

IN THE SUPREME COURT OF TENNESSEE

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

BRIEF OF AMICI CURIAE FORMER ACCESS TO JUSTICE
COMMISSION CHAIRS, TENNESSEE INNOCENCE PROJECT,
CHOOSING JUSTICE INITIATIVE, AND TENNESSEE
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT

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IDENTITY AND STATEMENT OF AMICI CURIAE

Amici constitute four groups and organizations: (1) Former Access To Justice Commission Chairs, who submitted an amicus brief in support of Appellant's Application for Permission to Appeal; (2) Tennessee Innocence Project; (3) Choosing Justice Initiative; and (4) Tennessee Association of Criminal Defense Attorneys ("TACDL"). To avoid unnecessary duplication and expense, these four amici have elected to submit one consolidated amicus brief in support of the Appellant. Pursuant to Tenn. R. App. P. 31(a), the specific interests of each applicant are set forth below.

1. Former Access to Justice Commission Chairs

The Former Access to Justice Commissioners constitute former Chairs of the Tennessee Supreme Court's Access to Justice Commission since it was established in 2009 pursuant to Tenn. Sup. Ct. R. 50, § 1.03:

- Margaret L. Behm (Chair, 2009-12)
- George T. "Buck" Lewis (Chair, 2012-14)
- Douglas A. Blaze (Chair, 2014-16)
- Marcia Eason (Chair, 2016-18)
- Gail Vaughn Ashworth (Chair, 2018-20)

Each of these former Chairs has devoted significant time and effort to close the justice gap and ensure that the legal needs of those who cannot afford representation are met. Their interest in this proceeding is the maintenance of the rule of law and the lawful exercise of judicial

power. Their further interest is the protection of constitutional rights and liberties and the fairness of judicial proceedings for citizens who cannot afford to pay for investigators and experts in capital cases.

2. Tennessee Innocence Project

The Tennessee Innocence Project was launched in February 2019 as the first full-time, non-profit innocence advocacy law firm in the State. The Project focuses on investigating and litigating actual innocence claims on behalf of incarcerated individuals in Tennessee, training law students and attorneys on how to prevent future wrongful convictions, and working to effectuate changes that better facilitate the discovery of wrongful convictions. The Project has a significant interest in the conduct of post-conviction litigation in the State. To date, the Project has obtained four exonerations and is currently litigating many others.

The Project not only focuses on the end stage of post-conviction litigation (i.e., getting someone who is innocent out of prison after conviction), but also endeavors to spotlight and remedy the conditions within our justice system that make wrongful convictions possible. The lack of reliable expert testimony is one of the most common issues that Innocence Project attorneys litigate and contend with in assessing and litigating cases. The Project has a substantial interest in bringing before the Court examples of the conditions that permit wrongful convictions to stain and dishonor our justice system. The Project takes on cases that often involve a “perfect storm” of factors leading to wrongful incarceration, and one of those factors is almost always the State’s

presentation of un rebutted or ineffectively rebutted expert proof that is later deemed unreliable. It can also involve a failure by the defense to present expert testimony that would have changed the outcome at trial. The Project litigates these issues regularly and has an interest in ensuring that expert funding rules are applied evenly and fairly.

3. Choosing Justice Initiative

The Choosing Justice Initiative is a non-profit law firm that works to end wealth-based disparities in the criminal legal system by advocating and litigating issues touching on cash bail, structurally embedded racial prejudice, misused prosecutorial discretion, and other practices that diminish constitutional rights. The Initiative represents indigent clients facing criminal charges, but also works to pursue broader impact litigation and advocate for reform on all of these issues.

The Initiative's interest in this case is that for indigent defendants, justice is often diminished, delayed, or withheld completely. The delivery of competent expert services is one of the stages ripe for constitutional deficiencies at both the trial and collateral stages because experts have an outsized role in shaping and altering proof. For attorneys practicing in trial and post-conviction courts in our State, obtaining and delivering expert services is part of providing competent defense and advocacy.

This case involves an investigative and expert funding issue that can lead to further injustices in the future. The failure to remedy a constitutional deficiency early in a case will inevitably lead to greater expense further down the line. The Initiative's interest here is effectively

identifying points in the criminal legal process where deprivations occur more frequently, just as a traffic engineer looks to accident location data to determine whether better signage or other safeguards are needed.

4. Tennessee Association of Criminal Defense Lawyers

The Tennessee Association of Criminal Defense Lawyers was founded as a non-profit corporation in 1973. Its members engage in the defense of criminal cases (at the state and/or federal level) both through private retention and under financing from local, state, and federal funding sources. The Association provides education, support, and training for lawyers who represent people accused of crime and regularly files amicus briefs on issues concerning criminal law. The Association also offers a substantial database of experts for its members.

Expert issues (including selection, retention, and funding) comprise a significant portion of the Association members' practices. A criminal defense lawyer who fails to appreciate how experts can alter the course of trial or of a post-conviction proceeding is not rendering competent legal services. The use of both scientific and non-scientific expert testimony is arguably one of the most important aspects of criminal practice. A defense attorney working with limited resources must walk the line between providing competent and effective representation, while also assessing how an expert affects the client's overall case in terms of narrative, persuasion, and proof. Often, defense lawyers face an adversary that is better equipped and better funded with respect to expert testimony and proof.

Experts and investigators come into play at all stages of the criminal system, from competency to guilt to mitigation. In particular, experts at the post-conviction stage can shed light on why a prior proceeding was deficient or why the system's interest in finality should yield to other considerations like constitutional deficiency. When the State proposes to incarcerate a citizen, effective expert testimony is part and parcel of giving a jury or a judge pause before revoking a defendant's freedom. The Association has a significant interest in the effective compensation and retention of experts and investigators at the post-conviction level, where funding is likely lowest and where the chance of a constitutional deprivation, or the perpetuation of a prior constitutional deprivation, may be relatively high.

5. Interest of All Amici Curiae

The system we have inherited from centuries of common law practice rests on the provision of competent and effective legal representation. All of the amicus parties appear in this Court for the simple reason that the procedures addressed in this case pose a significant risk of future constitutional deprivations. Though not every attorney who is an amicus party or member of an amicus party represents indigent capital defendants like the Appellant, each of those attorneys has an interest in ensuring that effective post-conviction review is a reality for criminal defendants in our state.

ARGUMENT

Post-conviction litigation costs money. Unearthing evidence by investigators, employing competent experts, and pursuing scientific testing years after a conviction is time-consuming and painstaking work. The General Assembly and this Court have recognized the importance of funding this work by authorizing trial courts to appropriate funds when indigent defendants need these investigators and experts to protect their constitutional rights. *See, e.g.*, Tenn. Code Ann. § 40-14-207(b); *Owens v. State*, 908 S.W.2d 923, 929 (Tenn. 1995). That includes exceeding the cap otherwise applicable to this funding when the indigent capital defendant proves to the trial court by clear and convincing evidence that extraordinary circumstances require it. Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5).

What happened in this case is all too common. Mr. Dotson, an indigent capital post-conviction petitioner, followed the rules and convinced the trial court that justice and fairness required that it authorize funds above the presumptive \$25,000 cap. But the Administrative Office of the Courts and the Chief Justice refused to approve his routine request to cut a check for those funds, effectively usurping the trial court's judicial decision.

This *de facto vacatur* of a trial court order in a capital proceeding through a non-judicial, administrative process violates the Tennessee and United States Constitutions. When judges issue orders in every other corner of the judicial system, those orders are not subject to reversal by a person who is not legally capable of exercising judicial power. The

current procedure deprives indigent death row prisoners of their rights to due process, equal protection of the laws, and a fundamentally fair post-conviction proceeding.

I. The Application of Tenn. Sup. Ct. R. 13 in this Case.

The General Assembly has authorized trial courts to exercise their discretion to “determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.” Tenn. Code Ann. § 40-14-207(b). The General Assembly’s enactment clearly vested the trial courts with jurisdiction to exercise discretion in assessing whether expert funding was required. The statute further authorized this Court to promulgate rules to provide for the reimbursement of reasonable and necessary expenses ordered by the trial court for these services. *Id.*

Consequently, Section 5 of Tenn. Sup. Ct. R. 13 empowers trial courts to determine whether expert or investigative services are “necessary to ensure that the constitutional rights of the [indigent capital post-conviction petitioner] are properly protected.” Tenn. Sup. Ct. R. 13 at § 5(a)(1). The remainder of Section 5 discusses how post-conviction petitioners should make such requests of the trial court. The petitioner must show that the investigative or expert services are necessary to establishing a ground for post-conviction relief. Tenn. Sup. Ct. R. 13 at § 5(c)(3). To exceed the \$20,000 per-case limit for investigative and \$25,000 per-case limit for expert services in capital cases, an indigent post-

conviction petitioner must prove that extraordinary circumstances exist by clear and convincing evidence. Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5).

Black’s Law Dictionary defines an “extraordinary circumstance” as “[a] highly unusual set of facts that are not commonly associated with a particular thing or event.” *Circumstance*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 310–11 (Tenn. 2012) (“‘Extraordinary’ is commonly defined as ‘going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable.’”) (quoting dictionary); *Extraordinary*, WEBSTER’S NEW INT’L DICTIONARY (2d ed. 1941) (“Designating a proceeding or action not normally required by law, or not prescribed for the regular administration of the law; as an extraordinary session of a legislature; an extraordinary session of a court.”). Thus, this portion of the test may be difficult for a petitioner to meet. The use of the word “extraordinary” means that very few cases (of a small original group) will qualify under this standard. But by statute and under this Court’s Rule 13, the trial court ultimately has discretion to make the decision of *which* capital cases will qualify to exceed the cap.

In the criminal context, “clear and convincing” means there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *E.g., State v. Jones*, 450 S.W.3d 866, 893 (Tenn. 2014) (explaining “clear and convincing” as compared to other evidentiary standards); *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999); 32A C.J.S. *Evidence* § 1553. This is the same evidentiary

standard governing the factual allegations underpinning the merits claims contained within the petition itself. Tenn. Code Ann. § 40-30-110(f).

Note the distinction: to succeed on his merits petition, the petitioner bears the burden of proving the factual allegations in his petition by a “clear and convincing” standard. But to succeed on his motion to exceed the cap for experts, the petitioner must prove to that same evidentiary standard that his case is “extraordinary.” So the ultimate burden is higher at this stage than at the merits-stage of the petition – a petitioner must not only show that he needs expert testimony to secure his constitutional rights, but he must show that he needs expert testimony *relatively* more than other indigent capital post-conviction petitioners. The post-conviction court could employ interim measures like ordering incremental funding to conserve costs, *e.g.*, *State v. Hagerty*, No. E2001-01254-CCAR10CD, 2002 WL 707858, at *9 (Tenn. Crim. App. Apr. 23, 2002) (trial context), but the Rule is clear that the trial court has discretion to make the decision about what is “extraordinary” and what constitutes “clear and convincing.” Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5).

If a post-conviction petitioner convinces the trial court that these high evidentiary standards have been met, he must then submit the trial court’s order to the Director of the Administrative Office of the Courts (“AOC Director”) for “prior approval.” Tenn. Sup. Ct. R. 13 at § 5(e)(4). The next section goes on to state: “If the director denies prior approval of the request, the claim shall also be transmitted to the chief justice for

disposition and prior approval. The determination of the chief justice shall be final.” Tenn. Sup. Ct. R. 13 at § 5(e)(5). In other words, even after the trial court has said yes to exceeding the expert fee cap, and made the evidentiary findings required by the Rule, the AOC Director can still deny the request without explaining why.¹ The Chief Justice can do the same thing and render the trial court’s ruling (that a certain case meets the specified evidentiary standard) a nullity without explaining why, and with no majority vote or imprimatur from other Justices.

There is *no* definition in the rule or in practice of what criteria the AOC Director should use to deny a request for prior approval. Likewise, there is *no* indication of what standards the Chief Justice should use in determining the propriety of the Director’s denial of prior approval of the trial judge’s order.

The application of the rule is not and has not been cabined to its proper function of enforcing purely administrative criteria. In this case and many others, the AOC Director and Chief Justice are not enforcing administrative policies. Rather, they are reversing substantive judicial determinations by trial courts about what constitutes “extraordinary circumstances,” what kind of evidence is “clear and convincing,” and whether funding is necessary to protect a death row prisoner’s constitutional rights. Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5). The AOC review

¹ This brief will refer to this administrative review as the “AOC review process.”

process—where a judge’s decision must be administratively approved, but where the administrative determination can effectively overrule the same judge’s legal determination—is opaque and unusual.

In the case under review, Mr. Dotson met the “extraordinary circumstances” bar. The trial court found that expert costs in excess of \$25,000 were required to protect Mr. Dotson’s constitutional rights, but the AOC Director and Chief Justice vacated the trial court’s order. This action, and the procedure that permitted it, violated the United States and Tennessee Constitutions in numerous ways.

II. An Administrator Cannot Lawfully Overrule a Court.

The AOC review process involves two administrative decision makers who cannot lawfully exercise judicial power: the AOC Director and the Chief Justice sitting alone.

First, the AOC and its Director are not judicial entities that can exercise judicial power. *Compare* Tenn. Code Ann. § 16-1-101 (judicial power vested in judges), *with* Tenn. Code Ann. § 16-3-801 (“There is created the administrative office of the courts. The purpose of this office is to assist in improving the administration of justice in the state by performing the duties and exercising the powers conferred in this part.”) (explicitly administrative). The AOC Director serves at the pleasure of the Supreme Court, Tenn. Code Ann. §§ 16-3-802(a); 16-3-803(a), and cannot directly or indirectly engage in the practice of law, Tenn. Code Ann. § 16-3-804(b). The AOC Director is the administrative gatekeeper

for post-conviction litigation funding, Tenn. Code Ann. § 16-3-806. She is not a judge.

Second, the Supreme Court can only decide a case with three out of five votes. Tenn. Const., Art. VI, § 2 (“The concurrence of three of the Judges shall in *every* case be necessary to a decision.”) (emphasis added); *Pierce v. Tharp*, 461 S.W.2d 950, 955 (Tenn. 1970); *Radford Tr. Co. v. E. Tennessee Lumber Co.*, 21 S.W. 329, 331 (Tenn. 1893). The Chief Justice also has administrative responsibilities that the AOC assists in carrying out. *Moore-Pennoyer v. State*, 515 S.W.3d 271, 279 (Tenn. 2017); Tenn. Code Ann. § 16-3-803(a) (“The administrative director of the courts shall work under the supervision and direction of the chief justice and shall, as the chief administrative officer of the state court system, assist the chief justice in the administration of the state court system to the end that litigation may be expedited and the administration of justice improved.”). But the Chief Justice sitting alone cannot exercise judicial power. Similarly, while a single judge may rule on a motion under our State’s appellate rules, “a single judge may not dismiss or otherwise finally dispose of an appeal or other proceeding. The action of a single judge may be reviewed by the court.” Tenn. R. App. P. 22(d).

When a post-conviction trial court concludes that a set of circumstances meets the legal standard justifying relief, but that determination is rendered null and void by an administrative actor who cannot exercise judicial power, it puts capital post-conviction petitioners in a terribly unfair position. To secure the necessary experts, a petitioner

must meet a high evidentiary bar before a judge. But even then, a win is not a win, and the trial court's determination can be vacated by an unelected judicial official who has no power as an appellate arbiter. *Mengel Box Co. v. Fowlkes*, 186 S.W. 91, 92 (Tenn. 1916) ("The presence of a judge or judges is necessary as an essential element of a court.").

The AOC Director is not authorized by statute or by the state Constitution to exercise judicial authority. Tenn. Const., Art. VI, §§ 3, 4 (appointment process for appellate judges, and election process for inferior court judges). Sitting alone, neither is the Chief Justice. Tenn. Const., Art. VI, § 2 (requiring concurrence of three of five judges for decisions). Funneling a trial court's judicial decision through an administrative procedure violates the state's Constitution when those administrative decision makers overrule the trial court's decision.

III. The Structure of the AOC Review Process Vitiates the Constitutional Jurisdiction of the Trial Court Without Explanation or Remedy.

The review process must remain limited to administrative issues. The AOC Director is only responsible for ensuring uniformity in the rates paid to experts under Rule 13. Tenn. Sup. Ct. R. 13 at § 5(d)(1). If an attorney seeks a rate of compensation that is higher than the maximum authorized by Rule 13, then the Rule purports to give the AOC Director the administrative power to deny such a request.² In *Petition of Gant*,

² The following discussion is limited to application of Rule 13 on its face. Amici understand that Appellant offers argument that application of the

937 S.W.2d 842, 843 (Tenn. 1996), an attorney doubled the rate authorized by Rule 13 for his work on a capital case (seemingly, it appears, because he believed the maximum rate was too low), and a trial court approved the higher rate. But then, the AOC Director denied his claim – and that was a permitted administrative correction. *Id.* (“Because the rate of compensation for attorneys appointed to represent indigent persons in criminal cases has been established by Supreme Court rule, we hold that the Director properly refused to apply a rate other than that established by this Court to calculate the compensation due petitioner.”).

But this case, and many like it, are totally different. Here, rather than curing an *administrative* failure (i.e., seeking a rate of compensation beyond that allowed by rule), the AOC review process constituted an unexplained vacatur of a trial court’s *legal determination* that extraordinary circumstances justified exceeding the \$25,000 expert cap. Saying “this case does not meet the extraordinary circumstances test” is different than saying “this application includes fees that exceed the maximum rate in the rule.” The first requires application of a legal

extremely low payment rates set forth in Rule 13 also suffers from constitutional defects. *Cf. McClain v. Atwater*, 110 So. 3d 892, 900 (Fla. 2013) (Pariente, J., concurring) (“If the Legislature provides for a set fee schedule but does not revisit this schedule for decades, this increases the risk that the statutory framework set up by the Legislature will become so out of line with reality that [it] materially impair[s] the abilities of officers of the courts to fulfill their roles of defending the indigent.”) (internal citations and quotation marks omitted).

standard (which necessarily involves a degree of discretion and legal judgment) while the second requires application of a purely actuarial or administrative rule (which involves comparing numbers on a chart to a request).

In another instructive example, an attorney appointed to represent a capital defendant at the trial stage requested reimbursement for meals in the same city where the attorney practiced. *Moncier v. Ferrell*, 990 S.W.2d 710, 711 (Tenn. 1998). This Court rejected the request. *Id.* at 712 (“A trial court should exercise caution in issuing ‘blank checks’ under Rule 13. While Rule 13 is designed to provide adequate and competent representation of indigent defendants, Rule 13 was not designed to have the State ‘pick up the tab’ at a local restaurant or subsidize a law practice.”).

Here, Mr. Dotson’s attorneys did not seek reimbursements outside the administrative confines of the Rule. Another example is *Short v. Ferrell*, 976 S.W.2d 92, 93 (Tenn. 1998), in which a petitioner did not procure prior approval to exceed the \$40.00 hourly rate for an attorney engaged as an expert to review trial counsel’s performance. Thus, the Court capped the billing rate at the statutory rate.

Other cases have involved proper examples of administrative functions: counsel failed to file the correct form, 976 S.W.2d at 93; counsel changed the maximum allowable rate to a higher rate, 937 S.W.2d at 843; counsel tried to get the State to pay for meals without actually travelling, 990 S.W.2d at 712. In contrast, this case involves a purely judicial

function where the decision is explicitly committed to the trial court's "sound discretion." Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5). *Cf. also Kelly v. Walker*, 346 S.W.2d 253, 257 (Tenn. 1961) ("We ask ourselves then what is the meaning of a sound discretion? We think that it means sound discretion exercised, not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and law, and directed by the Chancellor's reason and conscience to a just result."). And while Rule 13 does not necessarily create rights, *Owens v. State*, 908 S.W.2d 923, 928 n.10 (Tenn. 1995), it certainly cannot *abridge* rights or permit an administrator to overrule a court when that court clearly had jurisdiction to make a ruling.

A simple procedural example demonstrates why the determination in this case is judicial, and why the trial court's jurisdiction is honored for one response to a request while nullified for a different response to a similar request. Suppose an indigent, capital post-conviction petitioner files a motion to exceed the \$25,000 expert cap, and his motion is denied by the post-conviction court. Tenn. Sup. Ct. R. 13 at § 5(d)(5). The post-conviction court's denial of the motion is an interlocutory order, and a petitioner may use Tenn. R. App. P. 9 or 10 to seek review of that order. That is exactly the procedure followed in *Owens*, where the trial court denied the motion requesting funds for investigative and expert services, but this Court granted relief under Tenn. R. App. P. 9. *Owens v. State*, 908 S.W.2d 923, 925 (Tenn. 1995). Thus, case law is clear that if the petitioner's request to exceed the \$25,000 cap is denied, he can seek

review of that decision in the Court of Criminal Appeals under Tenn. R. App. P. 9 and 10, as he can with any interlocutory order. Practically, of course, obtaining interlocutory review for a decision like this is difficult, perhaps too difficult.

However, if the motion to exceed the expert cap under Rule 13 is *granted* by the post-conviction court, the petitioner is diverted to a different path: the AOC review process. If the AOC Director or Chief Justice denies his request, and as here, do so without explanation, *there is no appellate recourse* and the trial court's decision is vacated.

Under the Rule, the AOC review process can be used to reject a claim for reimbursement that facially fails to comply with the objective administrative criteria the Court set forth. But the Tennessee Constitution does not allow the Rule to be used to overrule a post-conviction court's determination that a case meets a substantive legal requirement—that “extraordinary circumstances” have been shown by “clear and convincing evidence” based on an underlying finding of the funding needed to protect an indigent capital defendant's constitutional rights.

Agencies cannot alter the judgment of a court, even if that judgment is illegal. *State v. Wooden*, 478 S.W.3d 585, 591 (Tenn. 2015). The AOC Director and Chief Justice, sitting alone, cannot exercise judicial power. Tenn. Const., Art. VI, § 2; Tenn. Code Ann. § 16-3-804(b); *see also Town of S. Carthage, Tenn. v. Barrett*, 840 S.W.2d 895, 899 (Tenn. 1992) (“We conclude that judges charged with interpreting the criminal laws of this

state should be elected in accordance with Article VI, § 4 of the Tennessee Constitution, in order to assure an independent judiciary free of the political caprice and whims of other government branches.”).

By statute, the AOC Director cannot practice law. Tenn. Code Ann. § 16-3-804(b) (“Neither the administrative director of the courts nor any employee of the state court system shall, during the term of office or employment, directly or indirectly engage in the practice of law in any of the courts of this state.”). Practicing law, in general, means acting in a representative capacity for others and exercising professional judgment as a lawyer. *Faerber v. Troutman & Troutman, P.C.*, No. E201601378COAR3CV, 2017 WL 2691264, at *4 n.3 (Tenn. Ct. App. June 22, 2017) (noting interplay of Rules of Professional Conduct and Tenn. Code Ann. § 23-3-101(3), which defines “practice of law”). Analyzing a trial court’s decision to see if it meets the articulated legal standard involves the exercise of professional legal judgment. That is not an actuarial act to determine if a rate comports with a table.

The Chief Justice cannot exercise the Supreme Court’s power of appellate review without two of his colleagues joining. Tenn. Const., Art. VI, § 2; Tenn. Sup. Ct. R. 10, Application § 1(B) (“A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions[.]”). Making a judgment that a trial court’s ruling did not follow an administrative guideline (i.e., applicant sought twice the maximum rate) is not a judicial function. But making a judgment that a trial court was wrong to conclude a set of circumstances met an evidentiary

standard certainly performs a judicial duty. Indeed, having the power to say that another judge made a decision that did not comport with the law (or having the power to declare that another judge's orders carry no legal effect) is the pinnacle of the judicial role.

Because the AOC review process lacks any meaningful transparency, litigants cannot determine whether the AOC Director and/or the Chief Justice have acted for an administrative reason or a judicial one. But the effect (the trial court's order is vacated and rendered a nullity) is certainly judicial. And judicial orders are based on records. In an adversarial system, the creation of a record to preserve the issues considered is not only routine, but crucial, especially in the context of post-conviction proceedings in state courts that may be later reviewed for error in the federal courts. What happened below was an exercise of judicial power and application of professional legal judgment where the only record created during the pendency of the "appeal" was a binary "red light/green light" result that vacated the trial court's order. This result is outside of the promise that the Rules of Civil Procedure will govern in all civil actions. Tenn. R. Civ. P. 1.

IV. The AOC Review Process Violates The United States Constitution.

The AOC review process in Mr. Dotson's and other cases violates the United States Constitution in several distinct ways. First, due process principles generally protect a person's entitlement to a benefit once that benefit is conferred by the government. *Bd. of Regents of State*

Colleges v. Roth, 408 U.S. 564, 576–77 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). When the post-conviction court determined that this case met the extraordinary circumstances threshold, it created an entitlement to funding for expert testimony. Once that order was entered, the State was required to afford the petitioner due process in taking that benefit away or reducing it. *Lankford v. Idaho*, 500 U.S. 110, 122 (1991). The opaque process by which the AOC Director and Chief Justice vacated the trial court’s order does not pass muster under any reasonable reading of due process. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) (“[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”).

Second, the AOC review process used in Mr. Dotson’s case violates principles of equal protection. The Constitution guarantees that all persons similarly circumstanced shall be treated alike. *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). An indigent capital post-conviction petitioner in Tennessee has different appellate rights depending on how a trial judge views his request to exceed Rule 13’s \$25,000 cap. Strangely, he has access to the appellate courts if his application is denied, but he has no access to the appellate courts if his application is granted and the AOC review process results in vacating the trial court’s order. The different tracks classify individuals differently for no rational purpose that amici can discern.

V. Expert Testimony is Critical in Capital Proceedings.

The interests of a petitioner in obtaining expert assistance necessary to protect his constitutional rights are particularly heightened in these kinds of cases. In the context of collateral review, especially for capital cases likely to receive further judicial treatment after state-court proceedings are exhausted, trial counsel’s failure to supervise an expert or understand the law surrounding experts can result in expensive litigation later. *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (“The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.”) (emphasis in original) (trial counsel misunderstood that he could have sought more funding for better expert). Transparency in collateral state court proceedings is crucial for effective review at later stages.

This Court created Rule 13 to effectuate the jurisdictional grant embodied in Tenn. Code Ann. § 40-14-207(b). *Owens v. State*, 908 S.W.2d 923, 929 (Tenn. 1995). Because the trial court has jurisdiction to determine whether expert services are necessary to ensure constitutional rights are protected, the AOC review process eclipses that jurisdictional grant. The goal of this funding is to ensure that constitutional rights are protected. *See, e.g., Goad v. State*, 938 S.W.2d 363, 365 (Tenn. 1996) (defense counsel was ineffective for failing to present mitigation evidence). Expert testimony is critical. *Wiggins v. Smith*, 539 U.S. 510, 516 (2003) (inadequacy of trial counsel’s mitigation investigation

demonstrated by post-conviction presentation of expert's report that demonstrated "the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents" through "state social services, medical, and school records, as well as interviews with petitioner and numerous family members"). The need for sufficiently funding these services is particularly poignant in capital cases. American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 955 (2003) ("It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, *post-conviction* and clemency, and to procure and effectively present the necessary *expert* witnesses and documentary evidence.") (emphasis added).

In this case, counsel sought a false confessions expert and mental health experts to assert ineffective assistance of trial counsel. Appellant's Brief at 21. These are particularly critical issues. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 (1994) ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified."); *Tigue v. Commonwealth*, 600 S.W.3d 140, 168 (Ky. 2018) (false confession expert should have been considered at trial); *McCloud v. State*, 208 So. 3d 668, 681 (Fla. 2016) ("Expert testimony concerning false confessions is particularly important because we know

that false confessions are one of the leading causes of subsequent findings of innocence, just like unreliable eyewitness testimony.”); *State v. Sireci*, 536 So. 2d 231, 233 (Fla. 1988) (successful post-conviction petition on failure of court-appointed psychiatrists to conduct adequate pretrial sanity evaluations). The record as to what experts the petitioner sought at the post-conviction stage must be thorough, complete, and transparent.

VI. Potential Remedies.

As Appellant notes, this Court established an Indigent Representation Task Force in 2015. That Task Force produced a report in April 2017.³ The section of the Report concerned with expert funding stated that the rates of expert compensation in Section 5 of Rule 13 were “lower than the prevailing market rate for their services.” Report at 53. Relevant here, the Task Force recommended the implementation of “[a] system...for which general classes of cases will receive the entitlement to expert services, with specification as to which types of experts are available in which circumstances.” It further recommended the burden of administering the appointed expert system be lifted from trial courts. Amici encourage this Court to revisit the Task Force’s findings because implementation of those recommendations could address the problem raised by this case.

³*Available at*
<https://www.tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf>.

Amici have undertaken to assess how other states address this problem. As demonstrated in the attached table, some states have no statutory procedure to secure expert funding, but many states' statutes and rules provide a mechanism to secure and appeal expert and investigator funding decisions. Broadly, two primary considerations animate all of these statutes or court rules.

First, the fact that these motions are heard *ex parte* attempts to chart a course between providing a party affiliated with the State the opportunity to respond to the petitioner's motion for expert funding, but also addressing the concern that such motions necessarily disclose the petitioner's legal strategy for the prosecution of the petition. Some jurisdictions solve this problem by permitting an administrator to respond, while others use what our State would call a district attorney *pro tempore* process. Second, these protocols attempt to balance limited funding pools with sufficient access to make these funds available to petitioners where trial courts have found the expenses are necessary to properly litigate the facts of the petition and preserve the petitioner's constitutional rights.

In assessing the protocols of other states, it appears the most broadly employed means of addressing denials of expert funding motions is what Tennessee already uses for trial court denials of the motions: the interlocutory appellate review process. In assessing appeals from *grants* of expert funding motions, other states frequently permit some state

actor to intervene or appeal in such a way that preserves both the *ex parte* nature of the proceeding and gives the State a chance to respond.⁴

The attached table provides the Court with a guide to solutions enacted by other states that could alleviate the current problem in Tennessee.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request this Court grant Appellant relief as to the AOC review process.

⁴ *See, e.g., Commonwealth v. Grise*, 558 S.W.3d 923, 924 (Ky. 2018) (Minton, J.) (denying Kentucky’s extraordinary appeal from a trial court’s decision to grant funding for experts in post-conviction); Utah Code Ann. § 78B-9-202(3)(c).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David R. Esquivel, hereby certify that the foregoing brief complies with the requirements of Tenn. Supreme Court Rule 46 governing e-filing of Amicus Briefs. It has been prepared in 14-point Century font and contains a total of 5,881 words in the main text (excluding tables and certification.).

s/ David R. Esquivel
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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2023, a true and exact copy of the foregoing document was served upon the following via e-mail and this court's electronic notification system:

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