IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JESSIE DOTSON,	)	
	)	
Appellant,	)	
	)	**SHELBY COUNTY**
v.	)	**No. W2019-01059-SC-R11-PD**
	)	
STATE OF TENNESSEE,	)	**CAPITAL CASE**
	)	
Appellee.	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

BRIEF OF THE STATE OF TENNESSEE

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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?

II

Whether Dotson's substantive challenges to the decision of the Director and the Chief Justice are outside the scope of review when they were not included in his Tenn. R. App. P. 11 application, which was narrowly focused on the absence of appellate review.

STATEMENT OF THE CASE AND FACTS

A. Trial court and direct appeal proceedings

A Shelby County jury convicted the petitioner, Jessie Dotson, Jr., of six counts of premeditated first-degree murder and three counts of attempted first-degree murder. *State v. Dotson*, 450 S.W.3d 1, 11 (Tenn. 2014). At the conclusion of the penalty phase, the jury imposed death sentences for each of Dotson's first-degree murder convictions. *Id.* The trial court later sentenced Dotson to an effective 120 years' imprisonment for each of his attempted first-degree murder convictions, to be served consecutively to his death sentences. *Id.* The convictions and sentences were affirmed on direct appeal, and a panel of this Court held that the death sentences were proportionate to the penalties in similar cases. *Id.* at 12, 84.

B. Post-conviction court proceedings

Dotson timely pursued post-conviction relief. (I, 27; II, 266-69, XX, 3.) Before the post-conviction hearing, he sought funds for several expert witnesses. The resolution of these requests is what gives rise to the issue before the Court.

1. Dotson requested funds for expert assistance that exceeded the enumerated maximum hourly rates.

Dotson filed a motion seeking prior authorization for expert funds in the amount of $17,500 to hire Dr. Bhushan S. Agharkar, a psychiatrist. (Sealed Mar. 8, 2017, Dr. Agharkar Motion.) The total was calculated using a $350 hourly rate, which exceed the hourly rate set out in Tenn. Sup. Ct. R. 13, §5(d)(1). (*Id.* at 15.) According to the motion, Dr. Agharkar's usual discounted rate was $400 per hour, but he agreed to an

additional discount for this case. (*Id.*) The post-conviction court granted prior authorization of Dotson's request for expert funds, finding that the $350 hourly rate was reasonable. (Sealed Mar. 8, 2017, Dr. Agharkar Order.)

The post-conviction court's order was submitted to the Director of the Administrative Office of the Courts ("AOC") for approval. (XIII, 102.) A letter detailing the Director's review noted that Tenn. Sup. Ct. R. 13, § 5 did not authorize an hourly rate of $350 for psychiatric services. (XIII, 103.) Therefore, the Director authorized funding for Dr. Agharkar's service at a rate of $250 per hour, as permitted by Rule 13. (XIII, 103.) The letter stated that the Chief Justice had reviewed the materials and concurred with the Director's action. (XIII, 103.) In accordance with the Rule, "[t]he Chief Justice's decision [was] final." (XIII, 103.)

Following receipt of the AOC's letter, Dotson filed a motion in the post-conviction court to vacate his death sentences, arguing that the "denial of constitutionally necessary expert services" violated his due process rights for expert assistance, his right to a full and fair post-conviction hearing, and the prohibition against cruel and unusual punishment. (I, 181-205.)

The post-conviction court denied Dotson's motion, noting that the Director had not denied all expert assistance. (I, 208-09.) Therefore, it concluded that Dotson's constitutional rights at the post-conviction hearing were not violated. (I, 208-09.)

Dotson then filed a Tenn. R. App. P. 10 application for interlocutory appeal in the Court of Criminal Appeals. (XIII, 51.) The court denied permission to appeal. (XIV, 417-18.) Dotson filed another Tenn. R. App.

P. 10 application in this Court, which also denied his application. (XIII, 26); *Dotson v. State*, No. W2017-02550-SC-R10-PD, Order (Tenn. May 5, 2018).

2. Dotson requested additional funds that exceeded the $25,000 per-case maximum for expert assistance.

Dotson later filed an ex parte motion seeking funding of $10,000 plus reasonable expenses for Dr. James R. Merikangas, a neurologist. (Sealed June 26, 2018, Dr. Merikangas Motion at 9.) He acknowledged that his request exceeded the $25,000 per-case maximum for expert services in capital post-conviction cases. (*Id.* at 10.) But he asserted that the court should grant prior authorization for funds above the $25,000 limit because "extraordinary circumstances arise from trial counsel's insufficient investigation into [Dotson]'s background and failure to adequately investigate and present the effects of [Dotson]'s mental disorders, traumatic childhood and cognitive impairments to the jury." (*Id.* at 10.) The post-conviction court granted Dotson's request for prior authorization of funds for Dr. Merikangas. (Sealed June 26, 2018, Dr. Merikangas Order.) Without explaining its holding, the court found that "extraordinary circumstances exist for funding authorization to exceed a total of $25,000 in this case[.]" (*Id.* at 2.)

Dotson filed another ex parte motion seeking $9,000 in expert funding for Dr. Richard Leo, a false confession expert. (Sealed Aug. 15, 2018, Dr. Leo Motion.) Dotson acknowledged that his request would exceed the $25,000 per-case maximum for capital post-conviction expert services. (*Id.* at 9.) But he argued that extraordinary circumstances

justified exceeding the cap because of "trial counsel's failure to adequate [*sic*] investigate and challenge the prosecution's evidence at trial." (*Id.* at 9.) The post-conviction court also granted prior authorization of funds for Dr. Leo. (Sealed Aug. 15, 2018, Dr. Leo Order.) It summarily found that extraordinary circumstances existed to justify funds exceeding $25,000 in the case, but it did not identify any such circumstances in the order. (*Id.* at 1-2.)

In September 2018, Dotson filed another ex parte motion seeking "funds to reimburse" Dr. James S. Walker, a neuropsychologist. (Sealed Sept. 20, 2018, Dr. Walker Motion). Dotson acknowledged that his request exceeded the $25,000 maximum allowed for expert services in the case. (*Id.* at 10.) But he argued that the $25,000 maximum did not apply to this request because Dr. Walker would be called as a fact witness regarding trial counsel's investigation and preparation for trial.[1] (*Id.* at 10.)

The post-conviction court granted Dotson's request for prior authorization of funds for Dr. Walker. (Sealed Sept. 25, 2018, Dr. Walker Order.) The court found that Dr. Walker would be presented as a fact witness at the post-conviction hearing, but it reasoned that Dr. Walker should be compensated "for the time it takes to travel, prepare for testimony by reviewing his records, and testify." (*Id.* at 2.) The court also concluded it was not necessary to address Dotson's claim that the $25,000 expert funding cap did not apply to Dr. Walker's testimony. (*Id.*

[1] Trial counsel had retained Dr. Walker to evaluate Dotson's mental health and help prepare a defense. (*Id.* at 2, 3, 5-6.)

at 2.) Instead, the court found that extraordinary circumstances existed to exceed the presumptive $25,000 maximum, "as established by clear and convincing evidence." (*Id.* at 2.)

The record does not contain any evidence reflecting the Director's or the Chief Justice's treatment of the orders granting prior authorization of funds for these three expert witnesses. Instead, immediately before the post-conviction hearing, Dotson's counsel announced that the Director and Chief Justice had "denied" the requests. (X, 29-34; *see also* XV, 6-7.) Counsel later argued that denial of funding for those three experts violated his rights at the post-conviction hearing. (XII, 424-27.)

The case proceeded to an evidentiary hearing without testimony from Dotson's requested experts. Following the hearing, the post-conviction court denied relief. (II, 289-397.) Dotson timely pursued an appeal in the Court of Criminal Appeals. (II, 458.)

C. The opinion of the Court of Criminal Appeals

In the Court of Criminal Appeals, Dotson argued that, by limiting his expert funding requests, the Director and the Chief Justice improperly exercised judicial power in violation of the Tennessee Constitution; violated his due process rights by failing to provide him with notice of the issues and evidence it would consider when reviewing the post-conviction court's funding order; and denied his rights to a full and fair hearing, equal protection of the law, and freedom from cruel and unusual punishment. (Pet's CCA Br. at 91-104; Pet's CCA Reply Br. at 23-27.)

The Court of Criminal Appeals concluded that the law did not provide an appeal from the Director's and the Chief Justice's review of expert funding requests under Section 5(e)(5). *Dotson v. State*, No. W2019-01059-CCA-R3-CD, 2022 WL 860414, at *65 (Tenn. Crim. App. Mar. 23, 2022), *perm. app. granted* (Tenn. Oct. 25, 2022). Additionally, the court concluded that it lacked authority to review Dotson's constitutional challenges to Rule 13. *Id.*

The Court of Criminal Appeals affirmed the denial of post-conviction relief. *Id.* at *73. Dotson later filed a petition for rehearing, addressing issues unrelated to the Rule 13 review of expert funding requests. *See Dotson v. State*, No. W2019-01059-CCA-R3-PC, Appellant's Petition for Rehearing (Apr. 14, 2022). That petition was denied. *Dotson v. State*, No. W2019-01059-CCA-R3-PC, Order (Tenn. Crim. App. Apr. 18, 2022).

D. Dotson's Rule 11 application

Dotson then filed a timely application for permission to appeal to this Court arguing, among other things, that lack of an appellate remedy from the Rule 13 review violated several of his state and federal constitutional rights. *Dotson v. State*, No. W2019-01059-SC-R11-PC, Application for Permission to Appeal (June 16, 2022). The Court granted the application for permission to appeal limited solely to the issue of whether lack of an appellate remedy from the Director's and the Chief Justice's Rule 13 review violated various constitutional rights. *Dotson v. State*, No. W2019-01059-SC-R11-PC, Order (Tenn. Oct. 25, 2022).

STANDARD OF REVIEW

Constitutional interpretation of procedures presents questions of law. *State v. Burns*, 205 S.W.3d 412, 414 (Tenn. 2006). Therefore, appellate courts review the claims de novo with no presumption of correctness given to legal conclusions of the lower courts. *Id.*

ARGUMENT

I. The Absence of Appellate Review from the Director's and the Chief's Justice's Administrative Action Does Not Violate Dotson's Constitutional Rights.

Dotson is not entitled to relief in this appeal because nothing in Tennessee statutes or rules grants an appeal from the Director's or the Chief Justice's review of an expert funding request pursuant to Tenn. Sup. Ct. R. 13, § 5. Neither the state nor federal constitution require any such appellate review. Therefore, absence of an appellate remedy from the Rule 13 administrative review does not violate due process, equal protection, the Tennessee Constitution's Open Courts Clause, the right to a full and fair hearing, or the prohibition against cruel and usual punishment.

A. There is no right of appeal from the Director's and the Chief Justice's Rule 13 review.

1. There is no right of appeal in Rule 13 or relevant statutes.

Indigent capital defendants may request funding for expert witnesses in post-conviction proceedings. Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13, § 5(a). When the post-conviction court determines, in its discretion, that expert funding is necessary, it may grant "prior authorization" for those services "in a reasonable amount to be determined by the court." Tenn. Code Ann. § 40-14-207(b). The court's order granting prior authorization for funding "shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part and rules promulgated thereunder by the supreme court." *Id.*

But the statutory authorization for expert services "should not be interpreted as a 'blank check[.]'" *Owens v. State*, 908 S.W.2d 923, 928 (Tenn. 1995). Instead, this Court, through its rules, sets out the nature of expenses for which reimbursement is allowed and the limitations on and conditions for such reimbursement. Tenn. Code Ann. § 40-14-206. Those rules are governed by what this Court "deems appropriate and in the public interest." *Id.*

Tenn. Sup. Ct. R. 13, § 5 governs the procedure that both the movant and the post-conviction court must follow when requesting or ruling upon a request for expert services. *Owens*, 908 S.W.2d at 928. When a petitioner submits a request for expert funding, the post-conviction court conducts an ex parte hearing and may, in its discretion, determine what expert services "are necessary to ensure that the constitutional rights of the defendant are properly protected." Tenn. Sup. Ct. R. 13, § 5(a)(1). Then the court may grant prior authorization for the services "in a reasonable amount to be determined by the court." *Id.*

Rule 13 sets out two different caps for funding available in capital post-conviction cases. First, in capital post-conviction cases, "the trial court shall not authorize more than *a total of* $25,000 for the services of *all* experts[.]" Tenn. Sup. Ct. R. 13, § 5(d)(5). The trial court may only exceed the $25,000 cap if it determines, in its sound discretion, "that extraordinary circumstances exist that have been proven by clear and convincing evidence." *Id.* Second, Rule 13 enumerates maximum hourly

rates for certain expert witnesses. As relevant to this case, psychiatrists' maximum hourly rate is $250.00.[2] *Id.*

Once the trial court grants prior authorization of expert fees, the order must be submitted to the Director for prior approval. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director denies prior approval, the claim is automatically submitted to the Chief Justice for disposition and prior approval. Tenn. Sup. Ct. R. 13, § 5(e)(5). "The determination of the [C]hief [J]ustice is final." *Id.* Neither the General Assembly nor this Court has granted capital post-conviction defendants the right to seek further appellate review.

2. The Post-Conviction Procedure Act does not permit an appeal from the Director's and Chief Justice's actions.

Dotson appears to argue that the Post-Conviction Procedure Act permits review of all decisions related to funding for expert services, including those of the Director and the Chief Justice. (Pet's Br. at 27-29.) That is not the case. The Post-Conviction Procedure Act only permits an appeal from actions of the post-conviction court, and it does not authorize

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[2] Notably, Rule 13 does not permit courts to grant prior authorization in excess of the enumerated hourly rates. *See* Tenn. Sup. Ct. R. 13, § 5(c)(1) (courts are permitted to grant prior authorization for reasonable hourly rates); *Petition of Gant*, 937 S.W.2d 842, 846 (Tenn. 1996) (when a Supreme Court rule enumerates maximum hourly rates, those rates are deemed reasonable and the trial court lacks express or implied authority to approve higher hourly rates). *C.f. Short v. Ferrell*, 976 S.W.2d 92, 93 (Tenn. 1998) (contemplating that an attorney acting as an expert witness may exceed the hourly rate enumerated for court-appointed attorneys representing indigent defendants when Rule 13 did not set out any hourly rates for attorneys acting as expert witnesses).

review of the Director's or the Chief Justice's Rule 13 administrative actions.

Tenn. Code Ann. § 40-30-116 permits an appeal from the final judgment of the post-conviction court. In this case, Dotson was not seeking appellate review of the post-conviction court's order. Instead, he sought review of actions taken and procedures employed by the Director and the Chief Justice in their administrative review. As noted, the plain language of the statute does not grant an appeal from that administrative review. *Id.*; *see* Tenn. Sup. Ct. R. 13, § 5(e)(5) ("The determination of the [C]hief [J]ustice shall be final.")

At most, Dotson had the right to appeal the post-conviction court's order regarding prior authorization of expert funds. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 517 (Tenn. 2013) (reviewing a post-conviction court's prior authorization order denying expert funds). But that appeal only reviews the post-conviction court's exercise of discretion regarding whether to grant prior authorization of funds. *See* Tenn. Sup. Ct. R. 13, § 5(a)(1). It does not address the Director's or the Chief Justice's treatment of that prior authorization order. Therefore, the Post-Conviction Procedure Act does not grant an appeal from the Rule 13 review of prior authorization orders.

B. The lack of a right to appellate review of the Director's and the Chief Justice's Rule 13 decisions is not unconstitutional.

Dotson argues that the lack of any appellate review of the administrative decisions made by the Director and the Chief Justice

violates a number of constitutional provisions. But none of his arguments has merit.

1. Due process does not require appellate review.

Lack of appellate review does not violate Dotson's right to due process. Criminal defendants are not constitutionally entitled to an appeal. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Further, due process does not require the State to create an appellate procedure where none exists. *Id.* Instead, the Constitution only requires that, when the State has granted an appeal, the procedure used satisfy basic tenets of due process and equal protection. *Id.*

This conclusion is supported by the federal Criminal Justice Act, which also contains fees-review provisions that are not subject to appellate review. Similar to Rule 13, the Criminal Justice Act provides the procedure governing payment for expert services rendered to indigent defendants. *See* 18 U.S.C. § 3006A(e). Like Rule 13, payment made under the Criminal Justice Act are made directly to the person, entity, or agency providing the services. *Compare* 18 U.S.C. § 3006A(f) (payment made directly to person rendering expert services when the court finds that funds are available), *with* Tenn. Sup. Ct. R. 13, § 6(b)(3) ("Payment may be made directly to the person, agency, or entity providing the services."). The statute sets a maximum amount payable to each person claiming compensation for services rendered. 18 U.S.C. § 3006A(e)(3). Notably, the trial court judge may permit compensation above the enumerated maximum, but any excess payment must be approved by the chief judge of the circuit. *Id.*

Like Rule 13, the Criminal Justice Act does not provide a right of appeal from the chief judge's decision regarding funding. *Id.*; *see also Rosenfield v. Wilkins*, 468 F. Supp. 2d 806, 811 (W.D. Va. 2006) ("The CJA contains no procedural mandates and no provision for judicial review of adverse fee decisions."), *aff'd*, 280 F. App'x 275 (4th Cir. 2008). But the chief judge's review is "an administrative rather than judicial act." *Marcum LLP v. United States*, 753 F.3d 1380, 1383 (Fed. Cir. 2014). Therefore, the majority of federal circuits have held that no appeal lies from the chief judge's decision regarding funding requests, though those seeking review may seek mandamus from the United States Supreme Court. *See id.* at 1384; *In re Marcum LLP*, 670 F.3d 636, 638 (5th Cir. 2012) (holding the only remedy from the chief judge's decision is a writ of mandamus); *In re Carlyle*, 644 F.3d 694, 700 (8th Cir. 2011) (observing that every circuit court that has considered the issue has held that the chief judge's CJA review is administrative and not appealable); *United States v. Bloomer*, 150 F.3d 146, 148 (2nd Cir. 1998); *United State v. Stone*, 53 F.3d 141, 143 (6th Cir. 1995); *United States v. Davis*, 953 F.2d 1482, 1497 n.21 (10th Cir. 1992) (chief judge's fee determinations are "administrative in character and do not constitute final appealable orders[.]"); *Landano v. Rafferty*, 859 F.2d 301, 302 (3rd Cir. 1988); *United States v. Rodriguez*, 833 F.2d 1536, 1537-38 (11th Cir. 1987); *In re Baker*, 639 F.2d 925, 927 (9th Cir. 1982); *United States v. Smith*, 633 F.2d 739, 741 (7th Cir. 1980). And due process does not require additional appellate remedies from this administrative review. *See Rosenfield v. Wilkins*, 280 F. App'x 275, 284 (4th Cir. 2008) (attorney's due process rights not violated by lack of explanation for administrative decision

reducing fees); *In re Carlyle*, 644 F.3d at 700 (stating "[t]here is no injustice" in lack of appellate review from district court's administrative refusal of funds); *see also Evitts*, 469 U.S. at 393 (states are not required to create an appellate procedure where none exists).

Similar to the federal procedure, the Director and Chief Justice conduct an administrative review under Rule 13. The process for requesting expert funds lacks any of the hallmarks of an adversarial proceeding. *See* Tenn. Sup. Ct. R. 13, § 5. The ex parte nature of the requests demonstrates that decisions made under Rule 13 are purely administrative. *See Bloomer*, 150 F.3d at 148; *In re Baker*, 639 F.2d at 927 ("These nonadversarial procedures established by the CJA convince us that the district judge's certification of attorneys' fees is an administrative act."). And like in the Criminal Justice Act, the Tennessee General Assembly has also seen "fit to curtail review by placing fee award determinations within the discretion of the presiding tribunals." *Marcum*, 753 F.3d at 1384; Tenn. Code Ann. § 40-14-206 (directing the Supreme Court to prescribe "limitations on and conditions for reimbursement as it deems appropriate").

Due process does not require the State to create that appeal that otherwise does not exist from Rule 13's administrative process. *See Evitts*, 469 U.S. at 393. Lack of an appellate remedy therefore does not violate Dotson's due process rights.[3]

[3] To the extent Dotson argues that the Rule 13 review, itself, violates due process, that question is outside the scope of this appeal as addressed in Section II of this brief.

2. Lack of an appellate remedy does not implicate Dotson's equal protection rights.

Dotson argues that the lack of an appeal from the Director's and the Chief Justice's decision distinguishes him from other capital post-conviction litigants and therefore violates equal protection. (Pet's Br. at 28 & n.10.) He is wrong. There is no distinction between Dotson's appellate rights and those of every other capital defendant seeking post-conviction expert funds. Therefore, his equal protection rights are not implicated.

"The equal protection provisions of the federal and state constitutions demand that persons similarly situated be treated alike." *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003). It follows that, when there is no distinction between groups, the there is no equal protection issue. *See id.*

There is no distinction between Dotson's appellate rights and those of other capital post-conviction petitioners. In each case Dotson cites, the appellant was seeking review of the post-conviction court's denial of prior authorization for requested expert funds. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 517 (Tenn. 2013) (reviewing the post-conviction court's denial of prior authorization for expert funds); *Davidson v. State*, No. E2019-00541-CCA-R3-PD, 2021 WL 3672979, at *18-27 (Tenn. Crim. App. Aug. 19, 2021) (same), *perm. app. denied* (Tenn. Dec. 8, 2021); *Hugueley v. State*, No. W2009-00271-CCA-R3-PD, 2011 WL 2361824, at *21-24 (Tenn. Crim. App. June 8, 2011) (same), *perm. app. denied* (Tenn. Dec. 13, 2011); *Hodges v. State*, No. M1999-00516-CCA-R3-PD, 2000 WL 1562865, at *28-29 (Tenn. Crim. App. Oct. 20, 2000) (same), *perm. app.*

denied (Tenn. Mar. 26, 2001); *Alley v. State*, 958 S.W.2d 138, 152 (Tenn. Crim. App. 1997) (same).[4] Dotson did not need to avail himself of that appellate remedy because the post-conviction court did not deny his requests. (*See* Sealed Mar. 8, 2017, Dr. Agharkar Order; Sealed June 26, 2018, Dr. Merikangas Order; Sealed Aug. 15, 2018, Dr. Leo Order; Sealed Sept. 25, 2018, Dr. Walker Order).

But that appellate review is limited to the post-conviction court's order granting or denying prior authorization of expert funds. That appeal has no bearing on the Director's and the Chief Justice's review of a prior authorization order. And, like Dotson, the litigants in those prior cases would also have no appellate remedy from a Rule 13 review.

Instead, all petitioners—whether the post-conviction court initially grants or denies prior authorization of funds—are treated the same once that prior authorization is granted. The prior authorization order still must go to the Director and, if necessary, the Chief Justice for prior approval before the funds can be allocated. *See* Tenn. Sup. Ct. R. 13, § 5(e)(4). Should the Director and the Chief Justice then deny funding, a capital post-conviction petitioner would still have no right to appeal that decision, even if he had sought an appeal from the post-conviction court's

[4] In *Zagorski v. State*, cited by Dotson, the petitioner did not seek appellate review of the denial of prior authorization for expert funds. Instead, the petitioner argued that denial of expert funds *at trial* rendered his counsel ineffective. *See* No. 01C01-9609-CC-00397, 1997 WL 311926, at *17-19 (Tenn. Crim. App. June 6, 1997), *aff'd Zagorski v. State*, 938 S.W.3d 654 (Tenn. 1999). Therefore, *Zagorski* is irrelevant to Dotson's claims in this appeal.

prior authorization order. *See* Tenn. Sup. Ct. R. 13, § 5(e)(5) ("The determination of the [C]hief [J]ustice shall be final.").

Therefore, Dotson is in the same position as any other post-conviction capital petitioner seeking expert funds. Lack of appellate review from a Section 5(e)(5) decision does not implicate his equal protection rights.

Even if Mr. Dotson's equal protection rights were implicated, this Court would not apply, as he suggests, strict scrutiny. (*Contra* Pet's Br. at 34-38.) Strict scrutiny applies only when a classification "operates to the peculiar disadvantage of a suspect class" or "interferes with the exercise of a fundamental right." *State v. Robinson*, 29 S.W.3d 476, 481 (Tenn. 2000). "Capital defendants are not a suspect class for equal protection analysis[.]" *State v. Dellinger*, 79 S.W.3d 458, 480 n.4 (Tenn. 2002). Moreover, there is no fundamental right to an appeal in capital post-conviction proceedings. *See Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005) ("[P]ost-conviction procedures are not constitutionally required . . . ."); *Evitts*, 469 U.S. at 393 (no constitutional right to an appeal).

At most, rational-basis review would apply to an equal protection challenge. Under rational-basis review, the judicial inquiry into distinction between groups "is limited to whether the classifications have a reasonable relationship to a legitimate state interest." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (quoting *Tenn. Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)). "[I]f some reasonable basis can be found for the classification, or if any state of facts may be

reasonably conceived justify it, the classification will be upheld." *Id.* The lack of an appellate remedy easily clears that hurdle.

First, both the State and criminal defendants have vested interest in the timely resolution of criminal litigation. *State v. Davis*, 466 S.W.3d 49, 78-80 (Tenn. 2015) (Lee, J. concurring); *see also State v. Lowe*, No. E2017-00435-CCA-R3-CD, 2018 WL 3323757, at *10 (Tenn. Crim. App. July 6, 2018) (stating "the timely resolution of criminal cases is essential to the pursuit of justice" when discussing delay between filing and hearing a motion), *perm. app. denied* (Tenn. Nov. 15, 2018). The absence of an appeal from an administrative funding decision in a post-conviction proceeding reasonably promotes that interest. *C.f. Fox v. Vice*, 563 U.S. 826, 838 (2011) (emphasizing "that the determination of fees 'should not result in a second major litigation.'")

Second, the Director and the Chief Justice are tasked with administering the state court system's accounts. Tenn. Code Ann. § 16-3-803(c)(2). The statutory authorization for expert services is not a "blank check," *Owens*, 908 S.W.2d at 928, and Rule 13 directs that the Director and Chief Justice "shall maintain uniformity as to the rates paid" to experts provided to indigent parties. Tenn. Sup. Ct. R. 13, § 5(d)(1). Therefore, the Director and Chief Justice have an inherent obligation to safeguard and distribute the limited taxpayer funds in such a way that promotes fair litigation for all criminal litigants. *See United States v. Smith*, 76 F. Supp. 2d 767, 773 (S.D. Tex. 1999) ("the court takes seriously its inherent obligation to safeguard the limited funds, supplied by the American tax payers," available under the Criminal Justice Act.).

Dotson asserts that such financial considerations must fall when compared to his "liberty interest." (Pet's Br. at 38.) But rational-basis review does not compare and weigh two competing interests. Instead, courts only look to "whether the classification have a reasonable relationship to a legitimate state interest." *Tester*, 879 S.W.2d at 828. Dotson's arguments to the contrary are without merit.

3. The open courts provision of the Tennessee Constitution does not require appellate review of the Director's and the Chief Justice's decision.

Similarly, the Open Courts Clause of the Tennessee Constitution does not require an appellate remedy from Rule 13's review. The Legislature has merely granted capital post-conviction defendants the opportunity to seek expert funding in the post-conviction court, and it has not mandated any appellate review of the Director's or the Chief Justice's decisions.

The Tennessee Constitution guarantees "[t]hat all courts shall be open; and every man, for an injury done him in his lands, goods, persons or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Tenn. Const. art. I, § 17; *see also* Tenn. Sup. Ct. R. 11(VII)(b) ("all courts shall be open and available for the transaction of business"). The Open Courts Clause is a mandate on the judiciary, not a limitation on the Legislature. *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (citing *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1920)).

The Court of Criminal Appeals' conclusion that Dotson lacked a right of appeal did not violate the Open Courts Clause because the

Legislature has nowhere granted a right of appeal from any administrative decision regarding funding. *See* Tenn. Code Ann. § 40-14-207(b). Dotson appears to rely entirely on the right of appeal in the Post-Conviction Procedure Act. (Pet's Br. at 33); *see* Tenn. Code Ann. § 40-30-116. But as explained above, the Post-Conviction Procedure Act does not provide for an appeal from the Director's and the Chief Justice's treatment of a post-conviction court's prior authorization order. Therefore, the Open Courts Clause did not require the Court of Criminal Appeals to consider Dotson's arguments.[5] And to the extent Dotson argues that notions of fundamental fairness should grant him an appeal, (Pet's Br. at 31-33), due process does not, as already discussed, require any such procedure. *Evitts*, 469 U.S. at 393 (there is no constitutional right to an appeal).

[5] It appears that Dotson, instead of addressing how lack of an appeal implicates the Open Courts Clause, argues that the Director's and Chief Justice's Rule 13 review violates the separation of powers. (Pet's Br. at 31-33.) But any argument regarding the separation of powers is outside the scope of the issue presented for review. *See* Tenn. R. App. P. 27(a)(4) (issues presented for review must be included in the statement of the issues); *Dotson v. State*, No. W2019-01059-SC-R11-PD, Order (Tenn. Oct. 25, 2022) (designating the issue for review in this appeal). Regardless, he relies entirely on the right of appeal in the Post-Conviction Procedure Act that, as discussed, does not apply to the Director's or the Chief Justice's review.

4. Absence of appellate remedy does not violate Dotson's right to a full and fair hearing, and Dotson has provided no argument to the contrary.

Dotson offers no argument that the absence of an appellate remedy from the Section 5(e)(5) review of an expert funding request violates his right to a full and fair post-conviction hearing. (*See* Pet's Br. at 27-38.) Instead, his argument is limited to a meritless claim that he was entitled to expert assistance at the post-conviction hearing.[6] (Pet's Br. at 48-53.) Consequently, Dotson has waived this Court's consideration of the issue, and it may not be reviewed for plain error. *See* Tenn. R. App. P. 27(a)(7) (brief of the appellant "shall contain" an argument for each issue, including citations to authority); *Donovan v. Hastings*, 652 S.W.3d 1, 9 (Tenn. 2022) (issue may be deemed waived when brief fails to include argument satisfying the requirements of Tenn. R. App. P. 27(a)(7)). Further, the plain error doctrine does not apply to post-conviction proceedings, and waiver precludes review of the issue. *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020).

Waiver notwithstanding, the absence of appellate review from the Director's and the Chief Justice's decision had no impact on Dotson's right to a full and fair hearing because Dotson was not entitled to expert assistance in the post-conviction proceedings. Dotson incorrectly relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985), to argue he had a due process right to present expert testimony at the post-conviction hearing. *See Ake*, 470 U.S. at 83 (capital defendants have a constitutional right to

[6] As detailed in Section II of this brief, Dotson's claim is outside the scope of this appeal.

assistance from competent psychiatrist at trial if sanity at the time of the offense is at issue.) *Ake* does not require expert funding in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987); *Teague v. State*, 777 S.W.2d 915, 927 (Tenn. Crim. App. 1988), *overruled on other grounds*, *State v. Mixon*, 983 S.W.2d 661, 671 (Tenn. 1999). Instead, due process only guarantees expert assistance "in cases where the defendant is seeking constitutionally-entitled judicial review." *Hugueley*, 2011 WL 2361824, at *24. Criminal defendants have no constitutional right to post-conviction review, so *Ake* does not apply in post-conviction proceedings. *See Pike*, 164 S.W.3d at 262-64; *Hugueley*, 2011 WL 2361824, at *24.

Instead, all that is required for a "full and fair" post-conviction hearing is an evidentiary hearing where the petitioner is afforded an opportunity to present evidence and argument in compliance with the procedures established by state rules and statutes. *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995); *see also Pike*, 164 S.W.3d at 262. Capital post-conviction petitioners are only entitled to *request* funding for expert services, but they are not guaranteed grant of that funding. *See* Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13, § 5. Further, no criminal defendant, at any stage of prosecution, is entitled to an expert of his choosing. *Ake*, 470 U.S. at 83; *State v. Smith*, 857 S.W.2d 1, 12 (Tenn. 1993).

Therefore, Dotson's claim that he was entitled to assistance from his chosen experts at the post-conviction hearing is without merit. Indeed, Dotson received his full and fair hearing, where the post-conviction court, the Director, and the Chief Justice assiduously followed

the procedures established by state statutes and rules. *See House*, 911 S.W.2d, at 711. Absence of an appeal from the Director's and the Chief Justice's decision regarding funding for experts did not affect Dotson's right to a full and fair post-conviction hearing.

5. Dotson has made no argument to show that absence of an appellate remedy implicates the prohibition against cruel and unusual punishment.

Similarly, Dotson offers no argument to show how the absence of an appellate remedy from Rule 13's review process the prohibition against cruel and unusual punishment. (*See* Pet's Br. at 27-38.)[7] His failure to address the absence of an appellate review makes a response "well nigh an impossibility." *See State v. Keen*, 926 S.W.3d 727, 743 (Tenn. 1994) (criticizing a defendant's "generalized" attack on capital appellate review process). Therefore, this Court should treat the issue as waived. *See* Tenn. R. App. P. 27(a)(7); *Donovan*, 652 S.W.3d at 9. Further, plain error does not apply in post-conviction proceedings to allow review of the issue. *Holland*, 610 S.W.3d at 458.

Nevertheless, lack of appellate review from the Director's and the Chief Justice's administrative funding decision in a collateral review proceeding does not implicate the prohibition against cruel and unusual punishment. The state and federal constitutions prohibit punishments which are "inhuman and barbarous" or "excessive [in] length or severity,

[7] Instead, Dotson's brief is limited to whether the Director's and the Chief Justice's review, itself, violates the prohibition against cruel and unusual punishment. (Pet's Br. at 53-54.) As detailed in Section II of this brief, such claim is outside the scope of this Court's review.

[or] greatly disproportionate to the offenses charged." *State v. Keen*, 31 S.W.3d 196, 215 (Tenn. 2000); *see also* U.S. Const. amend VIII; Tenn. Const. art. I, § 16. Some procedural safeguards protect against the imposition of constitutionally suspect punishments. Those "procedural aspects of the Eighth Amendment" are generally focused on two things: "(1) issues related to the channeling of the jury's discretion to impose death . . . ; and (2) issues related to the notion of individualized sentencing and consideration of mitigating evidence." *Keen*, 31 S.W.3d at 216 (internal citations omitted). Further, direct appellate review of a capital jury's imposition of the death penalty acts as an "additional safeguard against arbitrariness and caprice." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). But appellate review of a collateral attack on a capital conviction does not carry the same constitutional import. *See Abdur'Rahman v. Parker*, 558 S.W.3d 606, 619 (Tenn. 2018) ("*Gregg* provides no support for the Plaintiffs' argument that the expedited appellate review in this case, involving a separate collateral attack upon the Plaintiffs' death sentences, has denied them due process.").

Dotson has offered no explanation of how lack of an appeal from the Rule 13 review implicates the prohibition against cruel and unusual punishment. He cites to no authority, and the State has found none, to show that prohibition against cruel and unusual punishment requires meaningful appellate review of an interlocutory administrative funding decision in a collateral review proceeding. Indeed, this Court's precedent suggests that such appellate review is not constitutionally required. *See id.*; *Pike*, 164 S.W.3d at 262-64 (post-conviction procedures, including appellate review, are not constitutionally required).

Further, Dotson received meaningful appellate review of his death sentence on direct appeal, which served as a safeguard against arbitrariness and capriciousness. *State v. Dotson*, 450 S.W.3d 1, 77-84 (Tenn. 2014); *see also Gregg*, 428 U.S. at 195 (meaningful appellate review of sentencing safeguard against unconstitutionally arbitrary and capricious sentence). He is not constitutionally entitled to any further post-conviction collateral review of that sentence, including appeal of interlocutory funding decisions. *See Pike*, 164 S.W.3d at 262-64. Absence of an appeal, here, does not implicate the prohibition against cruel and unusual punishment.

II. Mr. Dotson's Arguments Challenging Rule 13's Procedure and the Substance of the Director's and the Chief Justice's Review Are Beyond the Scope of Review.

Dotson argues extensively that that the Director's and the Chief Justice's review, itself, violates his constitutional rights. (Pet's Br. at 39-54.) But his Rule 11 application limited the issue presented for review to lack of an appellate remedy from their decision. Therefore, the Director's and the Chief Justice's authority to review funding requests and the substance of that review are outside the scope of this appeal and thus are waived. Even if this Court were inclined to address their actions under Rule 13, the record is inadequate to allow such review, and Dotson's arguments lack merit.

A. The propriety and substance of the Director's and the Chief Justice's review of funding requests is outside the scope of this appeal.

This Court's review is limited to the issues raised in the application for permission to appeal. *State v. Linville*, 647 S.W.3d 344, 353 (Tenn. 2022); *TWB Architects, Inc. v. Braxton*, 578 S.W.3d 879, 887 (Tenn. 2019). A party seeking relief from this Court must include a statement of the issues presented in the Rule 11 application and the brief. *Hodge v. Craig*, 382 S.W.3d 325, 334-35 (Tenn. 2012). "The issues should be framed as specifically as the nature of the error will permit in order to avoid any potential risk of waiver." *Id.* at 335. Issues argued in the application or brief but not presented in the statement of the issues may be deemed waived. *See id.*

The only issue presented in Dotson's Rule 11 application was limited to whether *lack of an appellate remedy* from the Director's and

the Chief Justice's decisions violated various constitutional rights. (Pet's R. 11 App. at 1.) The order granting permission to appeal limited review to that same issue. *Dotson v. State*, No. W2019-01059-SC-R3-PD, Order (Tenn. Oct. 25, 2022).

Dotson's arguments challenging the substantive decision of the Director and the Chief Justice or their authority to render that decision, (Pet's. Br. 39-54), are thus outside the scope of this appeal and therefore waived. *See Linville*, 647 S.W.3d at 353 (review limited to issues presented in the Rule 11 application). Nor should this Court review these waived claims under plain-error review. The plain-error doctrine does not apply in post-conviction proceedings and will not allow review of an issue that would otherwise be waived. *Holland*, 610 S.W.3d at 458.

In short, this Court should not address Dotson's arguments challenging the Director's and the Chief Justice's authority to review prior authorization for expert funds or the substance of their decision regarding Dotson's funding requests.

B. The record is inadequate to allow review of the Director's and the Chief Justice's decision for three of the four fee claims.

Even if this Court were inclined to reach Dotson's arguments regarding the Director's and the Chief Justice's decision, the record is inadequate to address his claims. Notably, Dotson presents an as-applied constitutional challenge to the Director's and the Chief Justice's alleged denial of funding for expert services and the procedures they used to reach their decision. But the record before this Court will not allow such review.

First, the record does not contain any evidence of the Director's and the Chief Justice's decision regarding three of Dotson's requests. To the extent that Dotson challenges the denial of funding for those three experts, the record must first show that the funding was, in fact, denied.[8] Dotson bore the burden of creating an appellate record that adequately reflected what occurred below related to the issues he wished to raise on appeal, and he failed to do so. *See* Tenn. R. App. P. 24(b). This Court cannot review the effects of the Director's and the Chief Justice's decision when the record does not contain evidence of what that decision was.

Second, the minimal record presented shows the post-conviction court lacked authority to grant prior authorization for two of Dotson's expert funding requests, including for Dr. Agharkar, the only request whose denial is detailed in the record. Regarding Dr. Agharkar, Rule 13 established a maximum $250 hourly rate for psychiatrists. Tenn. Sup. Ct. R. 13, § 5(d)(1). The post-conviction court had no authority to grant a $350 hourly rate for Dr. Agharkar. *See Petition of Gant*, 937 S.W.3d at 846 (trial courts lack authority to grant funding at hourly rates that exceed rates set out in Rule 13); *c.f. Short*, 976 S.W.2d at 93 (Tenn. 1998)

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[8] Dotson's counsel announced, immediately before the post-conviction hearing, that the Director had "denied" his requests related to Drs. Merikangas, Leo, and Walker, but they made no effort to introduce evidence supporting that assertion. Arguments and statements from counsel are not evidence. *See Trotter v. State*, 508 S.W.2d 808, 809 (Tenn. Crim. App. 1974). Further, this Court has already concluded that documents presented after the post-conviction court denied relief are not properly includable in the appellate record. *Dotson v. State*, No. W2019-01059-SC-R11-PD, Order (Tenn. Feb. 2, 2023).

(only contemplating expert witness attorney exceeding fees for court-appointed counsel when Rule 13 did not enumerate an hourly rate for attorneys acting as experts). Regarding Dr. Walker, section 5 of Rule 13 only permits funding for expert services. *See* Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13, § 5(a)(1). It does not authorize funding for fact witnesses. (*See* Sealed Sept. 20, 2018, Dr. Walker Motion at 10 (acknowledging that Dr. Walker would be called as a fact witness at the post-conviction hearing)).

C. Alternatively, Dotson's challenges to Rule 13's procedures are without merit.

Dotson argues that the post-conviction court granted him a right to expert funding, and the Director and Chief Justice improperly exercised judicial power and deprived him of due process when they conducted the review required by Rule 13, section 5(e). (Pet's Br. at 39-42, 43-46.) He is incorrect.

The post-conviction court's initial order does not convey a right to expert funding. Instead, it is merely a "prior authorization" of funds, which is subject to further administrative review. Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13, § 5(a)(1). The Legislature has stated that funds may only be distributed pursuant to rules established by this Court. Tenn. Code Ann. § 40-14-206. Therefore, because the post-conviction court's prior authorization order is subject to further review, it does not create a property interest or entitlement to expert funds. *See Rosenfield*, 468 F. Supp. 2d at 811 ("The CJA's discretionary language and lack of particularized criteria mean that appointed attorneys have

no entitlement to the payments they request and therefore no property interest in any particular level of payment.").

Significantly, Dotson himself had no entitlement to the expert funds. Instead, any funds granted would have been paid directly to the individual or entity providing the services. Tenn. Sup. Ct. R. 13, § 6(b)(3). Therefore, his alleged injury rests solely on a claim that he could not call his chosen expert witnesses at the post-conviction hearing. (Pet's Br. at 48-54.) But, as discussed above, Dotson was not entitled to any expert assistance in the post-conviction proceedings, *see Finley*, 481 U.S. at 554-55; *Teague*, 777 S.W.2d at 927, and he was never entitled to an expert witness of his choosing. *Ake*, 470 U.S. at 83; *Smith*, 857 S.W.2d at 12.

Moreover, the Director and the Chief Justice conduct an administrative, not substantive, review. As discussed in Section I, the nonadversarial nature of Rule 13's procedure demonstrates that decisions made under the rule are purely administrative. *See Bloomer*, 150 F.3d at 148; *In re Baker*, 639 F.2d at 927 ("These nonadversarial procedures established by the CJA convince us that the district judge's certification of attorneys' fees is an administrative act."). Similar to the chief judge's review of funding requests under the federal Criminal Justice Act, the Director's and the Chief Justice's Rule 13 review is a purely administrative act. *See Marcum LLP*, 753 F.3d at 1384 (collecting cases which hold that the chief judge's review of fee claims under the Criminal Justice Act is "an administrative rather than judicial act.") Due process does not require the Director or the Chief Justice to provide Dotson with notice or an opportunity to be heard during that administrative review. *See State v. Garrard*, 693 S.W.2d 921, 922 (Tenn.

Crim. App. 1985) (the Chief Justice may perform purely administrative functions without any constitutional deprivation to a criminal defendant); (*contra* Pet's Br. at 43-47).

Dotson received a full and fair post-conviction hearing. He is not entitled to further relief.

CONCLUSION

The judgment of the Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Courtney N. Orr, counsel for the State of Tennessee, hereby certify pursuant to Tenn. R. App. P. 46, §3, Rule 3.02, that the number of words contained in the foregoing brief is 7,755. 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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