

**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**

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The core issue in this appeal is the denial of mental health and false confession expert assistance to capital post-conviction petitioner Jessie Dotson—after the post-conviction court found the expert assistance to be necessary to effectuate his constitutional rights. The Administrative Office of the Court’s (AOC) Director and the Chief Justice vacated the post-conviction court’s orders granting expert assistance. In doing so, the AOC Director and Chief Justice, two administrative decision makers, effectively usurped the trial court’s judicial determinations despite not having the authority to exercise judicial power. By engaging in a substantive review of the post-conviction court’s funding orders and vacating them, the AOC Director and Chief Justice violated Mr. Dotson’s constitutional rights.

Mr. Dotson proceeded to his post-conviction evidentiary hearing under protest due to the denial of necessary expert assistance. When he was unable to present expert testimony at his post-conviction hearing in support of his claims, the post-conviction court denied and dismissed his post-conviction petition. Mr. Dotson appealed, as is his right,¹ the denial and dismissal of his post-conviction petition. He asserted multiple constitutional claims regarding the denial of expert assistance, the process of the denial, and the resulting prejudice to his ability to prove his post-conviction claims.

¹ See 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.”); Tenn. R. App. P. 3(b).

The Court of Criminal Appeals adjudicated Mr. Dotson’s other claims in his appeal but held that the court was without jurisdiction to address the constitutional challenges Mr. Dotson raised regarding denial of expert assistance. *Jessie Dotson v. State*, No. W2019–01059–CCA–R3–PD, 2022 WL 860414 at *63–65 (Tenn. Crim. App., Jackson, March 23, 2022). The court found that it did “not have the authority to decide the Petitioner’s constitutional challenges” 2022 WL 860414 at *65. Finally, the court 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.*

While other capital post-conviction petitioners have been provided a remedy for the denial of expert assistance in appeals of dismissal of their post-conviction petitions, Mr. Dotson was deprived of any appellate remedy. Mr. Dotson applied to this Court for permissive review of the denial of an appellate remedy for the constitutional errors in his post-conviction arising from the denial of expert assistance. The Court granted review, the parties submitted briefs, and Mr. Dotson herein replies to the arguments raised by the State in the Appellee’s Brief (AB).

ARGUMENT

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.

In his opening brief, Mr. Dotson divided this argument into two sections. Section A addressed constitutional violations resulting from the Court of Criminal Appeals holding that Mr. Dotson was not entitled to an appeal. Section B addressed constitutional violations arising from the actions of the AOC Director and the Chief Justice—the harm of which was left unredressed due to the denial of an appeal. The State's brief is structured differently and contains two separate arguments. Appellant will respond to the State's arguments within the structure of his opening brief.

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.

The State argues that Mr. Dotson has no right to appeal denial of expert assistance because no statutes or rules permit an appeal from the AOC Director's or Chief Justices' decisions denying funding. (AB, 18). The State also argues that the Post-Conviction Procedure Act only encompasses the right to appeal from the post-conviction court's denial of expert funding and not when the post-conviction court's grant of

funding was vacated by the Director and Chief Justice. (AB, 21). Finally, the State argues that Mr. Dotson's constitutional rights were not violated by denying Mr. Dotson an appeal where constitutionally necessary expert assistance was granted by the post-conviction court and then vacated by the AOC Director and Chief Justice.²

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

The State asserts that due process does not require the State to create an appellate procedure where none exists. Mr. Dotson is not asking for creation of a new appellate procedure—he sought to avail himself of the same appeal to which other capital post-conviction petitioners are entitled under Tenn. Code Ann. § 40–30–116 and Tenn. R. App. P. 3(b). When denial of expert assistance impacts a petitioner's ability to collaterally challenge their conviction or sentence, Tennessee provides an

² The post-conviction court found that Mr. Dotson established particularized need for the services of Dr. Bhushan S. Agharkar, psychiatrist; Dr. James Merikangas, neurologist/psychiatrist; Dr. James Walker, neuropsychologist; and Dr. Richard Leo, an expert in false confessions.

Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows, by reference to particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. Tenn. Sup.Ct. R. 13, § 5(c)(3).

Hugueley v. State, 2011 WL 2361824, at *24 (Tenn. Crim. App., Jackson, June 8, 2011).

appellate mechanism to review such claims. *See, e.g., 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); *Hodges v. State*, No. M1999–00516–CCA–R3–PD, 2000 WL 1562865, at *28–29 (Tenn. Crim. App., Nashville, October 20, 2000) (post-conviction court did not abuse its discretion in denying a drug and alcohol expert, a fingerprint expert, and additional funds for the expert mental health/mitigation services previously approved); *Davidson v. State*, 2021 WL 3672797, at *12, *18–27 (Tenn. Crim. App., Knoxville, August 19, 2021) (post-conviction court did not abuse its discretion in denying services of a neuropsychologist to examine the Petitioner for evidence of brain dysfunction; Dr. Bryan Edelman, a social psychologist, to create a media analysis of the pretrial publicity; and Mr. Justin Levinson, a law professor, to review the extensive pretrial publicity for racial bias).

The State analogizes the Tennessee capital post-conviction funding procedure to the federal Criminal Justice Act (CJA), which provides the procedure governing payment for attorneys and expert services rendered to indigent defendants. *See* 18 U.S.C. § 3006A(e). Almost all of the cases cited in support of this argument involve attorney compensation. (AB, 23–24).³ The *Marcum* cases (AB, 23) involve compensation of a law firm

³ *Rosenfield v. Wilkins*, 468 F.Supp.2d 806 (W.D. Va. 2006) (Attorneys appointed under the CJA had no entitlement to full payment of their requested fees for legal services, and therefore no property interest in any particular level of payment that would be protected by the Fifth

for providing forensic accounting and litigation support services. *Marcum LLP v. United States*, 753 F.3d 1380, 1382 (Fed. Cir. 2014).⁴

The only case cited by the State involving non-legal expert compensation is *United States v. Bloomer*, 150 F.3d 146, 148 (2nd Cir. 1998). In *Bloomer*, retained counsel represented Mr. Bloomer at trial on methamphetamine manufacturing and distribution charges. *Id.* at 147. After the appellate court remanded the case for resentencing, counsel failed to move for CJA representation or *in forma pauperis* status. *Id.* at 148. Bloomer retained Dr. Edward Brown to testify at his resentencing

Amendment right to procedural due process.); *In re Carlyle*, 644 F.3d 694, 699 (8th Cir. 2011) (“[Attorney] Carlyle’s contributions in Clay’s service are important and appreciated. But it must be remembered that CJA service is first a professional responsibility, and no lawyer is entitled to full compensation for services for the public good.”); *United States v. Stone*, 53 F.3d 141, 141 (6th Cir. 1995) (attorney challenging amount of reimbursement); *United State v. Davis*, 953 F.2d 1482, 1497 (10th Cir. 1992) (seeking a writ of mandamus to force the district court to review attorney’s interim vouchers for payment); *Landano v. Rafferty*, 859 F.2d 301, 301 (3rd Cir. 1988) (attorney representing habeas corpus petitioner sought an appeal of an order refusing to appoint counsel retroactively and denying a request for a waiver of the maximum amounts allowable under the Criminal Justice Act); *United States v. Rodriguez*, 833 F.2d 1536, 1537–38 (11th Cir. 1987) (attorney appealed partial denial of requested compensation); *Matter of Baker*, 693 F.2d 925, 925 (9th Cir. 1982) (attorney appealed partial denial of the requested compensation); *United States v. Smith*, 633 F.2d 739, 741 (7th Cir. 1980) (three attorneys appealed from partial denial of the requested compensation).

⁴ Denying attorneys or experts compensation affects their livelihood at worst, whereas Mr. Dotson’s liberty and life are impacted by depriving him of court-ordered expert assistance found to be necessary to establish his post-conviction claims for relief.

hearing. *Id.* Over three years later, he learned that counsel had not paid Dr. Brown and therefore moved the district court for retroactive payment of expert fees under the CJA and for *in forma pauperis* status. *Id.* The district court denied his motions and he appealed to the United States Court of Appeals for the Second Circuit. *Id.*

The Second Circuit held that it was without jurisdiction to review fee determinations concerning services *already rendered*, which it concluded were purely administrative decisions and not appealable final orders. However, the court went on to state:

We note that our holding does not preclude appellate review of § 3006A determinations that impact a defendant's trial, sentence, or collateral challenge to a conviction or sentence. *See, e.g., United States v. Smith*, 987 F.2d 888, 890–92 (2d Cir. 1993) (district court erred in failing to appoint psychiatrist under § 3006A(e)); *United States v. Durant*, 545 F.2d 823, 829 (2d Cir. 1976) (reversing criminal conviction because district court failed to grant defense request for appointment of expert under CJA); *see also United States v. Labansat*, 94 F.3d 527, 529–30 (9th Cir. 1996) (reviewing denial of § 3006A(e)(1) motion on ground that lack of expert deprived defendant of effective assistance of counsel), *cert. denied*, 519 U.S. 1140, 117 S.Ct. 1013, 136 L.Ed.2d 890 (1997).

Bloomer was not deprived of Dr. Brown's assistance and his payment request under § 3006A(e) was for services Dr. Brown had already rendered.

Id. at 149.

To be clear, the CJA does not permit the Chief Judge of the Court of Appeals to vacate a trial court's order granting expert services. The State does not cite a single authority or case that stands for or supports

that proposition.⁵ Accordingly, the State’s reliance on the CJA in support of their position is misplaced.

Mr. Dotson attempted to challenge, in his appeal to the court below, determinations made by the AOC Director and Chief Justice which denied him expert services and impacted his collateral challenge to his convictions and death sentences. The denial of post-conviction court-approved expert services precluded a full and fair hearing. Denying Mr. Dotson his right to appeal this issue violates his state and federal rights to due process.

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

Appellant agrees with the State’s assertion that the Open Courts provision is a mandate on the judiciary. (AB, 29). The legislature has provided post-conviction petitioners with the right to appeal denials of post-conviction relief. Tenn. Code Ann. § 40–30–116. The right to appeal encompasses errors in the post-conviction proceedings, not just the merits of the individual claims for relief. *See, e.g., Davidson v. State*, 2021 WL 3672797, at *15–17 (Tenn. Crim. App., Knoxville, August 19, 2021) (reviewing a claim of due process violation arising from denial of a continuance of the evidentiary hearing); *Jordan v. State*, 2016 WL 6078573, at *79–81, *83–84 (Tenn. Crim. App., Jackson, October 14,

⁵ As the United States Supreme Court has made clear, “district courts have broad discretion in assessing requests for funding” and Courts of Appeals review district court decisions *denying* funding under the abuse of discretion standard. *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018).

2016) (reviewing a claim of due process violation arising from denial of a continuance of the evidentiary hearing; exclusion of expert testimony at the hearing). Such claims are cognizable because due process requires that a post-conviction petitioner be afforded an opportunity to seek relief “at a meaningful time and in a meaningful manner,” *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992).

As discussed in the opening brief and *supra*, at 9–10, challenges to errors in the post-conviction process include appeals regarding the denial of post-conviction experts in capital cases. The appellate courts have been open for capital post-conviction petitioners denied expert assistance to challenge those denials on appeal. Pursuant to the Open Courts provision, Mr. Dotson is entitled to the same access to the courts to challenge denials of court-ordered expert assistance. *See Staples v. Brown*, 113 Tenn. 639, 85 S.W. 254, 255 (1905) (“The 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.”) (emphasis added).

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

The State asserts that there is no distinction between Mr. Dotson’s appellate rights and those of other capital post-conviction petitioners seeking expert assistance. (AB, 25). The distinction is that the post-conviction court found expert assistance to be necessary to effectuate Mr. Dotson’s constitutional rights, that the requested services were necessary

to establish a ground for post-conviction relief, and that Mr. Dotson would be unable to establish his grounds for post-conviction relief by other available evidence. Then, the AOC Director and Chief Justice, without authorization by statute or the Tennessee Constitution to exercise judicial authority, vacated the orders granting expert services. Mr. Dotson was denied an appeal, whereas other capital post-conviction petitioners, who failed to convince the post-conviction courts of particularized need for services have been permitted to appeal expert denials.

The State argues that even if Mr. Dotson’s equal protection rights were implicated, his challenge would not survive rational-basis review.⁶ (AB, 27). The State asserts two justifications for Mr. Dotson’s discrepant treatment: 1) timely resolution of the litigation and 2) cost. (AB, 28). First, permitting Mr. Dotson to appeal the denial of expert assistance does not impact the timely resolution of the litigation. Whether the expert assistance denial comes from the post-conviction court or another entity, the appellate review mechanism is the same—the issue is raised upon the appeal from denial of the post-conviction petition.

Second, the State cites *United States v. Smith*, 76 F. Supp. 2d 767, 773 (S.D. Tex. 1999) in support of the proposition that the Director and Chief Justice have inherent obligations to parse out taxpayer funds to promote “fair litigation for all criminal litigants.” (AB, 28). *Smith* involved attorney fees, not expert funding assistance found necessary to

⁶ Mr. Dotson maintains that strict scrutiny review is warranted for the reasons set forth in his opening brief.

effectuate a capital post-conviction petitioner’s constitutional rights. 76 F. Supp. 2d at 773. The district court did not consider the reimbursement issue in the context of an equal protection challenge. In regard to the promotion of “fair litigation,” this Court has said that “[i]t is axiomatic that fairness cannot exist where an indigent defendant is deprived by poverty of a meaningful opportunity to defend when [his or her] liberty is at stake.” *State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995).

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.

The State argues that these claims are beyond the scope of review and waived and, even if the Court was inclined to address the actions of the Director and Chief Justice, the record is insufficient for review. (AB, 36–41). The State asserts that Mr. Dotson’s Rule 11 application was narrowly tailored to the denial of an appellate remedy for the decisions of the AOC Director and the Chief Justice. (AB, 36–37). Mr. Dotson’s argument in his Rule 11 Application is identical to the argument in his opening brief and clearly contains a challenge to both the AOC Director’s and Chief Justice’s actions and the Court of Criminal Appeals’ denial of an appellate remedy.⁷

⁷ “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.” (Application, 14; Brief, 27). In

“Appellants and parties seeking relief under Tenn. R.App. P. 11 must include in their application for permission to appeal and in their brief a statement of the issues they desire to present to the court and an argument with respect to each of the issues presented.” *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012). Mr. Dotson has done so, and this Court granted review of the first of two issues he presented and argued in his Rule 11 Application.⁸

The record is sufficient for the review of the arguments of the parties. The motions for expert services and the orders granting those services are in the record. The record reflects that Mr. Dotson’s counsel

his Reasons Supporting Review, Mr. Dotson asked the Court to exercise its supervisory authority and grant review “because the root of the issue is the language in this Court’s Rule that the Chief Justice’s decision to deny expert funding granted by the post-conviction court ‘shall be final’” and the lower courts did not have the authority to invalidate a Supreme Court Rule. (Application, 11).

⁸ The State cites *State v. Linville*, 647 S.W.3d 344, 353 (Tenn. 2022) in support of its argument that Mr. Dotson’s challenge to the propriety of the AOC Director’s and Chief Justice’s review of his funding requests is outside of the scope of this appeal. (AB 37). *Linville* supports Mr. Dotson’s position as this Court reiterated that issues raised in the application for permission to appeal are within this Court’s scope of review. *Id.* at 353. Moreover, the issue in *Linville* was that the defendant did not raise the claim in question in his application, but subsequently raised it in his brief. *Id.* That is not that case here. Mr. Dotson’s application and brief both clearly contain a challenge to both the AOC Director’s and Chief Justice’s actions. Moreover, it is worth noting that although the defendant in *Linville* did not sufficiently raise the claim in question in his application, this Court still exercised its discretion to address the substance of the defendant’s argument on appeal. *Id.*

informed the post-conviction court and opposing counsel that the AOC Director and Chief Justice vacated the orders providing funding for the assistance of two psychiatrists,⁹ the trial neuropsychologist, and the trial false confession expert. The record reflects that Mr. Dotson proceeded to hearing under protest due to the denial of expert assistance which was found necessary to effectuate his constitutional rights. The only information missing from the record is *why* the AOC Director and Chief Justice acted as they did, which is ultimately irrelevant to Mr. Dotson's claims because the AOC Director and Chief Justice were not enforcing administrative policies, but reversing substantive judicial determinations, which they did not have the legal authority to do.¹⁰

⁹ The State does not argue that the record is insufficient to review the denial of the first psychiatrist approved by the post-conviction court, Dr. Agharkar. (AB, 38–39). Dr. Merikangas was the second, replacement, psychiatrist approved by the post-conviction court after the AOC Director and Chief Justice vacated the court's order for Dr. Agharkar.

¹⁰ Mr. Dotson has repeatedly attempted to supplement the record with the communications counsel had with the AOC regarding expert assistance, which contain scant information about the Rule 13 process. The six items are discussed most recently in Mr. Dotson's motion to supplement the record in this Court filed January 17, 2023, which was denied. Mr. Dotson filed a designation of record which included the six items. (PC Vol. 2, 448). He moved to supplement in the post-conviction court and was denied without any reason provided. (*Id.*, 450–52, 453–55, 456–57). He filed a motion to supplement in the Court of Criminal Appeals on December 30, 2019, and was again denied. On August 26, 2021, he filed another motion to supplement after that Court asked questions about those documents at oral argument. He was again denied. *Dotson*, 2022 WL 860414 at *65 n.3 (“[I]nclusion of these documents in the appellate record is meaningless” as the Court found that it was

Pursuant to the Rule 13 procedure, Mr. Dotson is not entitled to know why the AOC Director or Chief Justice decides to vacate a post-conviction court's orders. He is not entitled to any record of the decision-making process. He is not entitled to notice or opportunity to be heard. Establishing a black box process to deprive him of expert services in itself precludes the ability to establish a record like that available in a Tennessee court. However, the record here is sufficient to address the issues Mr. Dotson raises about the process.

The State only minimally engages with Mr. Dotson's arguments regarding state and federal constitutional violations. Instead, the State asserts that Mr. Dotson has no property interest or entitlement to expert funds and the AOC Director and Chief Justice conduct only an administrative non-substantive review, again analogizing to the federal CJA and citing *Bloomer*. (AB, 39–41). As discussed *supra*, at 11–12, *Bloomer* explicitly recognized that denial of expert services which impacts a defendant's collateral challenge to a conviction or sentence is reviewable on appeal and the CJA provides no support for the State's position. Mr. Dotson is challenging the impact of the denial of expert assistance upon his collateral challenge to his convictions and sentences and the procedure by which he was deprived of experts found to be necessary to effectuate his constitutional rights. Under the caselaw cited by the State, he is entitled to do so.

without jurisdiction or authority to overturn the decisions of the AOC Director and Chief Justice.).

Regarding the State’s argument that Mr. Dotson is not entitled to any expert assistance in post-conviction proceedings, the General Assembly has provided for expert assistance in capital post-conviction cases. Tenn. Code Ann. § 40–14–207(b) (A court “may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If that determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court.”).

This Court has held that “under Tenn. Code Ann. § 40–14–207(b) (2012) and Tenn. Sup. Ct. R. 13, § 5(a), a post-conviction court has discretion to provide funding for expert witnesses for an indigent capital petitioner when those services are ‘necessary to ensure that the constitutional rights of the defendant are properly protected.’” *Reid ex rel. Martiniano v. State*, 396 S.W.3d at 517. The post-conviction court is in the best position to make certain judgments, which is why the court’s determinations cannot be overturned absent an abuse of discretion. *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). The post-conviction court is in the best position to determine case-specific needs for expert assistance, having reviewed the pro se petition, any amended petitions, and the record in the trial and direct appeal cases.¹¹ These principles,

¹¹ In this case, the post-conviction judge was the trial judge in this case. He had approved the services of neuropsychologist James Walker and false confession expert Richard Leo and was aware that neither expert was presented at trial. Mr. Dotson explained in detail in the motions for the services of Dr. Walker and Dr. Leo why their testimony was critical

which are essential to our appellate process, are turned upside down by the current Rule 13 procedure. The AOC Director's and Chief Justice's review of post-conviction courts' decisions granting expert funding in capital cases allows those entities to arbitrarily vacate the lower courts' orders without notice, opportunity to be heard, a record of the decision-making process, and without reason or further review.

CONCLUSION

Wherefore, the Appellant Jessie Dotson respectfully requests this Court to 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.

Respectfully submitted,



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to establishing post-conviction claims for relief. The post-conviction court approved those services.

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 4,277. 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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