

NO. 23-6174

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE DOTSON,
Petitioner,

v.

TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I

Whether this Court should overlook Dotson's waiver of the issue and overturn precedent to announce a new constitutional right to effective assistance of counsel in collateral proceedings.

II

Whether this Court should overlook Dotson's waiver of the issue and overturn precedent to announce a new constitutional right to expert assistance in collateral proceedings.

III

Whether Tennessee's administrative review of Dotson's requests for expert funds in collateral proceedings violated his rights to due process or equal protection when he had no constitutionally protected interest in expert funds, and the review process applies equally to all capital post-conviction petitioners who seek expert assistance in Tennessee.

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RULE 15.2 STATEMENT OF PROCEDURAL HISTORY

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June 25, 2013) (direct appeal from conviction and sentencing)

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Dotson v. Tennessee, 575 U.S. 906 (2015) (denying certiorari in direct appeal from conviction and sentencing)

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Order, *Dotson v. State*, No. W2017-02550-CCA-R10-PD (Tenn. Crim. App. Mar. 29, 2018) (order denying extraordinary appeal from denial of motion to vacate death sentences)

Order, *Dotson v. State*, No. W2017-02550-SC-R10-PD (Tenn. May 10, 2018) (order denying extraordinary appeal from denial of motion to vacate death sentences)

Order, *Dotson v. State*, No. 08-07688 (Shelby County Crim. Ct. May 16, 2019) (post-conviction court's order denying relief)

Dotson v. State, No. W2019-01059-CCA-R3-PD, 2022 WL 860414 (Tenn. Crim. App. Mar. 23, 2022) (appeal from the denial of post-conviction relief)

Dotson v. State, 673 S.W.3d 204 (Tenn. 2023) (appeal from denial of post-conviction relief)

OPINIONS BELOW

The Tennessee Supreme Court affirmed the denial of Dotson's request for post-conviction relief in a published opinion. *Dotson v. State*, 673 S.W.3d 204 (Tenn. 2023); (Pet's App'x. 001). The Tennessee Court of Criminal Appeals' opinion affirming the denial of post-conviction relief is unpublished but available on Westlaw. *Dotson v. State*, No. W2019-01059-CCA-R3-PD, 2022 WL 860414 (Tenn. Crim. App. Mar. 23, 2022), *aff'd* *Dotson*, 673 S.W.3d 204 (Tenn. 2023); (Pet's App'x. 020). The Shelby County Criminal Court's order denying post-conviction relief is unreported. Order, *Dotson v. State*, Case No. 08-07688 (Shelby County Crim. Ct. May 15, 2019); (Pet's App'x. 084).

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court affirmed the denial of Dotson's request for post-conviction relief on July 7, 2023. *Dotson*, 673 S.W.3d at 204. Justice Kavanaugh extended the time for filing a petition for writ of certiorari until December 4, 2023. *Dotson v. Tennessee*, No. 23-6174 (Sept. 28, 2023). Dotson filed his petition on December 4, 2023. He invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). (Pet. at 3.) But 28 U.S.C. § 1257(a) is the statute that gives this Court jurisdiction to directly review the “[f]inal judgments . . . rendered by the highest court of a State.”

CONSTITUTIONAL PROVISIONS, STATUTE, AND COURT RULE INVOLVED

Constitutional Provisions

The Sixth Amendment to the United States Constitution states, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to . . . have the [a]ssistance of [c]ounsel for his defense.”

The Fifth Amendment to the United States Constitution provides, in pertinent part, “nor shall any person . . . be deprived of life, liberty, or property, without the due process of law[.]”

The Fourteenth Amendment to the United States Constitution, § 1 states, in pertinent part, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Statute

Tenn. Code Ann. § 40-14-207(b) allows for indigent capital defendants to request funding for expert assistance in their defense, and provides:

In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, the court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure the constitutional rights of the defendant are properly protected. If that determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the Court. The authorization shall be evidenced by a signed order of the court. The order 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.

Court Rule

To effectuate section 40-14-207(b), the Tennessee Supreme Court promulgated Tenn. Sup. Ct. R. 13, § 5, which, in part, sets out the procedure for review and award of expert services funding to indigent capital prisoners seeking post-conviction relief. The Rule sets maximum hourly rates for certain experts, including a maximum \$250 rate for psychiatrists. Tenn. Sup. R. 13, § 5(d)(1).

Additionally, in post-conviction capital cases, “a trial court shall not authorize more than *a total* of \$25,000 for services of *all* experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.” Tenn. Sup. Ct. R. 13, § 5(d)(5).

STATEMENT OF THE CASE

I. Dotson's Crimes and Confession

In March 2008, Dotson shot and killed his brother, Cecil Dotson, Sr.; his brother's fiancée, Marissa Williams; his brother's friend, Hollis Seals; and Mr. Seals's girlfriend, Shindri Roberson. *State v. Dotson*, 450 S.W.3d 1, 13 (Tenn. 2014). Dotson staged the adult victims' bodies after the shooting. *Id.* at 15-17.

Dotson also repeatedly stabbed and beat Mr. Cecil Dotson, Sr.'s, five children. *Id.* at 13. Cemario, age four, and Cecil II, age two, died from their injuries.¹ Cemario suffered blunt force trauma to his head, which fractured his skull; severe puncture-style stab wounds to his chest and torso; and severe incised wounds to his head, neck, and hand. *Id.* at 35. Cecil II suffered multiple stab wounds to his head, torso, and extremities, including seven stab wounds that penetrated his skull. *Id.* at 34.

But the other three children—C.J., age nine; Cedrick, age five; and Ceniyah, age two months—survived the attack. *Id.* at 13, 14. Cedrick sustained multiple blunt force trauma injuries to his head and face and stab wounds to his eye, forehead, and neck. *Id.* at 23. Ceniyah sustained “significant head trauma,” causing a skull fracture, and suffered stab wounds to her lower extremities. *Id.* Meanwhile, C.J. was found in a bathtub with multiple stab wounds to his torso, cuts on his neck, and a “sawzall blade” sticking out of the top of his head. *Id.* at 14, 23.

A few days later, after he had been transported to the hospital to treat his injuries, C.J. identified Dotson as the person responsible for the attacks and murders. *Id.* at 24.

Police arrested Dotson and brought him in for questioning. *Id.* Initially, Dotson suggested that gang members had committed the crimes. *Id.* But once he was confronted with C.J.'s

¹ Consistent with the Tennessee Supreme Court's opinion on direct appeal, Respondent will refer to the child victims by their first names. See *Dotson*, 450 S.W.3d at 12 n.2.

statement identifying him as the attacker, he became visibly upset and confessed to killing the victims. *Id.* at 25. He also explained that he attempted to “get rid” of the children and “stuck them” using kitchen knives because they had seen him shoot the adult victims. *Id.*

Later, at Dotson’s request, police allowed him to speak to his mother. *Id.* at 26. Dotson again confessed to her that he had killed the victims. *Id.* He explained that he had been in an argument with Mr. Cecil Dotson, Sr., and he attacked the children because they had seen him. *Id.*

II. Dotson’s Convictions, Sentences, and Direct Appeal

A Shelby County jury convicted Dotson of six counts of premeditated first-degree murder and three counts of attempted premeditated first-degree murder. *Id.* at 44. The jury then sentenced Dotson to death for each of his first-degree murder convictions. *Id.* at 47. At a later sentencing hearing, the trial court imposed consecutive 40-year sentences for each of Dotson’s attempted first-degree murder convictions, resulting in a total of six death sentences plus 120 years’ incarceration. *Id.* at 47.

The Court of Criminal Appeals affirmed Dotson’s convictions and sentences. *State v. Dotson*, No. W2011-00815-CCA-R3-DD, 2013 WL 4728679, at *89 (Tenn. Crim. App. Jun 25, 2013). On automatic review, the Tennessee Supreme Court affirmed the Court of Criminal Appeals’ decision. *State v. Dotson*, 450 S.W.3d 1, 84 (Tenn. 2014). This Court denied certiorari. *Dotson v. Tennessee*, 135 S. Ct. 1535, 1535 (2015).

III. Dotson’s Post-Conviction Proceedings

Dotson then timely filed a petition for post-conviction relief alleging, among other claims, that he received ineffective assistance of counsel during his trial, sentencing hearing, and direct appeal. *Dotson*, 2022 WL 860414, at *19. Some of those claims involved challenges to trial counsel’s use of expert witnesses. *Id.* at *53-58.

In Tennessee, capital petitioners may receive funding for expert assistance in post-conviction proceedings. Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13, § 5(a)(1). Tennessee Supreme Court Rule 13, section 5 governs the distribution of that funding. Capital petitioners must first request expert funding from the post-conviction court. Tenn. Sup. Ct. R. 13, § 5(a)(1). If that court determines that expert funding is necessary to protect the petitioner's constitutional rights, it may grant "prior authorization" for reasonable funds. *Id.* But Rule 13 imposes clear guidelines on what constitutes reasonable funds. First, the rule sets out maximum hourly rates for some services. As relevant here, the hourly rate for psychiatrists "shall not exceed" \$250. Tenn. Sup. Ct. R. 13, § 5(d)(1). Second, in capital post-conviction cases, the post-conviction court "shall not authorize more than *a total of* \$25,000 for the services of *all* experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence." Tenn. Sup. Ct. R. 13, § 5(d)(5).

Once the post-conviction court grants prior authorization, its order goes to the Director of the Tennessee Administrative Office of the Courts ("the Director") for "prior approval." Tenn. Sup. Ct. R. 13, § 5(e)(4). The Director and the Chief Justice of the Tennessee Supreme Court "shall maintain uniformity as to the rates paid individuals or entities for service provided to indigent parties." Tenn. Sup. Ct. R. 13, § 5(d)(1). If the Director denies prior approval, the request goes to the Chief Justice of the Tennessee Supreme Court for disposition and prior approval. Tenn. Sup. Ct. R. 13, § 5(e)(5). "The determination of the [C]hief [J]ustice shall be final." *Id.*

Dotson made several requests for expert funding in his post-conviction proceedings, and many of those requests were granted without limitation. *See Dotson*, 673 S.W.3d at 213 n.5. Indeed, he presented the testimony of one of those experts at his post-conviction hearing. *See*

Dotson, 2022 WL 860414, at *30-32. But four of Dotson’s requests for expert funding exceeded the maximum funding allowed by Tenn. Sup. Ct. R. 13 § 5.

First, Dotson sought funding for a psychiatrist, Dr. Bhushan S. Agharkar. *Dotson*, 673 S.W.3d at 213. The post-conviction court granted prior authorization for funds at an hourly rate of \$350. *Id.* But the Director only approved funding for \$250 per hour, consistent with the rate schedule set out in Rule 13, section 5(d). *Id.* The Chief Justice agreed with the Director’s decision. *Id.*

Second, Dotson sought funding for three other experts: Dr. James R. Merikangas (a neurologist), Dr. Richard Leo (a false confession expert), and Dr. James Walker (a neuropsychologist). *Id.* at 213-14. In all three motions requesting funds, Dotson acknowledged that each request would exceed the \$25,000 limit for expert funds in capital post-conviction cases. *Id.* For Drs. Merikangas and Leo, Dotson argued that extraordinary circumstances existed to exceed the funding limit. *Id.* Conversely, Dotson characterized Dr. Walker, who had previously been hired by trial counsel, as a fact witness. *Id.* at 214. But he claimed that Dr. Walker’s testimony would still “primarily involve matters of specialized knowledge and opinions about his neuropsychological findings and conclusions.” *Id.*

The post-conviction court granted prior authorization for each of the above three funding requests, finding for each that extraordinary circumstances existed to exceed the \$25,000 cap. *Id.* at 213-14. The record does not contain documentation of how the Director and Chief Justice treated those prior authorization orders. But Dotson’s counsel orally informed the post-conviction court that the Director and Chief Justice had denied prior approval of those funding requests. *Id.* at 214.

After the Director and Chief Justice limited prior approval for Dr. Agharkar to \$250 per hour, Dotson filed a motion to vacate his death sentences. *Dotson*, 2022 WL 860414, at *62. He claimed that Dr. Agharkar would not work for \$250 per hour, and consequently, he was “precluded from accessing expert services necessary to protect his constitutional rights.” *Id.* The post-conviction court denied Dotson’s motion. *Id.*; (Resp’s App’x. at 001-02.) Later, the post-conviction court denied Dotson’s request to seek interlocutory review of that order. *Dotson*, 2022 WL 860414, at *62.

Dotson then filed an application for an extraordinary appeal in the Tennessee Court of Criminal Appeals, which was denied. Order, *Dotson v. State*, No. W2017-02550-CCA-R10-PD (Tenn. Crim. App. Mar. 29, 2018); (Resp’s App’x. at 003-05.) The Tennessee Supreme Court also denied Dotson’s application for extraordinary appeal. Order, *Dotson v. State*, No. W2017-02550-SC-R10-PC (Tenn. May 10, 2018); (Resp’s. App’x. 006.)

Dotson did not challenge the Director’s and Chief Justice’s denial of prior approval as related to funds for Drs. Merikangas, Leo, and Walker until his appeal to the Tennessee Court of Criminal Appeals from the denial of post-conviction relief. *See Dotson*, 2022 WL 860414, at *62-65.

Following a hearing, the post-conviction court denied relief. *Id.* at *35. Dotson appealed, raising several claims of ineffective assistance of counsel at trial and on direct appeal. *Id.* at *35-62. He also challenged the Director’s and Chief Justice’s denial or partial denial of his expert funding requests. *Id.* at *62.

The Tennessee Court of Criminal Appeals concluded that the law did not permit Dotson to appeal the Director’s and Chief Justice’s prior approval funding decision as part of his appeal from

the denial of post-conviction relief. *Id.* at *65. It also concluded that it lacked jurisdiction to consider Dotson’s constitutional challenges to Tenn. Sup. Ct. Rule 13, § 5. *Id.*

IV. The Tennessee Supreme Court’s Decision

The Tennessee Supreme Court granted review solely to address Dotson’s constitutional challenges to Rule 13. *See Dotson*, 673 S.W.3d at 209. First, the Court held that the Director’s and Chief Justice’s denial of Dotson’s funding request was a proper “administrative funding decision,” not a substantive decision or an improper exercise of judicial authority. *Id.* at 215. Second, the Court concluded that this administrative denial of funds did not violate Dotson’s procedural due process rights because neither Tenn. Code Ann. § 40-14-207(b) nor did Tenn. Sup. Ct. R. 13 create a constitutional right to funding for experts in capital post-conviction proceedings. *Id.* at 216-17. Third, the Court held that due process did not require appellate review of the Director’s and Chief Justice’s administrative funding decision. *Id.* at 219-22. Fourth, the Court held that denial of an appeal from the Director’s and Chief Justice’s administrative funding decision did not implicate Dotson’s equal protection rights. *Id.* at 219.

REASONS FOR DENYING THE WRIT

The petition should be denied because Dotson's two primary claims are waived. The issues of whether indigent prisoners are entitled to effective assistance of counsel in collateral proceedings and whether indigent prisoners have a substantive due process right to expert assistance in collateral proceedings are raised for the first time in Dotson's petition and are not properly before the Court. And in any event, both of those issues have long been settled by this Court. There is no constitutional right to counsel in collateral proceedings, *Shinn v. Ramirez*, 569 U.S. 366, 368 (2022), and there is no constitutional right to expert assistance in collateral proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

Dotson has also waived his newly expanded claim that Tennessee's administrative review of expert funding requests under Tenn. Sup. Ct. R. 13 violates the due process rights of all indigent prisoners—both capital and non-capital. In state court, Dotson raised a limited due process challenge to Tenn. Sup. Ct. R. 13 only as it applied to him. And application of that rule to Dotson's funding requests did not violate constitutional guarantees of due process or equal protection because there is no constitutional right to expert assistance in collateral proceedings, and Tenn. Sup. Ct. R. 13 applies equally to all capital post-conviction petitioners in Tennessee.

I. Any Issue about the Right to Effective Counsel in Collateral Proceedings Is Both Waived and Already Settled by this Court.

A. This issue is waived.

Even if the question of whether indigent prisoners have a constitutional right to effective assistance of counsel in collateral proceedings were an open question, this case would be a poor vehicle to consider it, because that issue is waived and not properly before this Court. Dotson raises this claim for the first time in his petition for writ of certiorari; the state courts did not address or decide the issue in the post-conviction appeal. *See generally Dotson*, 673 S.W.3d 204; *Dotson*, 2022 WL 860414. “This Court has almost unfailingly refused to consider any federal-law

challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [it] ha[s] been asked to review.” *Hemphill v. New York*, 595 U.S. 140, 148 (2022) (cleaned up). Issues raised for the first time in the petition for writ of certiorari are not properly presented to this Court. *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time in the petition for writ of certiorari). Therefore, the Court should deny Dotson’s petition for writ of certiorari as it relates to this new claim.

B. This issue is already settled.

In any event, this Court’s precedent is clear: there is no constitutional right to counsel in collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Martinez v. Ryan*, 566 U.S. 1, 16-17 (2012); *Davila v. Davis*, 582 U.S. 521, 528-29 (2017); *Shinn v. Ramirez*, 569 U.S. 366, 368 (2022).

Dotson suggests that *Martinez* and its progeny leave this question unresolved. (Pet. at 10-12.) Not so. *Martinez* recognized a narrow, equitable remedy to allow habeas corpus petitioners to demonstrate cause to excuse the procedural default of claim of trial counsel ineffectiveness. But neither *Martinez* nor its progeny even hint that indigent prisoners have a constitutional right to effective assistance of counsel in collateral proceedings. Instead, the cases affirmatively state otherwise.

This Court has repeatedly held there is no constitutional right to an attorney in collateral proceedings, and therefore, a prisoner cannot claim ineffective assistance of counsel in such proceedings. *See e.g., Coleman*, 501 U.S. 752; *Finley*, 481 U.S. at 555. *Martinez* did not displace that precedent. *See Martinez*, 566 U.S. at 9 (stating it was not considering whether there was a constitutional right to effective assistance of counsel in an initial-review collateral proceeding.)

Instead, *Martinez* recognized a narrow equitable exception to federal habeas corpus procedural rules: “Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance of trial counsel.” *Id.* Initially, *Martinez* was limited to cases where prisoners were required to raise ineffective assistance of trial counsel claims in collateral proceedings. *Id.* 11-13. Later, *Martinez*’s procedural exception was extended to habeas corpus cases in states where the procedural framework does not require ineffective assistance of trial counsel claims to be raised in collateral proceedings but “makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise [such claims] on direct appeal[.]” *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

But since 2013, this Court has consistently narrowed *Martinez*’s application. In *Davila v. Davis*, this Court concluded that the *Martinez* exception applies only to show cause for procedural default of claims alleging ineffective assistance of trial counsel. *Davila*, 582 U.S. at 530-31. It cannot be used to excuse procedural default of claims alleging ineffective assistance of appellate counsel. *Id.* Further, in *Shinn v. Ramirez*, this Court concluded that, absent satisfying some “stringent” statutory requirements, a habeas corpus petitioner could not put on evidence in federal court to develop a claim that inadequate review of collateral review counsel constitutes cause to excuse procedural default. *Shinn*, 596 U.S. at 389.

In other words, “*Martinez* foreclosed any extension of its holding beyond the narrow exception to procedural default at issue in that case.” *Id.* at 387 (cleaned up). And through all of these cases, this Court has consistently reiterated “there is no constitutional right to counsel in state postconviction proceedings[.]” *Id.* at 386; *see also Davila*, 582 U.S. at 524; *Coleman*, 501 U.S. at 752.

Dotson’s claim that these cases support a holding that prisoners have a constitutional right to effective assistance of counsel during collateral review is incorrect. *Martinez* creates only a narrow exception to the federal habeas corpus procedural default rules, *see Shinn*, U.S. at 387, and then it only does so as a matter of equity, *see Davila*, 582 U.S. at 531. Therefore, Dotson’s reliance on *Martinez* is misplaced. This Court should deny certiorari as to this claim.

II. Any Issue about a Due Process Right to Expert Assistance in Collateral Proceedings Is Both Waived and Already Settled by this Court.

A. This issue is waived.

Dotson suggests that indigent prisoners have a due process right to expert assistance in collateral review proceedings, and he asks this Court to extend its holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985), to that end. (Pet. at 12-14.) But he never raised this precise claim to the Tennessee Supreme Court. Instead, he simply assumed that *Ake*’s holding applied to collateral review proceedings.² (See Resp. App’x 266-72.) He made no attempt to explain why the due process right outlined *Ake* should be expanded to collateral proceedings, and the Tennessee Supreme Court did not address the issue. *See Dotson*, 673 S.W.3d at 226 (describing as “misplaced” Dotson’s reliance on *Ake* to support a claim he was deprived a full and fair post-conviction hearing). Therefore, the issue is waived and not properly before this Court. *See Hemphill*, 595 U.S. at 148; *Ortiz*, 422 U.S. at 898

B. This issue is already settled.

In any event, Dotson’s due process claim has long been settled by this Court’s holding that States have no constitutional obligation to provide avenues for collateral relief. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). It follows that criminal defendants seeking collateral review do

² Even then, Dotson raised only an as-applied due process claim, arguing that failure to fully approve his requests for expert assistance deprived him of a full and fair post-conviction hearing. (See Resp. App’x 137-42.)

not enjoy the same constitutional rights afforded at the constitutionally-mandated trial. *Id.* at 556-57; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (stating that *Finley* applies equally to capital cases).

The constitutional right to expert assistance is properly confined to trial proceedings. “State collateral proceedings . . . serve a different and more limited purpose than either the trial or appeal.” *Murray*, 492 U.S. at 10. “Postconviction relief is . . . removed from the criminal trial It is not part of the criminal proceeding itself.” *Finley*, 481 U.S. at 556-57. A petitioner may need expert assistance on collateral review “not as a shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.” *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974).

Dotson offers no compelling reason for this Court to overlook his waiver of the issue or to overturn its longstanding precedent that state collateral review proceedings do not carry the same panoply of constitutional rights as criminal trial proceedings.

III. Dotson’s Expanded Due Process Claim Is Waived, and Tennessee’s Rules for the Equitable Distribution of Limited Expert Funds Did Not Violate Dotson’s Rights to Due Process or Equal Protection.

A. Dotson’s expanded due process claim is waived.

Dotson suggests that Tenn. Sup. Ct. R. 13, § 5’s process for approval of expert funding violates the procedural due process rights of every indigent prisoner. (Pet. at 14-19.) But this case is no vehicle to consider the procedural due process rights of all indigent prisoners because Dotson made no such claim below. During the state court appeals, Dotson argued that Rule 13’s prior approval process—specifically an alleged lack of notice, lack of opportunity to be heard after the initial request for expert assistance, and lack of an appeal as of right from the final funding decision—violated his own procedural due process rights. (See Resp. App’x 137-42, 266-72.) The Tennessee Supreme Court limited its analysis to Dotson’s as-applied challenge, and it did not

address how Rule 13 may affect the procedural due process rights of any other indigent prisoners. *Dotson*, 673 S.W.3d at 216-22 (“We hold the provisions of Rule 13 for prior approval review are constitutional, as applied.”). Therefore, Dotson has waived his expanded procedural due process challenge to Tennessee’s expert funding scheme. *See Hemphill*, 595 U.S. at 148; *Ortiz*, 422 U.S. at 898.

B. Tennessee’s administrative review of Dotson’s request for expert funds did not violate his right to due process or equal protection.

Dotson claims Tennessee’s Rule 13 administrative review of expert funding requests violated his procedural due process rights because he had no notice of the Director’s and Chief Justice’s review, he was not aware of the standard of review they would apply, the Chief Justice’s review was not public, and Dotson was not granted an appeal as of right from the final funding decision. (Pet. at 15-18.) But the Tennessee Supreme Court properly concluded that the Director’s and Chief Justice’s administrative review under Rule 13 did not violate Dotson’s procedural due process rights.

First, Dotson has no constitutionally protected interest in expert funds. To claim procedural due process protections, the claimant must first show that he has a constitutionally protected interest at stake. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972). Only after courts determine that a claimant has a protected interest can it be determined what amount of process is due. *Id.*

As detailed above, Dotson had no due process right to expert assistance in collateral proceedings. Instead, his interest stems entirely from state statute. *See Tenn. Code Ann. § 40-14-207(b)*. Moreover, he sought these funds within the context of Tennessee’s post-conviction review, which is also wholly a creation of statute. *See Tenn. Code Ann. § 40-30-101 to -123*. Tennessee was not constitutionally required to create this collateral review procedure or provide

expert funding for it. *See Finley*, 481 U.S. 555-57.

Moreover, the post-conviction court's prior authorization order for expert assistance did not create a constitutionally protected interest in those funds. As the Tennessee Supreme Court explained, the post-conviction court's prior authorization order is simply that—*prior* authorization that is subject to further administrative review by the institution charged with fairly managing the finite pool of funds allocated for indigent criminal defendants. *Dotson*, 673 S.W.3d at 217. It did not grant Dotson a constitutionally protected interest in “any particular level of payment.” *Id.*³ Therefore, Dotson had no constitutionally protected interest that would trigger due process protections. *See Bd. of Regents of State Colls.*, 408 U.S. at 570-71.

Second, lack of an appeal from the Chief Justice's Rule 13 decision does not offend 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 must satisfy basic tenets of due process and equal protection.

Id.

The Director's and Chief Justice's review under Rule 13 is not an appeal. It is an administrative funding decision to equitably distribute Tennessee's “finite pool of funds” for indigent expert assistance. *Dotson*, 673 S.W.3d at 215-16. Indeed, their review cannot be an appeal because the post-conviction court's prior authorization order is not a final order granting funds. Instead, it is a preliminary authorization subject to further administrative review under Rule 13. *See id.* Because that administrative review is not an appeal, Dotson was not entitled to notice

³ Dotson faults Tennessee courts for examining his procedural due process claims as the assertion of a property right, (Pet. at 17), but that is how he framed the issue in the state courts. (Resp. App'x 133-37.)

and an opportunity to be heard. *Evitts*, 469 U.S. at 393.

Third, lack of an appeal from the Chief Justice's Rule 13 decision does not violate due process. Tennessee is not required to create an avenue to appeal the Chief Justice's administrative decision., *see id.*, and it has not done so, *see* Tenn. Sup. Ct. R. 13, § 5(e)(5); *Dotson*, 673 S.W. 3d at 217-18. Therefore, Dotson's due process rights are not implicated. *See Evitts*, 469 U.S. at 393 (stating due process rights only arise if the State creates an avenue for appeal).

Fourth, lack of an appeal from the Chief Justice's administrative decision does not implicate the Equal Protection Clause. (*Contra* Pet. at 15 n.2.) There is no distinction between Dotson's appellate rights and those of every other capital petitioner seeking expert funds during post-conviction review. All capital post-conviction petitioners—including Dotson—can appeal from a post-conviction court's order denying prior authorization for expert funds. *See, e.g.*, *Dotson*, 673 S.W.3d at 219; *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).⁴ But neither Dotson any capital post-conviction petitioners have the right to appeal from the administrative review of a prior authorization order under Rule 13. Because all capital post-conviction petitioners are treated the same once prior authorization is granted, the lack of an appeal from review under Rule 13 review did not violate Dotson's right to equal protection.

⁴ In his petition, Dotson cites *State v. Scott*, 33 S.W.3d 746, 752-56 (Tenn. 2000), to suggest that he was treated differently than other post-conviction petitioners seeking expert assistance from the post-conviction courts. (Pet. at 15 n.2.) But *Scott* examines the denial of expert assistance *at trial* and is inapplicable to the post-conviction context. 33 S.W.3d at 748.

Tennessee's administrative review of Dotson's expert funding request under Rule 13 did not implicate or violate his right to due process or equal protection. Therefore, certiorari should be denied as to these claims.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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