital post-conviction petitioners who are denied necessary expert assistance by trial courts are provided appellate remedies? Relatedly, is the denial of an appellate remedy in violation of the open courts provision of the Tennessee Constitution?

STATEMENT OF THE CASE

This is a capital post-conviction case in which Mr. Dotson was forced to proceed to an evidentiary hearing without the services of any mental health experts.[1] Prior to the post-conviction evidentiary hearing, Mr. Dotson moved the court to authorize the services of Bhushan S. Agharkar, M.D. (psychiatrist); James R. Merikangas, M.D. (psychiatrist/neurologist); Richard Leo, Ph.D., J.D. (false confession expert); and Dr. James S. Walker (neuropsychologist).[2] Pursuant to Tenn. Code Ann. § 40–30–207(b) and Tennessee Supreme Court Rule 13, the trial court found these services necessary to protect Mr. Dotson's constitutional rights, and it therefore authorized funding for those experts. However, when Mr. Dotson submitted the trial court's funding orders for approval pursuant to Tennessee Supreme Court Rule 13 § 5(e)(4)–(5), the AOC Director and Tennessee Supreme Court Chief Justice vacated them.

Mr. Dotson objected to proceeding through an evidentiary hearing without access to the experts who were found to be necessary to protect his constitutional rights. (PC Vol. 10, 29–34; PC Vol. 15, 5–7, 14, 27–28); PC Vol. 16, 15, 36). The hearing proceeded nonetheless, and, on May 16,

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[1] As undersigned counsel stated at the beginning of the post-conviction hearing, all previous capital post-conviction clients in the last two decades have had access to mental health experts to establish their claims. (PC Vol. 10, 29).

[2] Drs. Leo and Walker were retained by trial counsel, but neither were presented as witnesses at Mr. Dotson's 2010 trial. Mr. Dotson's convictions and death sentences were affirmed on direct appeal. *State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014).

2019, the post-conviction court filed its Findings of Facts and Conclusions of Law denying Mr. Dotson post-conviction relief. (PC Vol. 2, 289–397).

Mr. Dotson appealed. The Court of Criminal Appeals entered its opinion in this case affirming the post-conviction trial court's denial of Mr. Dotson's post-conviction petition on March 23, 2022. *Jessie Dotson v. State*, No. W2019–01059–CCA–R3–PD, 2022 WL 860414 (Tenn. Crim. App., Jackson, March 23, 2022).

The Court of Criminal Appeals held that it was without jurisdiction or authority to address the constitutional challenges Mr. Dotson raised in his Rule 3 appeal regarding the denial of expert services. *Dotson*, 2022 WL 860414, at *63–65. The Court also held that "the law does not provide an appeal of the Chief Justice's decision to deny the Petitioner's requests for funding of various expert witnesses." *Id.*, at *65. Mr. Dotson filed a petition for rehearing on April 14, 2022, which was denied on April 18, 2022.

Mr. Dotson timely filed his Application for Permission to Appeal in this Court on June 16, 2022. This Court granted Mr. Dotson's Application on October 25, 2022, and subsequently granted Appellant's unopposed motion to extend the time to file his opening brief to January 27, 2023.

STATEMENT OF THE FACTS

A. Trial counsel retained a mental health expert and a leading expert in false confessions.

Mr. Dotson's trial counsel engaged neuropsychologist James Walker to evaluate their client. (PC Vol. 10, 107). Counsel "knew that there were some deficits" and hired Dr. Walker to conduct

neuropsychological testing. (PC Vol. 10, 107–08). After interviewing Mr. Dotson, administering tests, and reviewing documents, Dr. Walker provided trial counsel a draft report informing counsel, among other things, that (1) as a child Mr. Dotson suffered severe physical abuse at the hands of his mother and father; (2) Mr. Dotson's childhood environment subjected him to violence and the constant threat of violence; (3) Mr. Dotson was intoxicated at the time of the offense; (4) Mr. Dotson suffered from significant mental health disorders, including cognitive disorder not otherwise specified; and (5) Mr. Dotson expressed antisocial characteristics. (PC Ex. 19, 19–22). He did not diagnose Mr. Dotson with antisocial personality disorder. (*Id.*, 19).

Dr. Walker did not testify at trial, nor did any mental health expert.

Mr. Dotson's trial counsel engaged Richard Leo, Ph.D., J.D., to investigate "challeng[ing] the false confession." (PC Vol. 10, 78). Counsel had heard that he was one of the leading experts in that field and wanted to challenge the voluntariness of Mr. Dotson's statement. (*Id.*, 78–79). Dr. Leo was approved for $150 per hour, for a total of $18,750 and 125 hours of work, plus reasonable and necessary travel expenses. (*Id.*, 79; PC Ex. 6). However, Dr. Leo only billed for $1,200 (or 8 hours) of work. (PC Ex. 49). Most of his consultations were with defense team investigator Rachael Geiser, not trial counsel. (*Id.*).

B. Post-conviction counsel attempted to engage multiple mental health experts and the trial false confession expert, all of whom were approved in orders entered by the trial judge which were then vacated by the AOC and Chief Justice.

In his amended post-conviction petition, Mr. Dotson asserted that his trial counsel provided ineffective assistance when they failed to utilize mental health experts to investigate Mr. Dotson's neurological, psychiatric, and cognitive impairments. (PC Vol. 1, 92–97). Mr. Dotson alleged that, as a result, trial counsel failed to present evidence that challenged the reliability and voluntariness of Mr. Dotson's statements and mitigated his culpability for the crimes charged. (*Id.*, 97–100). Although trial counsel retained a neuropsychologist, they did not retain a psychiatrist or neurologist—mental health experts who can provide services that a neuropsychologist cannot.

1. Dr. Agharkar was approved to provide mental health services.

To establish his allegations, Mr. Dotson moved the trial court to authorize funding for the services of Bhushan S. Agharkar, M.D., a forensic psychiatrist specializing in the areas of traumatic brain injury and post-traumatic stress disorder. (*See* 3/8/17 Sealed, *Ex Parte* Motion for Expert Services of Bhushan S. Agharkar, M.D.).[3] Mr. Dotson explained that trial counsel did not present expert mental health testimony, and he required Dr. Agharkar's services to present his claim

[3] The Court of Criminal Appeals granted Appellant's motion to supplement the record with designated *ex parte* funding motions. (Order filed 1/27/20). They are under seal. (*Id.*).

that as a result of counsel's lapse, jurors did not hear evidence regarding his mental health disorders, traumatic childhood, and cognitive impairments. (*Id.*, 4–15).

The trial court concluded that fifty hours of Dr. Agharkar's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 3/8/17 Sealed, *Ex Parte* Order). While Dr. Agharkar's $350 hourly rate[4] exceeded Rule 13 § 5(d)(1)(e)'s $250 maximum hourly rate, the trial court found Dr. Agharkar's rate "reasonable, within the range charged by similar experts [and] justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*Id.*, 1–2).[5] As a result, the trial court authorized $17,500 plus travel expenses for Dr. Agharkar's work. (*Id.*, 2).

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[4] Dr. Agharkar's usual *discounted* rate in indigent cases is $400 per hour. (See 3/8/17 Sealed, *Ex Parte* Motion for Expert Services of Bhushan S. Agharkar, M.D., 15).

[5] This Court recently conducted an inquiry into Tennessee's indigent funding system and the deficiencies in the current expert funding scheme contained in Tenn. Sup. Ct. R. 13, sec. 5. In September 2015, then-Chief Justice Sharon Lee announced the formation of a task force to study the delivery of services to indigent defendants across the state. On April 3, 2017, the Task Force issued its report to this Court with recommendations across the spectrum of indigent defense. *See* Task Force Report: *Liberty and Justice for All: Providing Right to Counsel Services in Tennessee*, available at https://www.tncourts.gov/IndigentRepresentationTaskForce.
Issue Seven in the report addresses the process of securing defense experts as currently set forth in Rule 13. (*Id.,* 52–53). The Task Force found that "[l]awyers and judges appearing before the Task Force stated that the current rates for paying certain experts under Tenn. Sup. Ct. R.

Pursuant to the current version of Tennessee Supreme Court Rule 13, counsel forwarded the trial court's order to the AOC for processing.[6] The AOC Director and the Chief Justice denied Dr. Agharkar's services at that rate, vacating the post-conviction's order. Without expert services which were found by the post-conviction court, the AOC, and Chief Justice Bivins to be necessary to protect Mr. Dotson's constitutional rights,[7] Mr. Dotson filed a motion to vacate his death sentences. (PC Vol.

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13 are below the market rate." (*Id.,* 52). As a result, "it is becoming difficult to find experts in a number of fields who will agree to serve as expert witnesses." (*Id.*) The task force recommended that payment for experts be adjusted to market rates. (*Id.,* 53). After carefully reviewing the report and its recommendations, the Court expressed support for the recommendations and began efforts to implement the recommendations. https://www.tncourts.gov/press/2017/07/12/tennessee-supreme-court-expresses-support-indigent-representation-task-force.

[6] In 2004, this Court amended Rule 13, adding sections 5(e)(4) and (e)(5) to create an AOC review process. This process requires an indigent petitioner to provide the AOC Director with the post-conviction court's funding order and receive "prior approval" of that order from the Director before he can access the funds the post-conviction court authorized. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director does not approve the order, the Chief Justice of the Tennessee Supreme Court reviews it. *Id.*, at § 5(e)(5). If the Chief Justice does not approve the post-conviction court's funding order, Rule 13 §§ 5(e)(4) and (e)(5) foreclose an indigent petitioner from accessing the funds the post-conviction court found necessary to protect his constitutional rights. *Id.*

[7] The post-conviction court noted that the AOC, in a March 21, 2017 letter, had "concluded that counsel has made the necessary showing of facts and circumstances supporting counsel's position that the services are necessary to ensure that the constitutional rights of Mr. Dotson are properly protected." (PC Vol. 1, 208). Further, the court noted that the

1, 181–207). The State responded to the motion, asserting, inter alia, that the requested remedy of vacating the death sentence was not ripe since Mr. Dotson had not been denied *all* expert assistance in the area of psychiatry. (PC Vol. 13, 10–12). The post-conviction court denied Mr. Dotson's motion, noting that he had "not been denied the request of all expert assistance in the area of psychiatry." (PC Vol. 1, 208–09).

Mr. Dotson then filed an application for permission for a Rule 9 appeal of the denial of the motion to vacate, which was denied. (PC Vol. 7). Mr. Dotson unsuccessfully pursued a Rule 10 appeal to the Court of Criminal Appeals and this Court. (*See Jessie Dotson v. State*, W2017–02250–CCA–R10–PD and *Jessie Dotson v. State*, W2017–02550–SC–R10–PD).[8] Dr. Agharkar declined Mr. Dotson's offer to work for $250 an hour. (*See* PC Vol. 10, 30).

2. Dr. Merikangas was approved to provide mental health services.

Mr. Dotson then renewed efforts to retain an expert at the $250 rate and moved the court to authorize funding for the services of James R. Merikangas, M.D (psychiatrist/neurologist). (*See* 6/26/18 Sealed, *Ex*

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letter stated the Chief Justice had reviewed all the materials provided to the AOC and concurred with the AOC's decision. (*Id.*) However, the AOC denied Dr. Agharkar's reduced rate as not permissible by Rule 13. (*Id.*).

[8] The Court of Criminal Appeals took judicial notice of the pleadings and orders filed in those Rule 10 actions and directed the clerk to consolidate the records with this appeal for the panel, and then to deconsolidate the records and return them to their original location in the local archive after conclusion of this appeal. (Order filed 1/27/20). Mr. Dotson requests this Court to take judicial notice of the records in those appeals.

Parte Motion for Expert Services of James R. Merikangas, M.D.). Mr. Dotson reiterated that he was presenting claims that involved trial counsel's failure to investigate and present mental state and mental health evidence. (*Id.*, 3–5). Mr. Dotson informed the court that Dr. Merikangas was qualified to provide counsel an expert opinion respecting Mr. Dotson's mental state at the time of the offense and any mental health disorders that may afflict him. (*Id.*, 8–9). Dr. Merikangas was willing to reduce his fee to work for the "state rate" of $250 hour. (*Id.*, 9).

The trial court concluded that Dr. Merikangas's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 6/26/18 Sealed, *Ex Parte* Order). While the court recognized that it would exceed Tennessee Supreme Court Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Merikangas's services, it also recognized that the Rule authorized courts to exercise discretion to exceed that limit. (*Id.*). Following the strictures of Rule 13, the court exercised its discretion to exceed the Rule's limit by finding by clear and convincing evidence that extraordinary circumstances existed. (*Id.*). As a result, the court authorized $10,000 plus travel expenses for Dr. Merikangas. (*Id.*).

Post-conviction counsel forwarded the trial court's funding order to the AOC Director. Lacy Wilber, Assistant General Counsel for the AOC, subsequently informed counsel that the AOC Director and Chief Justice vacated the court's funding order. (*See* PC Vol. 10, 31).

3. Dr. Leo was approved to assess the reliability and voluntariness of Mr. Dotson's statements.

Post-conviction counsel also attempted to retain Richard Leo, Ph.D., J.D., to investigate whether authorities had coerced Mr. Dotson

into making false statements against himself—the task he was initially retained to complete. (*See* 8/15/18 Sealed, *Ex Parte* Motion for Expert Services of Richard A. Leo, Ph.D., J.D., 4.). Mr. Dotson informed the post-conviction court that after hiring Dr. Leo, trial counsel barely spoke to him, provided him minimal materials, and did not ask him for an expert opinion about the reliability and voluntariness of Mr. Dotson's statements. (*Id.*, 4). Mr. Dotson asserted that given Dr. Leo's education, training, and experience, as well as his experience with Mr. Dotson's trial counsel, Dr. Leo's services were necessary to present a claim that trial counsel were ineffective for failing to investigate and present evidence challenging Mr. Dotson's statements. (*Id.*, 8). Dr. Leo was willing to work for a reduced rate of $150 an hour. (*Id.*).

The post-conviction court concluded that Dr. Leo's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 8/15/18 Sealed, *Ex Parte* Order Authorizing the Expert Services of Richard A. Leo, Ph.D., J.D.). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Leo's services, it exercised the discretion authorized by the Rule to find by clear and convincing evidence that extraordinary circumstances existed to exceed the limit. (*Id.*). As a result, the court authorized $9,000 plus travel expenses for Dr. Leo. (*Id.*). This amount was far less than the balance of the previously approved amount at trial, $18,750, minus the $1,200 for services rendered.

Counsel forwarded the post-conviction court's funding order to the AOC Director. Ms. Wilber subsequently informed counsel that the Chief Justice vacated the trial court's order. (*See* PC Vol. 10, 31–32).

4. Dr. Walker was approved to render his professional services as a neuropsychologist and to testify in support of Mr. Dotson's ineffective assistance of counsel claim.

Post-conviction counsel filed a motion seeking funding to present Dr. James Walker at the post-conviction hearing. (*See* 9/25/18 Petitioner's Sealed, *Ex Parte* Motion for Reimbursement of Neuropsychologist James S. Walker for Rendering Professional Services). Counsel asserted that Dr. Walker's services were necessary to establish his claims of ineffective assistance of counsel, specifically regarding the failure of trial counsel to present available mitigating evidence regarding Mr. Dotson's diagnosed mental diseases and defects. (*Id.*, 1). Counsel explained that trial counsel had retained Dr. Walker, who issued a preliminary report containing his diagnosis of cognitive disorder not otherwise specified, adjustment disorder, and verbal learning disorder. (*Id.*, 6). Dr. Walker also found that Mr. Dotson suffered severe physical abuse from his parents as a young child, was subjected to terrifying events in his neighborhood on a regular basis, and was intoxicated at the time of the offense. (*Id.*). Combined with his cognitive difficulties, his intoxication "would greatly impair a person's ability to make decisions, think reliably, or consider the consequences of his actions." (*Id.*). The preliminary report was attached to the motion with Dr. Walker's curriculum vitae. (*Id.*).

Counsel asserted that Mr. Dotson must have the ability to present expert testimony to demonstrate trial counsel's deficiencies and prejudice, and specifically the trial expert who possessed that knowledge. (*Id.*, 7). Counsel cited to an extensive body of case law recognizing that a competent presentation of a defendant's mental health issues through the testimony of a mental health expert is critically important in capital sentencing proceedings. (*Id.*, 8–9). Counsel asserted that trial counsel's failure to properly use the assistance of Dr. Walker prejudiced Mr. Dotson. (*Id.*, 9).

Counsel explained that Dr. Walker had already met with post-conviction counsel, so the reimbursement he required was limited to two hours to review his files and prepare for testimony, and four hours for his court appearance and testimony at the rate of $150 per hour, plus seven hours of travel at $75 per hour. (*Id.*). The total among requested was $1,425 plus travel expenses. (*Id.*, 10). Counsel asserted that Dr. Walker technically was not a post-conviction expert, but rather a trial team expert whose testimony was necessary in post-conviction. (*Id.*). His testimony would primarily involve matters of specialized knowledge and opinion, as opposed to factual matters. (*Id.*). However, in addition to discussing his neuropsychological findings and conclusions, he would also testify about his communications and interactions with trial counsel and agents or lack thereof. (*Id.*, 2). Thus, his testimony would be "much different in kind than that of a lay witness being called to recount what he saw or heard." (*Id.*).

The post-conviction court concluded that Dr. Walker's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 9/25/18 Sealed, *Ex Parte* Order Authorizing the Expert Services of James S. Walker, PH.D., Neuropsychologist, 1–2). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Walker's services, it exercised its discretion to do so by finding that extraordinary circumstances existed. (*Id.*, 2). As a result, the court authorized $1,425 plus travel expenses for Dr. Walker's services. (*Id.*).

Counsel forwarded the post-conviction court's funding order to the AOC Director. Mr. Dotson received a voicemail notification that the AOC Director and Chief Justice had vacated the trial court's order. (*See* PC Vol. 10, 33).

5. Mr. Dotson objected to proceeding to the post-conviction hearing without the expert assistance ordered by the trial court.

In advance of the post-conviction evidentiary hearing beginning October 1, 2018, counsel informed the trial court and the State at a September 12, 2018 telephonic hearing that the AOC had denied two experts approved by the trial court. (PC Vol. 15, 6). At that point, counsel had been advised by the AOC that an appeal was sent to the Chief Justice of that denial. (*Id.*). Counsel stated that one of the experts was a neurologist who is also a psychiatrist and the second was a false confession expert who also served as a trial expert. (*Id.*). Counsel also mentioned that they were speaking the next day with a trial mental health expert who potentially would be a witness at the hearing. (*Id.*, 7).

The trial judge informed counsel that he did not know what to tell them with regard to the AOC and its director denying fundings requests. (*Id.*, 14). The court stated: "I'm sorry, you're out." (*Id.*). The court expected counsel to be ready to go to hearing regardless. (*Id.*). Counsel asserted that in the absence of expert assistance, the denial of which violated due process and Eighth Amendment guarantees, Mr. Dotson's representation was hamstrung. (*Id.*, 27). "We're not going to be able to present a lot of proof in this case." (*Id.*, 28).

In another telephonic hearing, on September 21, 2018, counsel informed the court and the State that they had attempted to retain Dr. Richard Leo because he did only eight hours of work for the trial team, his testimony was not presented, and there was nothing to explain why in trial counsel's files. (PC Vol. 16, 15). Counsel explained that, though they had filed a motion for his services that was approved by the trial court, it had been denied by the AOC and the Chief Justice. (*Id.*). Accordingly, counsel would be unable to present an expert on that ineffective assistance of counsel claim. (*Id.*). A motion to retain Dr. Walker was pending at the time. (*Id.*).

Counsel stated in the September 21 hearing that they had "been rendered ineffective in representing Mr. Dotson in his post-conviction proceeding in violation of his rights to due process, effective assistance of counsel, and his right to be free from cruel and unusual punishment by being precluded from accessing numerous experts who this Court has found to be necessary to effectuate Mr. Dotson's constitutional rights."

(*Id.*, 36). Therefore, the hearing would be different than those that counsel and the court were used to, with limited exhibits. (*Id.*)

At the beginning of the October 1, 2018 evidentiary hearing on Mr. Dotson's post-conviction claims, counsel addressed the AOC and Chief Justice vacating multiple expert funding orders approved by the trial court. Regarding Dr. Walker, counsel explained that starting in Jerry Davidson's case,[9] the AOC had agreed to compensate trial experts for their time meeting with post-conviction counsel, traveling to court to testify, and for testimony. (*Id.*, 32–33). For the last decade, the AOC had funded such quasi-fact, quasi-expert professionals. (*Id.*, 33). However, Mr. Dotson was denied funding to produce Dr. Walker as a witness at his post-conviction hearing. (*Id.*).

Counsel asserted that the AOC and Chief Justice deprived Mr. Dotson of the assistance of multiple experts whose testimony was routinely presented in every other capital post-conviction case. (*Id.*). As a result, counsel were rendered incompetent in their representation of Mr. Dotson, in violation of their ethical duties to him and statutory duties as attorneys in the Office of the Post-Conviction Defender (OPCD). (*Id.*).

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[9] *See Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) in which post-conviction counsel presented Dr. Pamela Auble, a neuropsychologist retained by trial counsel, as a witness at the post-conviction hearing. The *Davidson* opinion states that Dr. Auble testified at a September 2009 hearing. *Id.* at *399. However, she testified on September 10, 2008. (*See Davidson v. State*, No. M2010–02663–SC–R11–PD, Vol. V, 203–31.) In addition to testifying about communications with trial counsel and her findings at that time, Dr. Auble reviewed a report by Dr. Spica (the post-conviction neuropsychologist) and testified to her expert opinions about his findings. (*Id.*, 219–20).

Counsel asserted that Mr. Dotson was denied his rights to a fair trial, due process, and freedom from cruel and unusual punishment. (*Id.*, 33–34). Finally, counsel explained that the hearing was "a very different kind of justice tha[n] our [other] clients have been afforded." (*Id.*, 34.).

6. Mr. Dotson appealed the denial of post-conviction relief, including denial of expert assistance to establish his post-conviction claims. The court below held that Mr. Dotson had no right to appeal the denial of expert assistance.

Mr. Dotson filed his Notice of Appeal in the court below on June 14, 2019. (PC Vol. 2, 458). In his appeal, Mr. Dotson raised several challenges to the AOC and Chief Justice vacating the post-conviction court's expert funding orders. (Brief of Appellant, 11/20/20, Issue X, 91–106). The Court of Criminal Appeals held it was without jurisdiction or authority to address the constitutional challenges Mr. Dotson raised in his Rule 3 appeal regarding the denial of expert services. *Dotson*, 2022 WL 860414, at *63–65. The Court also held that the law provides Mr. Dotson no right to appeal from the Chief Justice's rulings. *Id.*, at *65.

ARGUMENT

The actions of the AOC, Chief Justice, and the Court of Criminal Appeals denied Mr. Dotson his state and federal constitutional rights to equal protection, due process, freedom from cruel and unusual punishment, a full and fair hearing, and the state constitutional right to access the Tennessee courts.

I. The Administrative Office of the Courts' and the Chief Justice's Improper Exercise of Judicial Power in Vacating the Post-Conviction Court's Orders Granting Funding for Experts Who Were Necessary to Effectuate Mr. Dotson's Constitutional Rights and the Court of Criminal Appeals' Subsequent Denial of an Appellate Remedy Violate Mr. Dotson's State and Federal Constitutional Rights.

Mr. Dotson will first address the due process, open courts, and equal protection violations resulting from the Court of Criminal Appeals holding that Mr. Dotson was not entitled to an appeal, a right which is afforded to capital post-conviction petitioners denied expert services by trial courts. Mr. Dotson will then address the due process, Eighth Amendment, and open courts violations caused by the actions of the AOC Director and the Chief Justice—the harm of which is left unredressed due to the denial of an appeal.

A. Mr. Dotson's rights to due process, equal protection, and access to the Tennessee courts were violated by the denial of an appellate remedy for the constitutional violations occurring in his post-conviction proceedings.

All post-conviction petitioners are entitled to appeal the denial of a post-conviction petition and errors related to the denial. Tenn. Code Ann. § 40–30–116 ("The order granting or denying relief under this part shall be deemed a final judgment, and an appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure."). The right to appeal from denial of post-conviction relief is an appeal of right. Tenn. R. App. P. 3(b).

Tennessee Code Annotated § 40–14–207(b) entitles indigent capital post-conviction petitioners to expert services if a trial court finds the

services necessary to ensure a petitioner's constitutional rights. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). A post-conviction court's denial or limitation of funding is reviewable on an appeal of right from the denial of post-conviction relief under the abuse of discretion standard. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 517 (Tenn. 2013) (affirming the lower court's holding that the post-conviction court's limitation of funding was not an abuse of discretion). This is the same standard applicable on direct appeal from denial of expert services at the trial stage. *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) (citing *State v. Barnett*, 909 S.W.2d 423, 431 (Tenn. 1995) (reviewing trial court's denial of defendant's request for appointment of a psychiatric expert for an abuse of discretion)).

Numerous capital petitioners have sought relief from the denial of expert services in their post-conviction proceedings upon a Rule 3 appeal of right from denial of the post-conviction petition.[10] Mr. Dotson also

[10] *See Zagorski v. State*, No. 01C01–9609–CC–003971997, WL 311926 (Tenn. Crim. App., Nashville, November 3, 1997) (the decision of whether to authorize investigative or expert services lies within the sound discretion of the trial court, and there was no showing of prejudice since no experts testified and no showing as to what the expert testimony would be, so the issue was without merit); *Alley v. State*, 958 S.W.2d 138, 152 (Tenn. Crim. App. 1997) (trial court's denial of expert assistance was affirmed); *Hodges v. State*, No. M1999–00516–CCA–R3–PD, 2000 WL 1562865, at *28–29 (Tenn. Crim. App., Nashville, October 20, 2000) (trial court did not abuse its discretion in denying a fingerprint expert and denying additional funds for the expert mental health/mitigation services previously approved); *Hugueley v. State*, No. W2009–00271–CCA–R3–PD, 2011 WL 2361824, at *21–24 (Tenn. Crim. App., Jackson, June 8,

sought review, in a Rule 3 appeal of right, of the denial of expert services which were ordered by the post-conviction court to ensure that Mr. Dotson's constitutional rights were protected. For the first time in a capital post-conviction case since the 2004 amendments to Rule 13, the Court of Criminal Appeals in *Dotson* determined it could not and would not review the denial of expert funding to a petitioner. The lower court held that it did "not have the authority to decide the Petitioner's constitutional challenges …." 2022 WL 860414 at *65. The court also held that "the law does not provide an appeal of the Chief Justice's decision to deny the Petitioner's requests for funding of various expert witnesses." *Id.*

1. Mr. Dotson's state and federal rights to due process were denied.

"The maxim of the law is, that there is no wrong without a remedy…." *Bob v. State*, 10 Tenn. 173, 176 (1826). For "'whensoever the law giveth any right,' says Coke, 'it also giveth a remedy.' Coke on Litt. 56." *Memphis St. Ry. Co. v. Rapid Transit Co.,* 179 S.W. 635, 639 (Tenn.

2011) (trial court did not violate the petitioner's due process rights by denying funding for brain imaging, neuropsychologist, neuropsychiatrist, and pharmacologist); *Reid v. State*, Nos. M2009–00128–CCA–R3–PD, M2009–00360–CCA–R3–PD, M2009–01557–CCA–R3–PD, 2011 WL 3444171, at *35–39 (Tenn. Crim. App., Nashville, August 8, 2011) (the trial court did not abuse its discretion in denying authorization for all of the requested mental health expert funding); *Davidson v. State*, 2021 WL 3672797, at *18–27 (Tenn. Crim. App., Knoxville, August 19, 2021) (the decision of whether to grant funding for services is entrusted with the trial court and will not be disturbed absent an abuse of discretion and the court appropriately denied the requested expert services).

1915) (quoting *McInnis v. Pace*, 29 So. 835, 835 (Miss. 1901)). The legislature created a remedy for the improper denial of a post-conviction petition and errors occurring in the post-conviction court by enacting Tenn. Code Ann. § 40–30–116 ("[A]n appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure.").

"There is no constitutional right of appeal; yet where appellate review is provided by statute, the proceedings must comport with constitutional standards." *State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994) (citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)). Those constitutional standards include implementation of the Due Process Clause of the Fourteenth Amendment. 469 U.S. at 396. In *Evitts*, the Supreme Court affirmed previous precedents finding that when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause. 469 U.S. at 401. Pursuant to the Fourteenth Amendment, a state affording the right to an appeal bears the obligation of making that right more than a "meaningless ritual." *Evitts v. Lucey*, 469 U.S. at 394 (citing *Douglas v. People of State of Cal.*, 372 U.S. 353, 357 (1963)).

Mr. Dotson has been denied due process by the lower court's denial of a forum to review the denial of expert services that were found by the trial court to be necessary to effectuate Mr. Dotson's constitutional rights. *See* U.S. Const. Amend. XIV; Tenn. Const. Art. I §§ 8 and 9, and Art. XI §§ 8 and 16.

2. Mr. Dotson's right to access the courts, protected by Article I, Section 17, of the Constitution of Tennessee was denied.

The lower court's decision also violates the open courts clause of the Tennessee Constitution. Tenn. Const. Art. 1, § 17. The Tennessee Constitution provides that "all courts shall be open and every man, for an injury done him shall have remedy by due course of law, . . ." Article I, § 17.

As former Chief Justice Koch explains, this provision was "included in Tennessee's first constitution and has appeared virtually unmodified in every other version of our constitution .... [and] has a rich historical background that can be traced back more than eight centuries to the original 1215 version of Magna Carta." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconstruction of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 340 (1997). The purpose of this constitutional provision is "to ensure that all persons would have access to justice through the courts." *Id.*, at 341.

The open courts guarantee in the Tennessee Constitution has no analog in the United States Constitution and is complementary to the due process guarantees found in Article I, § 8 ("That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.") *Id.*, at 421.

The earliest decisions of the Tennessee Supreme Court interpreting the open courts provision acknowledged the Magna Carta as the source

for that provision and emphasized that the judiciary was "required by the most solemn obligations, to see that, as to any and every citizen, they are not violated in one jot or tittle." *Id.*, at 341 (citing *Bank v. Cooper*, 10 Tenn. (2 Yer.) 599, 612 (1831) (Peck, J.)). Embodied in this concept was the idea that all branches of government are bound by the state constitution, which provides a check upon legislative power when such power exceeds the bounds of the constitution. *Id.*, at 407–08. Thus, whereas the Magna Carta provided limitations upon royal power, the Tennessee Constitution limited "legislative and all other power." *Id.*, at 408.

"[A]ll other power" includes the power of the judiciary, where invoked to deprive a citizen of a right provided by the legislature—in this case the right to appeal. The Tennessee Constitution, Article II, § 1, states that "[t]he powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and by Article II, § 2, "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." *Underwood v. State,* 529 S.W.2d 45 (Tenn. 1975).

"[T]he doctrine of separation of the powers, as set out in Article II, §§ 1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government." *Id.,* at 47. "It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct...." *Mabry v. Baxter*, 58 Tenn. 682, 689, 1872 WL 4084, at *4

(Tenn. 1872). This Court recognized in *Mabry* that "[t]he most responsible duty devolving upon this court is to see that this injunction of the Constitution shall be faithfully observed. We have no right to go outside of statutes presented for our examination and adjudication, ….". *Id.*, at 689–90. Rather, "[w]e are to confine ourselves to the provisions of the statute itself, and in our decisions we are to presume that the Legislature not only acted upon consideration of public good, but that they have acted within the sphere of their legitimate powers." *Id.*, at 690.

The Court of Criminal Appeals' ruling that Mr. Dotson has no right to appeal the denial of expert services denies Mr. Dotson his statutory right to appeal pursuant to Tenn. Code Ann. § 40–30–116, and therefore violates the open courts provision of Article I, § 17.

3. Mr. Dotson's state and federal rights to equal protection were denied.

The Court of Criminal Appeals' ruling that Mr. Dotson's challenges to the denial of expert services cannot be appealed creates two classes of capital post-conviction petitioners. The above-listed capital post-conviction petitioners[11] who were denied expert services by the trial courts all received appellate review of those denials; but Mr. Dotson did not. The above-listed capital post-conviction petitioners had their claims reviewed on appeal under an abuse of discretion standard after their trial courts found that they had *not* established a need for expert services to effectuate their constitutional rights. Mr. Dotson has been precluded from any appellate review under any standard, although the trial court

[11] *See* footnote 10.

found those services to be necessary to effectuate his constitutional rights. The denial of appellate review therefore violates Mr. Dotson's federal and state rights to equal protection. *See* U.S. Const. Amend. XIV; Tenn. Const. Art. XI § 8.

The Equal Protection Clause of the Fourteenth Amendment states, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. The equal protection provisions of the federal and state constitutions demand that persons similarly situated be treated alike. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (Citizens have "substantive constitutional rights in addition to the right to be treated equally by the law."); *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988).

The Supreme Court has utilized three standards of scrutiny, depending on the underlying rights at issue, to determine if state action violates equal protection. Any classification that distinguishes between rights bestowed upon some but not other similarly situated individuals is subject to, at minimum, a rational basis review that asks whether the classification is rationally related to a legitimate government interest. *City of Cleburne*, 473 U.S. at 440. Rational basis review is the default form of scrutiny. *Id.*

Classifications based on race or national origin, *e.g., Loving v. Virginia,* 388 U.S. 1, 11, (1967), and classifications affecting fundamental rights, *e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 672 (1966), are given the most exacting scrutiny—strict scrutiny. "Strict scrutiny is a searching examination, and it is the government that bears the burden

to prove "'that the reasons for any such classification [are] clearly identified and unquestionably legitimate.'" *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013) (citations omitted). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Finally, a heightened, intermediate, level of scrutiny applies in certain circumstances. *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988). In *Clark*, the Court ruled that to "withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Id.*, at 461. So, the relation to the objective must be more than merely non-arbitrary or rational—it must be substantial—and the objective itself must be more than merely valid or permissible—it must be important.

This Court follows "the framework developed by the United States Supreme Court for analyzing equal protection claims." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) (citing *Doe v. Norris*). "It has utilized three standards of scrutiny, depending upon the right asserted. *See City of Memphis v. International Brotherhood of Elec. Workers Union,* 545 S.W.2d 98, 101 (Tenn. 1976) (reduced scrutiny); *Mitchell v. Mitchell,* 594 S.W.2d 699, 701 (Tenn. 1980) (heightened scrutiny); *Doe v. Norris,* 751 S.W.2d at 840 (strict scrutiny)."

The Court of Criminal Appeals' decision to deny Mr. Dotson the right to appeal the denials of expert assistance—a right which is afforded all other capital post-conviction petitioners who were denied funding—

must survive strict scrutiny analysis because the right to appeal is a fundamental right. "This Court has stated that rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citing *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 152). As discussed, *supra*, at I(A)(1), the right to appeal is statutory, but once the right is extended, the appeal must comport with constitutional standards. Thus, a non-constitutional fundamental right may be imbued with characteristics requiring strict scrutiny analysis. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 218 n. 15 (1982) ("[W]e look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though "the right to vote, *per se*, is not a constitutionally protected right.") (citing *San Antonio Independent School Dist.,* 411 U.S. 2, 35 n. 78 (1973)).

Strict scrutiny is also compelled by the nature of the underlying rights that are harmed by the lower court's denial of an appeal. The trial court found that the assistance of a psychiatrist, the trial neuropsychologist who the jury never heard, and the trial false confession expert who the jury never heard, were necessary to effectuate Mr. Dotson's constitutional rights. The denial of an appeal regarding deprivation of expert assistance necessary to effectuate Mr. Dotson's constitutional rights impacts his liberty and his life. This Court has found that an individual's right to personal liberty is a fundamental right for

equal protection purposes. *Doe v. Norris*, 751 S.W.2d at 842. Mr. Dotson's interest in liberty (and life) is "almost uniquely compelling" and weighs heavily. *State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). By contrast, the State's interest in mitigating a fiscal burden is less substantial. *Barnett*, 909 S.W.2d at 427.

If this Court determines that the lower court's interpretation of this Court's Rule 13 section 5(e)(5) is accurate and the rule does in fact preclude an appeal of expert funding denials, then this Court's implementation of the rule to deny appellate review must be subjected to strict scrutiny for the reasons stated above.

In the alternative, if this Court should employ a heightened, intermediate, level of scrutiny to determine whether the lower court's (or this Court's Rule 13) classification of Mr. Dotson's denials of expert assistance as non-appealable, whereas other capital petitioner's denials are appealable is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. at 461. The Supreme Court has recognized that certain forms of classification, while "not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Plyler v. Doe*, 457 U.S. at 217–18. While the classification of Mr. Dotson apart from other similarly situated capital petitioners *is* facially invidious, should the Court disagree, intermediate scrutiny is warranted, rather than reduced

scrutiny since the harm involves the underlying rights to effective assistance of counsel, a fair trial, due process, and to not be subject to cruel and unusual punishment.

However, at the reduced level of scrutiny, the State cannot show that the classification of the denial of Mr. Dotson's access to funding as unappealable, either by the lower court or by operation of this Court's Rule 13, is rationally related to a legitimate government interest. The only apparent reason to justify denying Mr. Dotson the right to appeal the AOC's and Chief Justice's vacating the post-conviction court's orders granting expert assistance is financial. Yet, the State's interest in mitigating a fiscal burden is less substantial than a person's liberty interest. *Barnett*, 909 S.W.2d at 427. Further, that would be a spurious excuse for treating Mr. Dotson differently than other capital post-conviction petitioners who appeal denial of trial courts' funding orders because a successful appeal would similarly impact the State's fiscal burden, but those petitioners are nonetheless granted the right to appeal.

In sum, this court should review the lower court's denial of an appeal to Mr. Dotson under the strict scrutiny standard. When evaluated under this standard—as well as the intermediate and reduced scrutiny standards—Mr. Dotson's state and federal rights to equal protection were violated.

B. Mr. Dotson's rights to due process, freedom from cruel and unusual punishment, and access to the Tennessee courts were violated by the AOC Director and the Chief Justice.

In 2004 this Court amended Rule 13, adding sections 5(e)(4) and (e)(5) to create an AOC review process. The review process requires an indigent petitioner to send funding orders to the AOC Director and receive "prior approval" of the post-conviction court's orders before he can access the funds authorized by the post-conviction court. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director does not approve the order, the rule mandates that the Chief Justice of the Tennessee Supreme Court "shall" review it. *Id.*, at § 5(e)(5). If the Chief Justice does not approve the post-conviction court's funding order, Rule 13 §§ 5(e)(4) and (e)(5) prevent an indigent petitioner from accessing the funds the post-conviction court found necessary to protect his constitutional rights. *Id.* The rule states that the "determination of the chief justice shall be final." Rule 13 §§ 5(e)(4).

1. By engaging in a substantive review of the post-conviction court's funding orders and vacating them, the AOC Director and Chief Justice violated Articles II, §§ 1 and 2 and VI §§ 1, 2, and 3 of the Tennessee Constitution.

Mr. Dotson does not dispute that pursuant to Supreme Court Rule 13 § 5(e)(4) and (e)(5), the AOC Director and Chief Justice could perform administrative tasks associated with the post-conviction court's funding orders. *See State v. Garrad*, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1985) (Chief Justice acting alone has authority to perform purely administrative functions in post-conviction cases). Such tasks could

involve, for example, establishing and monitoring the procedure through which the AOC makes payments to authorized experts. *C.f. Shelby County v. Blanton*, 595 S.W.2d 72, 80 (Tenn. App. 1978) (selection of a county depository is an administrative function). But the AOC Director and Chief Justice interpreted the AOC review process as giving them authority (1) to review the post-conviction court's substantive determination that the authorized funds were necessary to protect Mr. Dotson's constitutional rights; and (2) to vacate the post-conviction court's orders. By doing so, the AOC Director and Chief Justice unconstitutionally aggrandized their power by exercising a judicial function.

The Tennessee Constitution vests the state's judicial power in this Court and inferior courts that the General Assembly establishes. Tennessee Constitution, Art. VI, § 1. The General Assembly established the post-conviction court. Tenn. Code Ann. §§ 16–10–101, 102. Once it did so, the Tennessee Constitution vested that court with the state's judicial power. *See Carver v. Anthony*, 245 S.W.2d 422, 424, (Tenn. App. 1951) ("Jurisdiction carries with it power to determine every issue or question properly arising in the case."); Tenn. Const. Art. VI, § 2 ("The jurisdiction of this Court shall be appellate only…."); Tenn. Code Ann. § 16–3–201(a) ("The jurisdiction of this court is appellate only…."). This Court "has no original jurisdiction but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and

court of appeals, within each division, to the supreme court as provided by this code." Tenn. Code Ann. § 16–3–201(b).[12]

The General Assembly gave the post-conviction court jurisdiction over post-conviction proceedings. *See* Tenn. Code Ann. § 40–30–104(a). By doing so, the General Assembly authorized that court to exercise the state's judicial power in Mr. Dotson's case. As a result, when the post-conviction court granted Mr. Dotson's expert funding motions, it exercised the judicial power Article VI that the General Assembly gave it.

The AOC Director and Chief Justice applied Rule 13 § 5(e)(4) and (e)(5) in a manner that gave them authority to review the funding orders the post-conviction court entered pursuant to the state's judicial power. But under Article VI of the Tennessee Constitution, only an entity vested with the state's judicial power could vacate those orders. Given this reality, the AOC Director and Chief Justice must meet the state constitutional requirements for exercising judicial power before either of them could substantively review and vacate the post-conviction court's funding orders. *See State ex rel. Newsom v. Biggers,* 911 S.W.2d 715, 717 (Tenn. 1995); *Town of South Carthage v. Barrett*, 840 S.W.2d 895, 898–900 (Tenn. 1992). Neither the AOC Director nor the Chief Justice meets those constitutional requirements.

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[12] This Court also has jurisdiction over interlocutory appeals and the authority to assume jurisdiction over an undecided case pending in any intermediate state appellate court. Tenn. Code Ann. § 16–3–201(c) and (d).

Pursuant to Article VI, § 3 of the Tennessee Constitution, the Governor must appoint, and the General Assembly must confirm, a person who exercises the judicial power of an intermediate appellate court. The Governor did not appoint, nor did the General Assembly confirm, the AOC Director. As a result, when the AOC Director substantively reviewed the post-conviction court's funding orders, she purported to assume jurisdiction in violation of Articles II, §§ 1 and 2 and VI §§ 1 and 3 of the Tennessee Constitution.

Similarly, the Chief Justice interpreted Rule 13 § 5(e)(5) as giving him power to substantively review and vacate the post-conviction court's funding orders. But Article VI, § 1 of the Tennessee Constitution vests the state's judicial power, including the power to review inferior court decisions, in the Tennessee Supreme Court, not in any single Supreme Court judge or justice. Article VI, § 2 provides that the Supreme Court shall consist of five judges, one of whom shall preside as Chief Justice, and the concurrence of three judges is necessary for the exercise of the state's judicial power. As a result, when the Chief Justice substantively reviewed the post-conviction court's funding orders and vacated them, he violated Articles II, §§ 1 and 2 and VI §§ 1 and 2 of the Tennessee Constitution. Acting alone, the Chief Justice could not exercise the state's judicial power, and his decisions vacating the post-conviction court's funding orders are therefore invalid. Art. VI § 2 ("The concurrence of three of the [Supreme Court's] Judges shall in every case be necessary to a decision."); *Pierce v. Tharp*, 461 S.W.2d 950, 955 (Tenn. 1970); *Radford Trust Co. v. East Tennessee Lumber Co.,* 21 S.W. 329, 331 (Tenn. 1893).

2. Because the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues and evidence they would consider, they violated Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.

Due process protects a person's legitimate entitlement to a benefit. *Board of Regents v. Roth,* 408 U.S. 564, 576–77 (1972). In determining whether a person has such an entitlement, courts look to, among other things, understandings stemming from state law sources. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985).

For example, in *Goldberg v. Kelly*, the United States Supreme Court concluded that persons qualifying to receive welfare benefits had a legitimate entitlement to them. A state statute provided that a person could obtain such benefits by making a specified showing, and once a social services official concluded that a person made that showing, the official established a legitimate entitlement to the benefits that due process protected against arbitrary deprivation. *Goldberg v. Kelly,* 397 U.S. 254, 261–62 (1970).

As in *Goldberg*, Tennessee Code Annotated § 40–30–207(b) establishes a benefit that Mr. Dotson was entitled to receive upon making a specified showing. Specifically, that statute provided that Mr. Dotson could receive authorization for expert funding upon a showing that the funding was necessary to ensure the protection of his constitutional rights. Tenn. Code Ann. § 40–30–207(b). Four separate times the post-conviction court concluded that Mr. Dotson made this showing, and it authorized funding for the services of Drs. Agharkar, Merikangas,

Walker, and Leo. While the post-conviction court noted that Dr. Agharkar's hourly rate exceeded Rule 13 § 5(d)(1)'s maximum rate, it found Dr. Agharkar's rate "reasonable, within the range charged by similar experts (and) justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*See* 3/8/17 Sealed, *Ex Parte* Order (Agharkar), 1–2). And while the post-conviction court recognized that authorizing funds for Drs. Merikangas, Walker, and Leo would exceed Rule 13 § 5(d)(5)'s $25,000 limit for the services of all experts, it concluded that extraordinary circumstances warranted doing so. (6/26/18 Sealed, *Ex Parte* Order (Merikangas), 1–2; 8/15/18 Sealed, *Ex Parte* Order (Leo), 1–2; 9/25/18 Sealed, *Ex Parte* Order (Walker), 2). As a result, the post-conviction court entered orders authorizing funding for the services of the four experts in specific amounts. (3/8/17 Sealed, *Ex Parte* Order (Agharkar), 2; (6/26/18 Sealed, *Ex Parte* Order (Merikangas), 2; 8/15/18 Sealed, *Ex Parte* Order (Leo), 2; 9/25/18 Sealed, *Ex Parte* Order (Walker), 2).

A state statute offered Mr. Dotson a benefit, and a state actor determined that he had made the necessary showing to access that benefit. Like the welfare recipients in *Goldberg*, Mr. Dotson's legitimate entitlement to the expert funding the post-conviction court authorized created for him a benefit that due process protected.

Before a state actor can deprive a person of a protected interest, he must give the person notice of the proposed deprivation and an opportunity to contest it. *Loudermill*, 470 U.S. at 546; *In re Oliver*, 333 U.S. 257, 273 (1948). Notice includes (1) informing the property holder of

the specific issues he must address; and (2) disclosing to him the material that the state actor will consider in making her decision. *Bowman Transportation, Inc. v. Arkansas–Best Freight System, Inc.* 419 U.S. 281, 288 n.4 (1974). Similar obligations of notice exist in cases involving a person's liberty or life. *In re Gault*, 387 U.S. 1, 33–34 (1967); *Lankford v. Idaho*, 500 U.S. 110, 120–22 (1991); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). If the state actor fails to provide the individual this basic information, she violates due process. *See Lankford*, 500 U.S. at 127; *Gardner,* 430 U.S. at 362.

The actions of the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues or evidence they would consider when they reviewed the post-conviction court's funding orders. As a result, they not only deprived Mr. Dotson of the notice required by due process but denied him the ability to contest their determinations.[13]

The AOC review process is not a court of law as established by the Tennessee Constitution, and understood by the common law, but is instead essentially a black box—a process with observable inputs and

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[13] In addition to due process, the complementary Open Courts provision was also violated. This Court has held that "[t] he obvious meaning of [Article I, § 17] is that there shall be established courts proceeding according to the course of the common law, or some system of well established judicature, to which all of the citizens of the state may resort for the enforcement of rights denied, or redress of wrongs done them." *Staples v. Brown*, 113 Tenn. 639, 85 S.W. 254, 255 (1905). In vacating the post-conviction court's orders granting expert funding in a secret, closed process, the AOC and Chief Justice deprived Mr. Dotson of his rights to due process and to access open courts.

outputs only and unseen inner workings. In fact, unlike the courts of our state, the process is secret and closed to litigants. The AOC and Attorney General have successfully invoked attorney-client privilege regarding communications and documentation between the AOC and the Chief Justice about expert funding decisions. *See, e.g.*, *State of Tennessee v. Luis Alexis Briceno*, E2022–00414–CCA–R3–CD, Brief of Appellant (11/04/22), 38–39, 52–53 (citing T.R. Vol. 2, 198, 232–33; R. Vol. 16, Exhibits, p. 17).[14]

No state interest supports the failure of the AOC Director and Chief Justice to provide Mr. Dotson notice of the issues and evidence they would consider in reviewing the post-conviction court's funding orders. While a state actor may summarily deprive a person of a protected property right when exigent circumstances exist, *see Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 299–301 (1981), no such circumstances existed here. And even if such circumstances existed, due process required that Mr. Dotson receive a post-deprivation hearing and notice of the issues that hearing would

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[14] Appellant moves the Court to take judicial notice of the record in *State v. Briceno*. *See, e.g., Caldwell v. State*, 917 S.W.2d 662, 666 (Tenn. 1996); *Delbridge v. State*, 742 S.W.2d 266 (Tenn. 1987). At Mr. Briceno's motion for new trial proceedings, the Attorney General, on behalf of Lacy Wilber, moved to quash Mr. Briceno's subpoena to Ms. Wilber to provide testimony and produce documents related to the AOC's denial of expert funding which had been granted by the trial court. T.R., Vol. II, 198–203. The Attorney General invoked the attorney-client privilege and Tennessee Supreme Court Rule 34(1), asserting that the communications about the expert funding issues were confidential and not subject to the Tennessee Public Records Act. *Id.*, 201–02.

address. *See Hodel*, 452 U.S. at 303. Mr. Dotson never received any notice, pre-deprivation or post-deprivation, about the issues and evidence the AOC Director and Chief Justice considered in vacating the post-conviction court's funding orders. As a result, the decisions of the AOC Director and Chief Justice summarily depriving Mr. Dotson of the property rights, which the post-conviction court's funding decisions conveyed, violated due process. *C.f. Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433–34 (1982); *Burford v. State,* 845 S.W.2d 204, 209 (Tenn. 1992); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

At its most basic level, due process means fundamental fairness. *See State v. White,* 362 S.W.3d 559, 566 (Tenn. 2012). Such fairness "can rarely be obtained by secret, one-sided determination of facts decisive of rights." *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Because the AOC Director and Chief Justice engaged in an opaque, one-sided review of the post-conviction court's funding orders, they violated due process.[15]

[15] As the post-conviction judge explained during the evidentiary hearing, "I do not or have not received any orders from the Administrative Office of the Court or the Supreme Court as to granting or denying. I have been advised through telephone conversations about the denial but I don't have any reasons. I haven't been given any reasons so I can't speak to the Chief Justice's opinions on why he grants or doesn't grant these things." (PC Vol. 12, at 425).

3. The AOC Director and Chief Justice's decisions vacating the post-conviction court's funding orders violated Mr. Dotson's right to a full and fair hearing on his ineffective assistance of counsel claims and violated Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Dotson was entitled at trial to have access to a "competent psychiatrist" to "conduct an appropriate examination," and to "assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (defendant's rights to due process in death penalty trial were violated by denial of access to a psychiatrist); *see also McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) (Alabama failed to meet its obligations under *Ake* to provide defendant in death penalty prosecution with access to an independent mental health expert to assist in evaluation, preparation and presentation of his defense); *Hinton v. Alabama*, 571 U.S. 263 (2014) (defense counsel's performance constitutionally deficient in a death penalty case where he failed to seek additional funds to replace an inadequate expert).

Mr. Dotson did not receive necessary expert assistance at trial because his attorneys failed to retain a psychiatrist, in violation of his right to the effective assistance of counsel. These two important constitutional rights—the right to competent expert assistance and to competent legal representation—were both abridged by the denial of constitutionally necessary expert assistance in this post-conviction case.

Access to expert assistance, particularly in a capital case, is a fundamental necessity to protect a defendant's constitutional rights. *See*

Ake, 470 U.S. at 77 ("The private interest in the accuracy of a criminal proceeding that places an individual's liberty or life at risk is almost uniquely compelling."). The state, as well as a post-conviction petitioner, "has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial." *Id.*, at 83–84 (right to expert assistance in capital sentencing phase of trial). Tennessee capital post-conviction petitioners are entitled to experts where the protection of constitutional rights is at stake. *See Owens v. State*, 908 S.W.2d at 928.

As a matter of clearly established constitutional law, Mr. Dotson's right to be heard in a meaningful manner includes the right to obtain and present the testimony of experts. Indeed, the Supreme Court in *Ake* found this principle to be "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, [and] derive[d] from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.*, at 76. *See also State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake*).

"Capital defendants possess a constitutionally protected right to provide the jury with mitigation evidence that humanizes the defendant and helps the jury accurately gauge the defendant's moral culpability." *Davidson v. State*, 453 S.W.3d 386, 402 (Tenn. 2014). Evidence of psychiatric conditions is extremely important and powerful mitigating

evidence. *See Davidson*, 453 S.W.3d at 405 (counsel ineffective for failing to investigate and present evidence of cerebral atrophy, schizophrenia, and frontal lobe dysfunction; granting sentencing relief based in large part on mental health expert testimony of a psychiatrist and neuropsychologist developed in post-conviction); *Sears v. Upton*, 561 U.S. 945, 946 (2010) (counsel ineffective for failing to investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter v. McCollum*, 558 U.S. 30, 36 (2009) (counsel ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior" that "substantially impaired . . . his ability to conform his conduct to the law" and constituted "an extreme mental or emotional disturbance" as a result of this brain damage); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (counsel ineffective for failing to investigate and present evidence that defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant "suffered damage to the frontal lobe of his brain . . . [which] can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses"); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (counsel ineffective for failing to investigate and present evidence of defendant's brain damage); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1996) (granting relief where jury did not hear of defendant's brain damage).

Moreover, Tennessee's capital post-conviction scheme specifically encompasses a petitioner's right to present expert testimony in support of claims for relief. *See* Tenn. Code Ann. § 40–14–207(b); Tenn. Sup. Ct. R. 13 § 5(b). Because the AOC Director and Chief Justice precluded Mr. Dotson from accessing constitutionally necessary expert assistance, Mr. Dotson was unable to access the tools required to establish ineffective assistance of counsel in failing to investigate and present mental health mitigation. Therefore, he was denied the right to due process and a full and fair hearing. *See* U.S. Const. Amends. VI, VIII, and XIV; Tenn. Const. Art. I §§ 8, 9 and 16, and Art. XI §§ 8 and 16; *Ake v. Oklahoma*, 470 U.S. 68 (1985)*; McWilliams v. Dunn*, 137 S.Ct. 1790 (2017); *Evitts v. Lucey,* 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Griffin v. Illinois*, 351 U.S. 12 (1956).

Mr. Dotson was entitled to a "full and fair hearing." Tenn. Code Ann. § 40–30–106(h) ("A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence."). Due process requires the "opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Tennessee recognizes this fundamental concept as well. *See Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (concluding that in Tennessee post-conviction cases, due process is a paramount concern); *Whitehead v. State*, 402 S.W.3d 615, 627 (Tenn. 2013) ("[P]ost-conviction proceedings, unlike other ordinary civil

proceedings, warrant heightened due process protections."); *Mills v. Wong*, 155 S.W.3d 916, 924–25 (Tenn. 2005) (post-conviction "necessarily implicate[s] fundamental due process interests in life or in freedom from bodily restraint ...."); *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004) ("The fundamental right of due process is ... an over-arching issue that has been recognized as a concern in post-conviction proceedings.").

This Court also has consistently acknowledged that due process "embodies the concept of fundamental fairness." *See, e.g., Howell*, 151 S.W.3d at 461 (internal quotation omitted). The need for courts to adhere to the concept of fundamental fairness is particularly acute in capital post-conviction cases. *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011) ("heightened due process is applicable" and "heightened reliability required [given] the gravity of the ultimate penalty in capital cases."); *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001) ("As it has long been recognized, the penalty of death is qualitatively different from any other sentence and this qualitative difference between death and other penalties calls for a greater degree of reliance when the death sentence is imposed."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (same). Yet, Mr. Dotson was denied access to the tools needed to ensure that his post-conviction hearing comported with due process and fundamental fairness.

In addition to these constitutional protections, Tennessee's death-sentenced post-conviction petitioners also have a statutory right to expert assistance. *See* Tenn. Code Ann. § 40–14–207(b); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Pursuant to Tenn. Sup. Ct. R. 13, § 5(c)(1),

funding for expert services is available based upon a showing of a "particularized need" for the requested services. "Particularized need" may be demonstrated when an "appellant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the appellant's right to a fair trial." Tenn. Sup. Ct. R. 13 § 5(c)(2); *see also State v. Barnett*, 909 S.W.2d 423, 430 (Tenn. 1995). As discussed above, the trial court found that Mr. Dotson demonstrated particularized need for the services of Drs. Agharkar, Merikangas, Leo, and Walker.

The post-conviction court found that Mr. Dotson was entitled to necessary, reasonable psychiatric expert services in post-conviction, and that the cost of those services could exceed the $25,000 cap due to extraordinary circumstances. The AOC Director and Chief Justice denied Mr. Dotson his right to those services by vacating the post-conviction court's orders without providing Mr. Dotson with a basis for their decisions or the opportunity to advocate that the post-conviction court's orders were proper. Mr. Dotson's rights to due process in the litigation of his post-conviction claims, specifically the claims of ineffective assistance of counsel, as well as his state and federal constitutional rights to be free from cruel and unusual punishment were thereby violated. Without the services of a constitutionally necessary expert, Mr. Dotson was precluded

from developing mental health mitigation that should have been presented to the jury.[16]

CONCLUSION

For the foregoing reasons, this Court should reverse the post-conviction court's decision denying Mr. Dotson relief, reinstate the post-conviction court's orders granting expert services which were vacated by the AOC and Chief Justice, and remand the case for an evidentiary hearing on his post-conviction claims where he can present expert evidence.

[16] Also, had Mr. Dotson not been denied access to Dr. Leo's services, he would have been able to effectively challenge Mr. Dotson's statements and prevailed on his claim that trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to pursue suppression of Mr. Dotson's statements. *See* Brief of Appellant in the Court of Criminal Appeals, Argument I. The State's case that Mr. Dotson perpetrated the Lester Street attacks would have rested on the unreliable testimony of two children, which is insufficient proof to support his convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of this pleading was rendered through the electronic filing system and/or email to Courtney N. Orr, Senior Assistant Attorney General, Criminal Appeals Division, Office of the State Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202-0207 on this the 26th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

I, Kelly A. Gleason, counsel for Mr. Jessie Dotson, hereby certify pursuant to Tenn. Sup. Ct. R. 46, § 3.02, that the number of words contained in the foregoing brief is 11, 528. This word count does not include the words contained in the title page, table of contents, table of authorities, and certificate of compliance. This word count is based upon the word processing system used to prepare this brief.

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