****CAPITAL CASE****

No.

IN THE
Supreme Court of the United States

JESSIE DOTSON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

This case concerns a constitutional loophole that this Court's jurisprudence has steadfastly avoided. In *Douglas v. California*, 372 U.S. 353 (1963), this Court recognized that an indigent defendant is entitled to counsel in his or her first appeal as of right. In *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court held that due process mandates that an indigent defendant be afforded the right to effective assistance of counsel on direct appeal. This Court demarcated the limits of these rights in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and held that the right to counsel does not extend to collateral proceedings.

This Court, however, has repeatedly recognized that many states channel ineffective assistance of counsel claims to collateral proceedings, where the defendant has no right to counsel. *Martinez v. Ryan*, 566 U.S. 1, 12–13 (2012); *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). As a result, if a defendant's post-conviction counsel fails to raise and develop a claim, it will "deprive a defendant of any review of that claim at all." *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). In spite of this recognition, a nagging question remains as to whether a prisoner is entitled to effective assistance of counsel when his first opportunity to raise such a claim must occur in a collateral proceeding.

The first question presented is:

1. **Does a prisoner have a right to effective counsel in collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial?**

The clear command of this Court's jurisprudence is that state prisoners must primarily develop and litigate constitutional claims in state court. *See Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States.") (cleaned up); *Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[S]tate courts are the principal forum for asserting constitutional challenges to state convictions."); *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.").

At the same time, this Court has long held that upon sufficient showing, a state, "at a minimum" must provide a defendant with expert assistance to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). The holding in *Ake* recognizes the fundamental reality that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Richter*, 562 U.S. at 106. But, as described above, prisoners do not have a right to expert assistance in collateral proceedings, even though these proceedings often offer the sole opportunity to raise an ineffective assistance of counsel claim.

The second question presented is:

2) Does a prisoner have a due process right to expert assistance in a collateral proceeding that offers the first opportunity to raise an ineffective assistance of counsel claim?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, petitioner-appellant below, is Jessie Dotson.

Respondent, respondent-appellee below, is the State of Tennessee.

LIST OF PROCEEDINGS

1. *State v. Dotson*, 08-07688 (Shelby Cty. Crim Ct. Oct. 12, 2010).
2. *State v. Dotson*, No. W2011-00815-CCA-R3DD, 2013 WL 4728679 (Tenn. Crim. App. June 25, 2013).
3. *State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014).
4. *Dotson v. Tennessee*, 575 U.S. 906 (2015).
5. *Dotson v. State*, 08-07688 (Shelby Cty. Crim. Ct. May 16, 2019).
6. *Dotson v. State*, No. W201901059CCAR3PD, 2022 WL 860414 (Tenn. Crim. App. Mar. 23, 2022.
7. *Dotson v. State*, 673 S.W.3d 204 (Tenn. 2023).

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INTRODUCTION

This petition concerns a constitutional loophole. As this Court has repeatedly recognized, many states channel ineffective assistance of counsel (IAC) claims to state collateral proceedings. Because such proceedings are deemed "collateral," prisoners are not entitled to counsel, let alone effective assistance of counsel. Furthermore, by situating such proceedings outside of the trial and direct appeal process, states insulate themselves from the constitutional imperative to provide expert assistance. This Court has been adamant that state courts are primarily responsible for ensuring the rights of criminal defendants and that respect for federalism and comity is essential in the criminal appellate process. Nonetheless, the reality is that state collateral proceedings most times serve as the sole forum where a criminal defendant may receive a merits ruling on an IAC claim. Therein lies the dilemma presented by this case.

Jessie Dotson was expected to challenge the performance of his trial counsel without effective assistance of counsel or the assistance of experts. His trial counsel called a single witness in his capital sentencing hearing despite abundant red flags in Mr. Dotson's life history. Trial counsel failed to preserve a video recording of Mr. Dotson's purported confession, which would serve as the primary evidence against him. Numerous claims presented on direct appeal were reviewed for plain error only because of counsel's deficient performance. And while his state post-conviction counsel raised several IAC claims in an amended petition, counsel failed to offer *any* evidence to support the claims raised. By asserting claims without evidence in support, post-conviction counsel doomed the claims in state court and also insulated them from habeas review. *See Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J.

dissenting from the denial of certiorari). ("A claim without any evidence to support it might as well be no claim at all.").

Although Tennessee has a statutory mechanism to provide experts in capital post-conviction matters, Mr. Dotson was denied expert assistance to develop his ineffective assistance of counsel claims in state court. That denial did not occur because the post-conviction court found that such assistance was unnecessary. To the contrary, the post-conviction court specifically found that such assistance was necessary to vindicate his constitutional rights. Instead, he was denied by the director of the Tennessee Administrative Office of the Courts (AOC) and the Chief Justice of the Tennessee Supreme Court. This denial had nothing to do with the merits of Mr. Dotson's expert request. In fact, the Chief Justice conducted no substantiative review and only denied the funding as a matter of budgetary restraint. Mr. Dotson was denied funding without notice, without an appellate process, and against a specific finding that such assistance was necessary to protect his constitutional rights.

These twin issues—a prisoner's right to assistance of counsel in collateral proceedings and a prisoner's right to expert assistance in such proceedings—stems from the same constitutional loophole created by states' channeling IAC claims into collateral proceedings. In this case, Mr. Dotson was denied a meaningful opportunity raise and litigate his claims. This was first caused by his post-conviction counsel's utter failure to muster evidence in support of multiple claims. His fate was further doomed by the State of Tennessee's refusal to provide Mr. Dotson expert assistance to develop his claims. This petition demonstrates that without a guarantee of effective counsel—and the tools such as experts necessary to perform effectively—violations of

prisoners' Sixth Amendment rights will evade review. The Constitution demands more.

OPINIONS AND ORDERS BELOW

The opinion of the Tennessee Supreme Court is published. *Dotson v. State*, 673 S.W.3d 204 (Tenn. 2023). The Tennessee Court of Criminal Appeals opinion affirming denial of Mr. Dotson's petition for post-conviction relief is unreported. *Dotson v. State*, No. W201901059CCAR3PD, 2022 WL 860414, *1 (Tenn. Crim. App. Mar. 23, 2022). The post-conviction court denied Petitioner's petition for post-conviction relief on May 16, 2019. *Dotson v. State*, 08-07688 (Shelby Cty. Crim. Ct. May 16, 2019).

JURISDICTION

The Tennessee Supreme Court entered judgment on July 7, 2023. *Dotson*, 673 S.W.3d at 209. Pursuant to this Court's September 28, 2023, Order, this Petition is due on December 4, 2023. This petition is timely filed. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend XIV, § 1

STATEMENT OF THE CASE

Jessie Dotson was convicted of six counts of first-degree murder. *State v. Dotson*, 450 S.W.3d 1, 11 (Tenn. 2014), *cert. denied*, *Dotson v. Tennessee*, 575 U.S. 906 (2015). At the end of the penalty phase, Mr. Dotson was sentenced to death. *Id.* He was also convicted of three counts of attempted first-degree murder, and the trial court imposed consecutive, 40-year sentences as to each count. *Id.* Mr. Dotson's convictions and sentences were affirmed on direct appeal. *Id.* at 12. Mr. Dotson filed a timely petition for post-conviction relief. *Dotson v. State*, No. W201901059CCAR3PD, 2022 WL 860414, at *1 (Tenn. Crim. App. Mar. 23, 2022). The trial court denied the petition, and the Tennessee Court of Criminal Appeals affirmed. *Id.*

The Tennessee Supreme Court granted permission to appeal and articulated the following questions for review, which are the subject of this petition:

> [W]hether the provisions of Rule 13 for prior approval review are unconstitutional, as applied; whether the Petitioner has been unconstitutionally denied appellate review of the denial of expert funds; and whether the Petitioner has been deprived of his statutory right to a full and fair post-conviction hearing due to the denial of expert funds.

Dotson, 673 S.W.3d at 209.[1]

At issue was Tennessee Supreme Court Rule 13. That rule provides that in capital post-conviction matters the post-conviction court "may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected."

[1] *See id.* at 210, n.2 (rejecting State's argument that "Petitioner's arguments challenging Rule 13 and the authority of the AOC Director and the Chief Justice to deny prior approval of expert funds [were] waived").

Tenn. S. Ct. R. 13(5)(a)(1); *see also* Tenn. Code Ann. § 40-14-207; *Owens v. State*, 908 S.W.2d 923, 928 (Tenn. 1995). The rule permits expenditures up to $25,000 for capital post-conviction petitioners but that cap may be exceeded upon a finding of extraordinary circumstances by the post-conviction court. Tenn. S. Ct. R. 13(5)(d)(5).

Between March 2017 and September 2018, Mr. Dotson moved *ex parte* for funding for four experts: Dr. Bhushan S. Agharkar, a psychiatrist, Dr. James R. Merikangas, a neurologist, Dr. Richard Leo, a psychologist and false confession expert, and Dr. James S. Walker, a neuropsychologist. *Dotson*, 673 S.W.3d at 213–14. The post-conviction court found that the requisites of Rule 13 had been satisfied and granted Mr. Dotson's motions. *Id.* Additionally, the post-conviction court found that the case presented extraordinary circumstances and authorized Mr. Dotson to exceed the $25,000 cap on expert assistance. *Id.*

These orders were forwarded to the director of the AOC for approval. With respect to the request for funding for Dr. Agharkar, the AOC reduced the allowable rate from $350 per hour to $250 per hour, consistent with the rates set in Rule 13. *Id.* The Chief Justice concurred in the reduction. *Id.* As to the other three orders, the Chief Justice summarily denied funding. *Id.*

Mr. Dotson raised numerous challenges to Rule 13 below, which were uniformly rejected by the Tennessee Supreme Court. First, the court below rejected Mr. Dotson's claim that the AOC director and the Chief Justice,[2] acting alone, were not authorized to exercise judicial authority over the post-conviction court's order. In doing so, the Court held that Rule 13 does not authorize substantive review of the

[2] According to the Tennessee Supreme Court, when the Chief Justice is overseeing funding requests, he acts in an administrative capacity with no judicial function.

post-conviction court's order. *Id.* at 215. In the view of the Tennessee Supreme Court, the AOC director and Chief Justice merely made an "administrative funding decision." *Id.* The court held "[The Tennessee Supreme Court], through the AOC Director, has to efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases. Rule 13, section 6(b)(2) requires the AOC Director to give due consideration to state revenues when deciding compensation and reimbursement claims." *Id.*

Second, the court below held the lack of notice, a hearing, or any discernable standard was not a violation of due process. *Id.* at 217. The court found that Mr. Dotson did not have a constitutionally protected interest in the Rule 13 funding and therefore typical due process protections did not apply to the funding decision. *Id.* ("[U]unlike the financial assistance benefits in *Goldberg* [*v. Kelly*, 397 U.S. 254 (1970)], our General Assembly makes a finite appropriation of these indigent funds, requiring administration funding decisions to be made."). It reasoned that "[b]ecause the Petitioner cannot establish a constitutionally protected right, he cannot establish that the prior approval provisions of Rule 13 deny him procedural due process." *Id.*

Finally, the court held that the absence of any appellate remedy for the denial by the AOC director and the Chief Justice did not raise a constitutional due process problem. *Id.* at 222. The court reasoned that "[e]ven though there is no review of the reasons for the administrative funding decisions, the effects of those decisions are subject to review." *Id* at 221. In essence, the court below held "[a] full and fair hearing requires only 'the opportunity to present proof and argument on the petition for post-conviction relief.'" *Id.* at 222 (citing *House v. State*, 911 S.W.2d 705, 714 (Tenn. 1995));

but see House v. Bell, 547 U.S. 518, 522 (2006) (holding that House had "made the stringent showing" of innocence to excuse procedural default).

Of the appellate claims Mr. Dotson raised in post-conviction, the Tennessee Supreme Court only reviewed those regarding the constitutionality of Rule 13. All other claims were dismissed by the Tennessee Court of Criminal Appeals. *Dotson*, 2022 WL 860414, at *1. A startingly number of claims raised in Mr. Dotson's post-conviction petition were deemed waived, utterly unsupported by evidence introduced at his post-conviction hearing, or otherwise bungled. *See id.* at *37 (finding petitioner's IAC claim regarding the failure to challenge the introduction of his statement on Fifth Amendment grounds had "offered no basis in his petition to support the claim"); *id.* at *38 (denying Mr. Dotson's IAC claim that trial counsel failed to challenge a coerced confession "[g]iven the lack of evidence presented by the Petitioner at the post-conviction hearing."); *id.* at 39 (denying Mr. Dotson's IAC claim regarding his mother's statement because "the Petitioner did not present any additional proof"); *id.* at *41 (finding that the broadly pled IAC claim regarding the destruction of evidence claim was narrowed because "[t]he only evidence presented at the post-conviction hearing [was] trial counsel's failure to request the jury instruction"); *id.* at *48 (denying that Mr. Dotson's IAC claim regarding impeachment evidence of the sole eyewitness because he "waived this ground for relief by offering no other argument or citation to authorities in support thereof.").[3]

[3] Tennessee presently offers no forum by which the ineffective assistance of post-conviction counsel may be reviewed. Previously, such ineffective assistance claims could be reviewed pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), in federal habeas proceedings. The application of *Shinn v. Ramirez*, 596 U.S. 366 (2022), lays bare the truth that without so called "*Martinez* hearings" there is simply no forum, state or federal, to meaningfully review post-conviction counsel's performance.

While this list of post-conviction counsel's failure to investigate and present evidence in support of his claims is by no means exhaustive, it is evident that post-conviction counsel managed to waive, narrow, or fail to substantiate numerous claims. This is strong prima facie evidence of post-conviction counsel's ineffectiveness and counsel's failures certainly doomed Mr. Dotson's hopes for post-conviction relief.

REASONS FOR GRANTING THE WRIT

Many states, including Tennessee, channel IAC claims to collateral proceedings. *Trevino*, 569 U.S. at 422; *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014); *State v. Blackmon*, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001).[4] This feature of state law results in a vexing problem presented in this case. A criminal defendant has no constitutional right to counsel or expert assistance in collateral proceedings. Yet, as this court has observed, if post-conviction counsel fails to raise an IAC claim in collateral proceedings, that will "deprive a defendant of any review of that claim at all." *Trevino*, 569 U.S. at 423. Accordingly, in these states, collateral proceedings serve as the primary or even the sole venue to raise claims of IAC, and the failure to raise a claim and properly develop almost surely means that there will be no review of the claim at all.[5]

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[4] Tennessee is a state that does not categorically preclude raising an IAC claim on direct appeal. Nonetheless, "ineffective assistance of counsel claims should normally be raised by petition for post-conviction relief." *State v. Blackmon*, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001) (cleaned up). "[T]he practice of raising ineffective assistance of counsel claims on direct appeal is fraught with peril since it is virtually impossible to demonstrate prejudice as required without an evidentiary hearing." *Id.* at 328 (cleaned up).

[5] "States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review." *Trevino*, 569 U.S. at 422. Frequently, IAC claims require appointment of a different lawyer, evidence outside the record on direct appeal, and sufficient time to investigate and develop claims in ways that are not conducive to review on direct appeal. *Id.*

A. Certiorari is warranted to resolve the persistent, unresolved issue of whether a prisoner has the right to the effective assistance of counsel in collateral proceedings that, under state law, offer the first opportunity to present an ineffective assistance of counsel claim.

This case stands at the juncture of several of this Court's criminal legal doctrines. It is black-letter law that a criminal defendant is entitled to counsel at trial. U.S. Const. amend. XI; *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). This Court has expanded this right to include the right to counsel in the first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963); *Ross v. Moffitt*, 417 U.S. 600, 618 (1974). And a criminal defendant is entitled to effective assistance of counsel on appeal, regardless that there is no constitutional right to appeals. *Evitts v. Lucey*, 469 U.S. 387, 400–01 (1985). These rights, however, cease in collateral appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

This Court's neat distinction between direct appeal and collateral proceedings is untenable in light of the fact that many states channel ineffective assistance of counsel claims into collateral proceedings. *Martinez*, 566 U.S. at 13. When state post-conviction counsel fails to raise and develop and IAC claim, it "deprive[s] a defendant of any review of that claim at all." *Trevino*, 569 U.S. at 423. Accordingly, in many states, including Tennessee, collateral proceedings serve as the primary, if not the sole, venue to raise claims of IAC, and the failure to raise a claim, and properly develop it, almost surely means that there will be no review of the claim at all.

This analysis is not new. This Court has recognized on at least three occasions that without a right to effective assistance of counsel in collateral proceedings, meritorious IAC claims may go unvindicated and claims will elude review altogether. *Trevino*, 569 U.S. at 423; *Martinez*, 566 U.S. at 13; *Coleman*, 501 U.S. at 755.

Nonetheless, when this Court has been presented with this vexing problem of constitutional law, it has declined to address the issue directly. *Id.*

The primacy of state collateral proceedings has only gained importance in light of recent holdings of this Court. *Ramirez*, 596 U.S. at 376 ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States.") (cleaned up); *Richte*r, 562 U.S. at 103 ("[S]tate courts are the principal forum for asserting constitutional challenges to state convictions."); *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."). Simply, state court proceedings are "the main event." *Coleman*, 501 U.S. at 747; *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Consider now what is implicit in this Court's jurisprudence. A prisoner must raise and develop all claims for relief in state court. The failure to do so has drastic consequences, including forfeiting the right to have *any* court consider the merits of a claim. *Ramirez*, 142 S. Ct. at 1728 (noting that federal merits review of procedurally defaulted claims will only occur in the most "extraordinary cases"). But in the realm of IAC, prisoners must raise and develop claims without the right to counsel. The prisoner is told he must not "sandbag." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). But he must navigate a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments" at this stage without the assistance of counsel. *Coleman*, 501 U.S. at 759 (Blackmun, J. dissenting). The Sixth Amendment guarantee of effective assistance of counsel in a criminal trial is a hollow farce if an individual is purportedly given that right but is denied the ability to vindicate that right for no

other reason than he was unlucky enough to have had constitutionally deficient lawyers twice or was simply denied counsel altogether.

This Court has "suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction." *Martinez*, 566 U.S. at 8 (quoting *Coleman*, 501 U.S. at 755). This Court's jurisprudence and AEDPA require prisoners to primarily look to state court to vindicate constitutional error in their cases. In light of the fact that a large number of states channel IAC claims to collateral proceedings, certiorari is warranted to ensure that meritorious IAC claims are presented to state courts, consistent with the doctrines of comity and federalism. Pursuant to Supreme Court Rule 10(c), certiorari is appropriate because this case presents an issue of constitutional law that this Court has yet to address in spite of repeated recognition of the existence of this important issue.

B. Certiorari is warranted to determine whether an indigent prisoner has a right to expert assistance in a collateral proceeding that offers the first opportunity to present an ineffective assistance of counsel claim.

This Court has also long held that in a criminal trial, upon sufficient showing, a state, "at a minimum" must provide a defendant with expert assistance to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). This now familiar rule is based in the pervasive doctrine of this Court that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76; *accord Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S.

353 (1963), *Griffin v. Illinois*, 351 U.S. 12 (1956). As with the right to counsel above, these rights end after trial and direct appeal. *See Finley*, 481 U.S. at 555. Accordingly, in states that channel IAC claims to collateral proceedings, indigent prisoners must develop and litigate such claims without a right to expert assistance.

There can be little doubt that this Court's jurisprudence—particularly in the area of capital sentencing—demonstrates that expert assistance is vital in IAC claims. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." (quoting *Richter*, 562 U.S. at 106); *Sears v. Upton*, 561 U.S. 945, 956 (2010) (finding psychological impairments compelling mitigation evidence); *Rompilla v. Beard*, 545 U.S. 374, 390–91 (2005) (finding that mental health experts would have offered compelling evidence at trial); *see also Moore v. Texas*, 581 U.S. 1, 13 (2017) (instructing that intellectual disability claims require applying the "medical community's diagnostic framework"). In the arenas of mental health, competency, and intellectual disability, there can be little doubt that lawyers lack the essential skills to meaningfully diagnose and understand these conditions, much less conduct an appropriate examination.

Frequently, IAC claims will arise that allege trial counsel was ineffective for failing to seek expert assistance or for failing to utilize such assistance effectively. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020); *Buck v. Davis*, 580 U.S. 100, 119 (2017); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 516 (2003). In such cases, expert assistance is no less important than it is at trial. Indeed, the only way to demonstrate deficient performance and prejudice is to utilize an expert to show the import of the issue at hand and demonstrate its

significance to the case. Although many IAC claims will not require expert assistance, some do. *Hinton*, 571 U.S. at 273; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).

This Court's clear command to develop claims in state court makes little sense if prisoners cannot do so. In instances where expert assistance is necessary to establish trial counsel's ineffectiveness, an indigent inmate will be denied any opportunity to do so simply because the state has channeled his IAC claim into a collateral proceeding where, under current law, the rights of *Ake* do not attach. Whether an indigent prisoner is denied expert assistance at trial or whether he is denied expert assistance to show that his counsel was ineffective, there is little practical difference. In either case, "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 U.S. at 76. There is no principled reason to conclude that this statement has any less truth just because the state has labeled a proceeding as "collateral."

Although Tennessee has a statutory system that purportedly should be adequate to protect a prisoner's rights, Mr. Dotson's case demonstrates that this system falls short. Mr. Dotson sought expert assistance under Tennessee's statutory framework, and the post-conviction court found that these services were "necessary to ensure that the constitutional rights of the defendant are properly protected." Tenn. S. Ct. R. 13(5)(a)(1); *Owens*, 908 S.W.2d at 928.

But the director of the AOC slashed the funding amount for one of Mr. Dotson's experts and Chief Justice concurred in the decision. As to the other three experts, the Chief Justice denied the assistance all together. The Tennessee Supreme Court

expressly held that the decisions made by the Chief Justice in this capacity were non-judicial and that he was not exercising any substantive review of the decision of the post-conviction court. *Dotson*, 673 S.W.3d at 215 ("As promulgator of Rule 13, it was not the Court's intent to authorize substantive review."). Rather, the Chief Justice and the director of the AOC made "an administrative funding decision" in order "to efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases." *Id.* at 215. Accordingly, the decision to deny funding offered no substantive review of the order of the post-conviction court and "[t]here is no suggestion here that the prior authorization orders [of the post-conviction court] did not comply with Rule 13." *Id.* The inescapable conclusion based on this record is that the post-conviction court made a judicial finding that expert assistance was necessary to protect Mr. Dotson's constitutional rights but that the funding was denied out of budgetary concerns.

Mr. Dotson met his burden in the post-conviction court that the experts he requested were necessary to protect his constitutional rights. *Dotson*, 673 S.W.3d at 215. The AOC director and the Chief Justice denied Mr. Dotson access to these experts, not because they found any deficiency in the finding of the post-conviction court—in fact, they conducted no substantive review of the request at all. *Id.* Rather, as a matter of budgetary restraint they thought it wise to deny these funds. According to the Tennessee Supreme Court, these decisions are not reviewable on appeal.[6] *Id.*

[6] Curiously, if the post-conviction court had denied Mr. Dotson funding for experts, that ruling would be subject to the normal appellate process. *Dotson*, 673 S.W.3d at 218; *State v. Scott*, 33 S.W.3d 746, 752–56 (Tenn. 2000).

Moreover, the court below found that Mr. Dotson was not entitled to notice or a hearing regarding the denial of these services. *Id.* at 217. Under such circumstances, the basic requirements of procedural due process were not satisfied.

"The fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267. Equally fundamental is the doctrine that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

In this case, review of the post-conviction court's prior authorization for experts was conducted without any discernible standard. With respect to the process utilized by the AOC director, the applicable rule only states that "[o]nce the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director for prior approval." Tenn. S. Ct. R. 13(5)(d)(4). With respect to the Chief Justice's authority, the rule baldly states that "[i]f 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. S. Ct. R. 13(5)(d)(5). Accordingly, the text of Rule 13 offers zero guidance of the standards by which requests for funding are evaluated. Nor is there any other apparent source of authority to guide the standard by which these expert motions are evaluated. This standardless criteria for evaluation is a quintessential violation of due process. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that

men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

Were that not enough, Rule 13 in text and application does not provide a petitioner with notice of an impending denial nor does it provide for a hearing before or after the denial. The court below dismissed this constitutional problem, reasoning that a post-conviction petitioner does not possess a property right to such funding, holding that a welfare recipient's interest in receiving benefits differs in magnitude from Mr. Dotson's interest. This conclusion misses the mark. The private interest at stake is not so much a *property* interest in indigent funding but rather Mr. Dotson's *liberty* interest in vindicating his Sixth Amendment rights. It is a drastic oversimplification to think that Mr. Dotson's interest in expert funding is a mere property interest; he is a death row inmate and unless he can prevail on such a challenge, he will be executed. As noted above, this was Mr. Dotson's sole opportunity to vindicate his Sixth Amendment rights. As such, "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). In these circumstances, Mr. Dotson's interest in collaterally attacking his sentence, quite literally, has life and death consequences, sufficient to trigger the due process protections of notice and hearing.

This Court has recognized as much. "In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent *drastic loss of liberty*, is unlawful." *Lucey*, 469 U.S. at 396

(emphasis added); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (applying heightened due process standards to capital cases). This Court's due process and equal protection doctrines commands that indigent prisoners must have "the same right to a decision on the merits of their appeal as do wealthier defendants." *Lucey*, 469 U.S. at 403. In short, once states extend a right of appeal—even if that appeal is not constitutionally mandated—its procedures must comport with due process. And, frankly, the procedural protections in capital cases dwarf the rights of indigent individuals to receive notice and hearing before termination of welfare benefits.

The Tennessee Supreme Court's decision fails to pass constitutional muster for yet another reason. The Chief Justice's decision is entirely cloaked in secrecy. Once a judicial order is forwarded to him, the system operates as a black box. No rationale for denial exists. It is opaque as to what considerations will merit a favorable decision. As this Court noted more than half a century ago, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951). So too here.

This Court has consistently recognized the primacy of state collateral proceedings in raising and developing IAC claims and has expressly noted that such proceedings are defendants' first and nearly always only opportunity to receive a merits ruling on such claims. Moreover, this Court has also recognized that in many instances a defense will necessarily require expert assistance. *Richter*, 562 U.S. at 106. These doctrines cannot be reconciled with the stark reality that such state proceedings do not offer defendants, including capital litigants, a right to experts to develop IAC claims. Certiorari is warranted as this Court's doctrines regarding the

limitations of rights under *Ake* has not kept pace other developments in criminal law, most particularly the limitations of review of such claims in federal habeas. A lack of guidance from this Court has enabled states like Tennessee to effectively deny the ability to raise and develop IAC claims at their sole opportunity to do so. This case asks that this Court to define the due process protections that are required to ensure that criminal defendants have a meaningful opportunity to vindicate their Sixth Amendment rights. The Court below defined the due process rights narrowly and found that Mr. Dotson had no due process rights at stake. As such, the court below has decided an important issue of constitutional law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Dated: December 4, 2023

Respectfully submitted,

s/Kelley J. Henry

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CERTIFICATE OF WORD COUNT

Case name: *Dotson v. Tennessee*
Title: Petition for Writ of Certiorari

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 5,307 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 4th day of December, 2023

s/Kelley J. Henry
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