

IN THE SUPREME COURT OF TENNESSEE

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

---

**BRIEF OF AMICI CURIAE ACCESS TO JUSTICE COMMISSIONERS  
IN SUPPORT OF APPELLANT'S APPLICATION FOR PERMISSION  
TO APPEAL**

---

David R. Esquivel (#21459)  
Michael C. Tackeff (#36953)  
BASS, BERRY & SIMS PLC  
150 Third Avenue South, Suite 2800  
Nashville, Tennessee 37201  
Phone: (615) 742-6285  
Fax: (615) 742-0405  
DEsquivel@bassberry.com  
Michael.Tackeff@bassberry.com

*Counsel for Amici  
Access To Justice Commissioners*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 3

IDENTITY AND STATEMENT OF AMICI CURIAE ..... 6

ARGUMENT ..... 6

    I.    The Application of Tenn. Sup. Ct. R. 13 in this Case..... 7

    II.   An Administrator Cannot Overrule a Court. .... 10

    III.  Reversing a Trial Court’s Finding that the Expert Cap  
          Should Be Exceeded is a Judicial Function..... 12

    IV.  The AOC Review Process Also Violates The United States  
          Constitution. .... 15

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972) .....	15
<i>Case v. State of Neb.</i> , 381 U.S. 336 (1965) (Clark, J., concurring) .....	16
<i>Doe v. Norris</i> , 751 S.W.2d 834 (Tenn. 1988).....	15
<i>Petition of Gant</i> , 937 S.W.2d 842 (Tenn. 1996).....	12
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) .....	15
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956) .....	15
<i>House v. State</i> , 911 S.W.2d 705 (Tenn. 1995).....	16
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123 (1951) (Frankfurter, J., concurring).....	15
<i>Lankford v. Idaho</i> , 500 U.S. 110 (1991) .....	15
<i>McCulley v. State</i> , 53 S.W. 134 (Tenn. 1899).....	11
<i>Mengel Box Co. v. Fowlkes</i> , 186 S.W. 91 (Tenn. 1916).....	10

<i>Owens v. State</i> , 908 S.W.2d 923 (Tenn. 1995).....	13
<i>Pierce v. Tharp</i> , 461 S.W.2d 950 (Tenn. 1970).....	11
<i>Radford Tr. Co. v. E. Tennessee Lumber Co.</i> , 21 S.W. 329 (Tenn. 1893).....	11
<i>Shinn v. Ramirez</i> , 142 S. Ct. 1718 (2022).....	17
<i>State v. Wooden</i> , 478 S.W.3d 585 (Tenn. 2015).....	14
<i>Town of S. Carthage, Tenn. v. Barrett</i> , 840 S.W.2d 895 (Tenn. 1992).....	14
<b>Statutes</b>	
Tenn. Code Ann. § 16-1-101 .....	10
Tenn. Code Ann. § 16-3-801 .....	10
Tenn. Code Ann. § 16-3-802(a).....	10
Tenn. Code Ann. § 16-3-804(b).....	10, 14
Tenn. Code Ann. § 16-3-806 .....	10
Tenn. Code Ann. § 40-14-207(b).....	7
Tenn. Code Ann. § 40-30-101 <i>et seq.</i> .....	11
<b>Other Authorities</b>	
Tenn. Const., Art. VI, § 2 .....	11, 14
Tenn. Const., Art. VI, §§ 3, 4.....	11

Tenn. R. App. P. 9.....	13
Tenn. R. App. P. 10.....	13
Tenn. Sup. Ct. R. 13 .....	<i>passim</i>
Tenn. Sup. Ct. R. 50, § 1.03.....	5

## IDENTITY AND STATEMENT OF AMICI CURIAE

Amici constitute all of the 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)
- J. William Coley (Chair, 2020-22)

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.

## ARGUMENT

It is an unfortunate reality that 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 expend funds when indigent defendants need these investigators and experts to protect their constitutional rights. That includes exceeding the cap otherwise applicable to this funding when the indigent defendant proves to the trial court by clear and convincing evidence that extraordinary circumstances require it.

What happened in this case is not atypical – it is all too common. Mr. Dotson followed the rules and convinced the trial court to authorize funds above the presumptive \$25,000 cap. But the Administrative Office of the Courts refused to approve his wholly administrative 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, they are not subject to veto by a person who is not legally capable of exercising judicial power. The current procedure relegates post-conviction litigation to second-class status and 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 statute further authorized this Court to promulgate rules to provide for the reimbursement of reasonable and necessary expenses ordered for 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 can 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 \$25,000 per-case limit for investigative and expert services in capital cases, a post-conviction petitioner must prove that extraordinary circumstances exist by clear and convincing evidence. Tenn. Sup. Ct. R. 13 at § 5(d)(4, 5).

An indigent capital petitioner must meet a high evidentiary standard to exceed the \$25,000 cap for investigative and expert services. There are not many capital cases to begin with in our justice system. The use of the word “extraordinary” means that very few cases (of a small group to begin with) 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* few capital cases will qualify to exceed the cap.



If a post-conviction petitioner convinces the trial court that this high evidentiary standard has 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, the AOC Director can still veto the request without explaining why.<sup>1</sup>

There is no definition in the rule or in practice of what criteria the AOC Director uses to deny a request for prior approval. There is no indication of what standards the Chief Justice uses in determining the propriety of the Director's denial of prior approval of the trial judge's order. That would be unremarkable if the application of the rule were cabined to its proper function of enforcing purely administrative criteria. But in this case and many others, the AOC Director and Chief Justice are not enforcing administrative policies, they are effectively 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

---

<sup>1</sup> This brief will refer to this administrative review as the "AOC review process."

death row prisoner’s constitutional rights. The AOC review process—where a judge’s decision must be administratively approved, but where the administrative determination can effectively overrule a 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 denied Mr. Dotson access to the approved funding necessary to effectuate those rights. This action, and the procedure that permitted it, violated the United States and Tennessee Constitutions in numerous ways.

## **II. An Administrator Cannot Overrule a Court.**

The first problem is that the AOC review process involves two administrators who cannot lawfully exercise judicial power. 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.

When a post-conviction trial court concludes that a set of circumstances meets a legal standard justifying a kind of relief, but that determination is rendered unenforceable by an administrative actor who cannot exercise judicial power or even practice law, it puts capital post-conviction petitioners in an impossible 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 is usurped 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.”).

Once the General Assembly vested courts with power over post-conviction proceedings, Tenn. Code Ann. § 40-30-101 *et seq.*, neither the legislature nor the Supreme Court can remove decision-making in such proceedings and channel them to an administrator rather than a judge. *McCulley v. State*, 53 S.W. 134, 180 (Tenn. 1899) (“The legislature cannot confer judicial power upon a court. When it creates a court, it is the constitution which invests the court and judge with judicial power, and makes the court a constitutional tribunal.”). The General Assembly and Supreme Court cannot give trial courts the power to rule on motions in post-conviction cases, then remove that power for certain motions only.

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); *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). Funneling a trial court’s judicial decision through an administrative procedure violates the state’s Constitution when those administrators overrule the trial court’s decision.

### **III. Reversing a Trial Court’s Finding that the Expert Cap Should Be Exceeded is a Judicial Function.**

The AOC Director is 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 AOC Director has the administrative power to deny such a request. In *Petition of Gant*, 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 is 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 effectively 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 standard (which necessarily involves a degree of discretion) while the second requires application of a purely administrative rule (which involves comparing numbers on a chart to a request).

A simple procedural example demonstrates why the determination in this case is judicial. Suppose an indigent, capital post-conviction petitioner seeks a hearing to exceed the \$25,000 cap, and his application is denied by the post-conviction court. Tenn. Sup. Ct. R. 13 at § 5(d)(5). The post-conviction court’s order finding that the “extraordinary circumstances” test has *not* been met 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.

If the request to exceed the expert cap under Rule 13 is granted by the post-conviction court, however, the petitioner is diverted to a different procedural path: the AOC review process. If the AOC Director and Chief Justice deny his request, and as here, do so without explanation, there is no appellate recourse. Essentially, then, *grants* of motions under Rule 13, Section 5 are relegated to second-class status: they are reviewed by people who are not statutorily capable of practicing law (in the case of the AOC Director) and who lack constitutional authority to exercise judicial power (in the case of both the AOC Director and the Chief Justice, acting without the concurrence of two other Supreme Court justices). There is no mechanism for appellate review after a denial.

The AOC review process certainly can be used to reject a claim for reimbursement that facially fails to comply with the objective criteria the Court set forth in the Rule. But the Tennessee Constitution does not allow it 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. This is a far cry from a denial based on listing a rate that is higher than the maximum allowed by rule.

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). Because both the AOC Director and Chief Justice, sitting alone, cannot exercise judicial power, Tenn. Const., Art. VI, § 2; Tenn. Code Ann. § 16-3-804(b), and unfortunately did so in this case, their actions violate Article VI of Tennessee’s Constitution. *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.”).

#### **IV. The AOC Review Process Also 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). The U.S. Supreme Court has held that states cannot deprive indigent appellants of their right to access transcripts because of an inability to pay – destitute defendants have the same rights as wealthy ones. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). Here, an indigent capital post-conviction petitioner has different and fewer appellate rights depending on how a judge views his request to exceed Rule 13's \$25,000 cap. Ironically, 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 *vacatur* of the trial court's order. The different tracks classify individuals differently for no reasonable purpose that amici can discern.<sup>2</sup>

---

<sup>2</sup> Furthermore, the Tennessee Supreme Court is the *only* forum where Mr. Dotson can raise his due process, equal protection, and other constitutional claims. The Court of Criminal Appeals held that it lacked jurisdiction to consider a constitutional challenge to the AOC review process.



Third, the use of the AOC review process in this manner undermines the effectiveness of both state post-conviction and federal habeas review—an interactive federal-state regime that is essential in safeguarding the constitutional rights of indigent capital prisoners. As this Court has explained, *House v. State*, 911 S.W.2d 705, 709 (Tenn. 1995), the U.S. Supreme Court suggested that states create post-conviction procedures to supplement the traditionally limited remedy of habeas corpus in federal courts. *Case v. State of Neb.*, 381 U.S. 336, 340 (1965) (Clark, J., concurring) (“This will enable prisoners to ‘air out’ their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts.”).

In recent months, the U.S. Supreme Court held that federal courts cannot pursue fact-finding on ineffective assistance of post-conviction counsel. *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). This new direction from the U.S. Supreme Court means that the record on post-conviction is essentially frozen, which makes expert testimony all the more essential at this stage. To allow non-judicial officers to deny funding that a post-conviction court has found is constitutionally required – for unarticulated reasons, using a process that bears no semblance to actual appellate review – is inconsistent with the U.S. Supreme Court’s direction that states should provide a forum for litigating constitutional violations after conviction. It affects not only the post-conviction petitioner’s access to the state courts, but also may doom the petitioner’s subsequent federal court proceedings.

## CONCLUSION

For the foregoing reasons, Amici Curiae respectfully ask this Court to grant the Petitioner's application for permission to appeal on Question 1 and resolve this important issue.

Respectfully submitted,

s/ David R. Esquivel

David R. Esquivel (#21459)

Michael C. Tackeff (#36953)

BASS, BERRY & SIMS PLC

150 Third Avenue South, Suite 2800

Nashville, Tennessee 37201

Phone: (615) 742-6285

Fax: (615) 742-0405

DEsquivel@bassberry.com

Michael.Tackeff@bassberry.com

*Counsel for Amici*

*Access To Justice Commissioners*

## 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 2,989 words in the main text (excluding tables and certification.).

s/ David R. Esquivel  
David R. Esquivel

## CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, a true and exact copy of the foregoing document was served upon the following via e-mail and this court's electronic notification system:

Courtney N. Orr  
Senior Assistant Attorney General  
Criminal Appeals Division  
Office of the State Attorney General  
P.O. Box 20207  
Nashville, TN 37202-0207

Kelly A. Gleason  
Andrew L. Harris  
Assistant Post-Conviction Defenders  
Office of the Post-Conviction Defender  
P.O. Box 198068  
Nashville, TN 37219-8068.

s/ David R. Esquivel  
David R. Esquivel