The post-conviction court denied this claim holding that in *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2016), the Tennessee Supreme Court found that an autopsy report was not testimonial and, therefore, this claim has no merit. (PC Vol. 2, 382). The *Hutchison* opinion, however, does not state that all autopsies are nontestimonial statements. The *Hutchison* Court held that under the circumstances of that particular case, the autopsy report in that case was not testimonial. *Hutchison*, 482 S.W.3d at 896.

In *Hutchison*, an autopsy report was admitted into evidence through the testimony of a pathologist who did not conduct the autopsy. *Id.* at 901. The testifying pathologist was not permitted to testify about what was in the report but was allowed to indicate that she relied on both the report and the autopsy photographs in arriving at her independent conclusions. *Id.* The Tennessee Supreme Court found that the autopsy report in *Hutchinson* was not testimonial because it lacked the formality and solemnity of affidavit, deposition, or prior testimony in that author of the report neither swore to nor certified facts or findings contained in the report, and the report was not made for purpose of proving guilt of a particular criminal defendant at trial because the defendant was in custody at the time of the autopsy. *Id.* at 912–14.

Neither of those rationales are applicable here. First, Dr. Laboy stated in all three of the autopsy reports he prepared that: "The facts stated herein are correct to the best of my knowledge and belief" and signed directly below that statement on each report. (Trial Exs. 298, 384, 458). Each report also contained a signed statement from the County Medical Examiner indicating that the "information contained herein regarding such death is true and correct to the best of my knowledge and belief." (*Id.*). Accordingly, the autopsy reports prepared by Dr. Laboy possess sufficient "indicia of solemnity." *Williams*, 567 U.S. at 110–11 (Thomas, J., concurring) (quoting *Davis* 547 U.S. at 836–37).

Second, in *Hutchison*, the defendant was arrested at the time the crime was discovered, so he was already in custody when the autopsy was performed. *Hutchison*, 482 S.W.3d at 911. The autopsy was not done in order to "bring an end to an ongoing threat." *Williams*, 567 U.S. at 83. Once again, that was not the case here. The murders occurred in the early morning hours of March 2, 2008. The autopsies were conducted on March 4. Mr. Dotson was not arrested until March 8. Accordingly, at the time Dr. Laboy performed the three autopsies, no one had been arrested for committing these crimes and the police were searching for suspect(s). As Sergeant James Max testified, the police initially had "no suspects. It was what they called a cold case" and the police were investigating whether the murders were committed by members of the Gangster Disciples. (Trial Vol. 25, 1426, 1447). Thus, the autopsies were conducted, in part, to aid the police investigation and produce evidence that would lead to an arrest, "bring an end to an ongoing threat," and establish or prove events relevant to the prosecution of this case.

Lastly, in *Hutchinson*, the testifying pathologist relied solely on her training, expertise, and judgment to forge independent conclusions. *Hutchison*, 482 S.W.3d at 911. She did not testify about what was in the autopsy report. Yet again, that was not the case here. Dr. Funte testified at length about the autopsy reports prepared by Dr. Laboy and his conclusions, including, but not limited to, describing a diagram made by Dr. Laboy and photographs that were taken during the autopsies that he performed. (*See, e.g.*, Trial Vol. 27, 1806–23). Here, the Confrontation Clause was violated because Dr. Funte's testimony did not rely solely on her independent judgment.

Accordingly, for all of these reasons, Mr. Dotson's case is distinguishable from *Hutchison* and that opinion is not a bar to relief on this claim.

At the post-conviction hearing, trial counsel testified that they did not object to Dr. Funte addressing the three autopsies that she did not perform because the defense was not disputing the cause of death. (PC Vol. 11, 267–68). That testimony is seemingly contracted by the defense's motion in limine asking for a hearing to challenge the introduction of most, if not all, of the crime scene and related photographs. (Trial Vol. 2, 273–75). Trial counsel testified that the crime scene photographs were "horrendous," "some tough stuff," and "were that bad." (PC Vol. 10, 56–57). Objecting to the testimony of Dr. Funte regarding three autopsies that she did not conduct would have been consistent with their strategy to prevent the introduction of inflammatory photographs.

Mr. Dotson respectfully asks this Court to look at the following two examples of the numerous inflammatory photographs taken during the autopsies conducted by Dr. Laboy which would have been excluded if counsel had objected: photograph taken during the autopsy of Hollis Seals. (Trial Vol. 27, 1800, 1816–17; Trial Ex. 274); and photograph taken during the autopsy of Cecil Dotson, Sr. (Trial Vol. 27, 1866, 1879–81; Trial Ex. 359).

Counsel had no reasonable strategy for failing to object to Dr. Funte's testimony respecting the autopsies Dr. Laboy performed, and that failure allowed the prosecution to put prejudicial evidence before the jury. In failing to object, counsel rendered ineffective assistance.

XIV. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to challenge effectively the testimony of State witnesses.

Mr. Dotson's trial counsel failed to meet prevailing professional norms in regard to witness preparation, which resulted in prejudice to Mr. Dotson. Even in non-capital cases, *The National Legal Aid and Defender Guidelines*, Guideline 7.5–Presenting the Defense Case, require counsel to develop a plan for direct examination of each potential defense witness, prepare all witnesses for direct and possible cross-examination, and conduct appropriate redirect

examination. Counsel should anticipate the weaknesses of the State's proof and prepare for cross-examination by thoroughly reviewing discovery and integrating the defense theory of the case. *Id.*, Guideline 7.4. Counsel did not conduct examinations accordingly and thus failed to submit the State's case to sufficient adversarial testing. Rather than adhere to baseline professional standards, trial counsel fell woefully short of them.

Counsel's cross-examination of police witnesses reflects off-the-cuff questioning by looking at police supplements, rather than questioning borne of careful review of all records in order to ascertain a timeline of the police investigation. Jessie Dotson was first interviewed on March 4, 2008. During Sergeant Walter Davidson's testimony, counsel questioned him about asking Sergeants Joseph Stark and James Max to interview Mr. Dotson on *March 5, 2008*. (Trial Vol. 24, 1142). During Mr. Dotson's testimony, counsel questioned him about his interview with the police on *March 5, 2008*. Trial Vol. 29, 2173–74. This is despite the fact that days earlier Sgt. Max had clarified that the interview was on March 4, 2008 and his supplement incorrectly dated the interview as March 5, 2008.[24] (Trial Vol. 25, 1431).

Not only did trial counsel's failure to notice the date discrepancies signal a lack of familiarity with the police investigation timeline, but it also marked a lost opportunity to cross-examine the officers on human errors regarding the incorrect supplement which would have diminished the credibility of the officers who investigated this case. At the post-conviction hearing, trial counsel testified that their guilt phase defense was that Mr. Dotson was innocent, these crimes were committed by multiple assailants and "there is not one shred of physical evidence to corroborate the State's theory." (PC Vol. 10, 53: PC Vol. 11, 265). Given trial

[24] It is apparent from the time stamp regarding entry of the supplement and the context of the entry that March 4, 2008 was the correct date. (PC Ex. 47).

counsel's theory of the case, there can be no reasonable strategy to justify their failure to cross-examine the officers about the incorrect supplement.

Failing to cross-examine key witnesses falls below the reasonable standard of performance required by the Sixth Amendment. *See Higgins v. Reinco*, 470 F.3d 632–34 (6th Cir. 2006). When significant grounds exist to challenge a witness's testimony, the failure to do so constitutes ineffective assistance of counsel. *Cargle v. Mullin*, 317 F.3d 1196, 1211 (10th Cir. 2003); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987). Although counsel had a basis to impeach the officers' testimony and raise concerns about the integrity of the police investigation in this case, they failed to use the incorrect supplement to confront the State's witnesses. Had the officers been effectively cross-examined, there is a reasonable likelihood that Mr. Dotson would have been found not guilty of first degree murder.

The post-conviction court denied this claim, finding that the defense team "more than sufficiently investigated the discovery and prepared for trial." (PC Vol. 2, 379). The lower court added that trial counsel planned their defense around the fact that there was no physical evidence connecting Mr. Dotson to the crimes and strategically focused on the issues which were beneficial to their case. (*Id.*) Using the incorrect supplement for cross-examination, however, is consistent with the defense innocence theory as it undermines the credibility of the police who investigated the case. Thus, there is no strategic or tactical reason for failing to cross-examine the police about the inconsistency, and the tools to do so were readily available to trial counsel.

In another instance of ineffective representation, trial counsel failed to object to Sergeant Anthony Mullins's testimony as a supposed bloodstain pattern analysis expert. (Trial Vol. 18, 160–61). Dr. Marilyn Miller, a leading expert on crime scene reconstruction, testified on behalf of Mr. Dotson at his post-conviction hearing and raised concerns about what specialized training

Sgt. Mullins had in the area of blood spatter analysis. (PC Vol. 12, 344). There is no shortage of evidence belying Sergeant Mullins's "expertise." Sergeant Mullins used incorrect terminology, misidentified several impact spatters as castoff stains, and testified to opinions which only a forensic pathologist would hold the expertise to address, such as his testimony that Shindri Roberson was shot on the couch and then was moved down onto the floor and that the four adult victims were moved, either close to or possibly after death. (Trial Vol. 19, 261, 278–79; Trial Vol. 22, 764-65; PC Vol. 12, 401; PC Ex. 55). Dr. Miller raised concerns that Sergeant Mullins did not write a report. (PC Vol. 12, 371). She noted that most bloodstain pattern analysis experts will write a report and that report will be reviewed by another bloodstain pattern analysis expert for completeness and accuracy. (*Id.*). That did not happen here. Furthermore, a crime scene reconstruction based on blood stain patterns should be based solely on an analysis of the evidence found at the crime scene. (*Id.*) Sergeant Mullins's conclusions, however, were tainted by relying on statements of the surviving witnesses and Mr. Dotson which "is not the foundation of crime scene reconstruction work." (*Id.* at 371–72). As a result, Sergeant Mullins's conclusions were based on subjectivity, not objectivity. (*Id.* at 372).

Sergeant Mullins was also allowed to testify as an expert in general crime scene investigation but testified erroneously in regard to that as well. He incorrectly testified that control samples of carpet were taken to provide examiners a visual of samples without blood stains. (Trial Vol. 19, 263). Rather, carpet control samples are taken to ensure background substrate is not interfering with tests of blood-stained samples. (PC Ex. 55).

In none of these instances did trial counsel object to Sergeant Mullins's testimony or to his qualifications as an expert. Blood spatter analysis is regarded as a "complicated subject," whose use is to recreate the events of a crime. *State v. Halake*, 103 S.W.3d 661, 672 (Tenn.

Crim. App. 2001). Accordingly, a police officer asked to "engage in a blood spatter analysis"—as was the case in both *Halake* and the one at hand—may not always be qualified to do so. *Id.* In Mr. Dotson's case, trial counsel should have objected to qualification of Sergeant Mullins as an expert and conducted a voir dire to demonstrate his insufficient qualifications. Mr. Dotson was prejudiced by this failure to object to and challenge Sergeant Mullins's testimony. A proper voir dire would have resulted in a limitation of this testimony.

The trial court denied this claim, concluding that Dr. Miller's testimony does not establish prejudice. (PC Vol. 2, 379. The lower court is incorrect. Dr. Miller raised numerous concerns about Sergeant Mullins's fitness as a bloodstain pattern analyst and crime scene reconstructionist. Her review of Sergeant Mullins's methodology and conclusions indicated a plethora of areas ripe for cross-examination which would have allowed trial counsel to challenge Sergeant Mullins's testimony and raised questions about the integrity and validity of the crime scene investigation in this case. Dr. Miller also testified that if she had been present in the courtroom during Sergeant Mullins's trial testimony—because she would not have known in advance what his conclusions were since he did not issue a report—she could have consulted with trial counsel and helped the defense craft their cross-examination of him. (PC Vol. 12, 385–86). Had counsel performed reasonably and effectively cross-examined Sergeant Mullins, the jury would likely have doubted his credibility and conclusions, which would likely have led them to question the prosecution's case. With Sergeant Mullins's testimony discounted, at least one juror, looking at the remaining evidence, would have a reasonable doubt about Mr. Dotson's guilt or whether he deserved the death penalty.

In another instance of ineffective representation, defense counsel's attempt to discredit Willie Boyd Hill (aka "Frank") backfired badly and completely undermined defense counsel's

theory that a group that included persons named Roderick and Cassandra—who C.J. had named as suspects—were tied to Willie Hill, who in turn was part of the Gangster Disciples and who had a motive to kill Cecil, Sr. Counsel questioned Mr. Hill about his Facebook friend Roderick Deshun Hill. (Trial Vol. 24, 1251–52). The Facebook page of Roderick Deshun Hill was introduced as an exhibit, as was a picture of Willie Hill's sister Cassandra. (Trial Exs. 251–52). When Willie Hill denied personal knowledge of Roderick Hill, counsel asked if he was "sitting in this courtroom today looking at his picture and you don't know who he is?" (Trial Vol. 24, 1252). When Hill suggested that Roderick had probably requested him because of the same last names, counsel asked "[t]hat's as true as everything else you've told us?" (*Id.*). Hill confirmed that it was.

The State located Roderick Deshun Hill and presented him as a witness. (Trial Vol. 28, 1986–87). He confirmed his Facebook page, (Trial Ex. 252), and stated that he did not personally know Willie Hill. Roderick was sixteen years old at the time of trial and thirteen in March of 2008.

The State, in guilt phase closing, capitalized on defense counsel's unforced error, arguing:

> The defense brought you in here and they handed this Facebook page up to Willie Boyd Hill and he's, like, I don't know who this guy is. Yeah, here's Roderick. Here's Roderick. We brought you Roderick in here, didn't we? We brought you that middle school kid who was 13 years old at the time in here and let you see him and talk to him, Roderick. Wasn't Willie Boyd Hill, GDs or anything else.

(Trial Vol. 30, 2312). In rebuttal closing, the prosecutor again ridiculed defense counsel's blunder, tying it in to the defense theory in whole:

> Then they bring in a Facebook page of Roderick. We've got to pull him out of school. Why are they doing all this? Because they don't want you to look at the proof. They don't want you to look at the facts and the evidence. It's smoke and mirrors.

(*Id.* at 2366). Followed by:

> How are you going to follow up Roderick and Cassandra? How many Cassandras are there in the world? Roderick? How many Rodericks are there in the world? We know one, right? We've got his Facebook page. He was 13 at the time.
>
> How are you going to investigate that? A bloody mask? That kid was laying in a tub for 40 hours. He was dreaming. He was seeing things. And what's the moral to the story, ladies and gentlemen? Think about it. If you get a knife in your head, if you get a knife in your head and you lay in a tub for 40 hours in your own blood and you get a craniotomy, be careful what you say because it could help let your attacker go free. That's absurd. It's smoke and mirrors. C.J. knows who put the knife in his head. He knows it and he told you who did it.

(*Id.* at 2381).[25]

The post-conviction court denied this claim, finding "the defense clearly put the reasonable doubt issues before the jury, especially as it related to C.J.'s identification of Petitioner and version of events." (PC Vol. 2, 380). In so holding, the lower court assumed the defense "did all they could with the alternative theory issues." (*Id.*). The lower court ignores the fact that questioning Mr. Hill about the Facebook page of Roderick Deshun Hill sabotaged any attempt to connect Roderick and Cassandra—who C.J. had named as suspects—to the Gangster Disciples. In doing so, the defense implied that a thirteen year old boy was the assailant at Lester Street. That notion was ludicrous, hurt defense counsel's credibility, and undermined any "reasonable doubt" and "alternative theory" issues.

XV. Mr. Dotson's counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to object to inflammatory and irrelevant testimony.

Counsel failed to object and move to strike inflammatory and irrelevant testimony resulting from the State's direct examination of Sergeant Walter Davidson. When asked by the

[25] As discussed in Section XVII, below, counsel failed to object and move to strike these improper comments. Some of these issues were raised on appeal, for example "smoke and mirrors," but they were waived and thus "review [was] limited to plain error." *Dotson*, 450 S.W. 3d at 99.

prosecution if Sgt. Davidson had "ever seen anything like this," counsel should have objected—the sergeant's personal experience was irrelevant to a finding of Mr. Dotson's innocence or guilt. (Trial Vol. 23, 1046). In the absence of an objection, Sergeant Davidson responded "it was a tough thing to handle, I'll just say." (*Id.*). The prosecutor then commented, not asked, that Sergeant Davidson "can only speak for [himself] and what was in [his] mind, [his] state of mind." (*Id.*) The prosecutor continued: "did you want to get the person or persons who actually did it . . . .?" (*Id.*). Sergeant Davidson confirmed that he did and would not have rested in the effort. (*Id.).*

The prosecutor then asked, again with no defense objection, whether Sergeant Davidson wished he had never been on duty that night and Davidson agreed. (*Id.*). Sergeant Davidson testified that, as he prepared for trial and reviewed photographs of things he had done, he recounted holding a child whose throat was slit and moving the child's head in order to take pictures. (*Id.* at 1047–48). This line of questioning was improper in direct examination as Sergeant Davidson's mental state at the time he investigated this case and in preparing for trial was not at issue.

Trial counsel were ineffective in failing to object and moving to strike this testimony. There can be no explanation for counsel's failure to object to such inflammatory testimony. This prejudiced Mr. Dotson as this testimony served no purpose other than to arouse the passions of the jury, as the proof was fear-inducing, inflammatory, and distractive to the relevant questions in Mr. Dotson's case. *See Martin v. Grosshans*, 424 F.3d 588, 591–92 (7th Cir. 2005) (counsel ineffective for failing to object to irrelevant and prejudicial testimony of prosecution witness); *Crotts v. Smith*, 73 F.3d 861, 867 (9th Cir. 1996) (counsel ineffective for failing to object to non-probative inflammatory testimony).

The traumatic effect that working this case had on this police officer has no bearing on the question of whether Mr. Dotson committed the Lester Street attacks. Due to counsel's failure to object, the jury was informed that the crimes were so egregious they invoked trauma in a seasoned police detective. Counsel's failure to object to this testimony permitted the State to sensationalize and dramatize the offense.

Additionally, appellate counsel was ineffective for failing to raise and preserve this record-based claim on direct appeal. At the time of Mr. Dotson's appeal, a death-sentenced appellant could raise any issue appearing on the face of the record, whether it was raised below or not, and receive *de novo* review of the issue. *See State v. Bigbee*, 885 S.W.2d 797, 805 (Tenn. 1994); *State v. Martin*, 702 S.W.2d 560, 564 (Tenn. 1985); *State v. Duncan*, 698 S.W.2d 63, 67–68 (Tenn. 1985); *State v. Strouth*, 620 S.W.2d 467, 471 (Tenn. 1981). Because Mr. Dotson's challenge to Sergeant Davidson's testimony has merit, competent counsel should have raised it on direct appeal and there can be no strategic consideration weighing in favor of appellate counsel's failure to litigate this issue. When appellate counsel fails to raise such a clearly meritorious claim, the failure to do so constitutes ineffective assistance. *Claudio v. Scully*, 982 F.2d 798, 799 (2d Cir. 1992) (when there is a "reasonable probability that the neglected claim[s] would have succeeded on appeal, [] counsel's failure to raise the claim f[alls] outside the range of reasonably competent assistance."); *Jackson v. Leonardo*, 162 F3d. 81 (2d Cir. 1998) ("In the instant case, we believe that appellate counsel's failure to raise a well-established, straightforward, and obvious . . . [claim] . . . constitutes ineffective performance.").

XVI. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they made improper comments during opening statement at the sentencing hearing.

During opening statement at the penalty phase, defense counsel told the jury that Mr. Dotson's case had more aggravating circumstances than he had ever seen. (Trial Vol. 31, 2470). Counsel's statement solidified in the jurors' minds that Mr. Dotson was truly the "worst of the worst" and therefore, deserving of the death penalty.

Counsel's acquiescence that his client deserved a death sentence was objectively unreasonable and a violation of counsel's "duty of loyalty to the client, from which derive[s] the 'overarching duty to advocate the defendant's cause. . . .'" *See Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997). "A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest." *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988). Indeed, "an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." *Id.*

Counsel's admission that Mr. Dotson's actions warranted the death penalty were obviously prejudicial as the lawyers charged with saving his life were seemingly in agreement with the prosecutors about the circumstances fitting into a category where death was the most appropriate option. Mr. Dotson was therefore denied the right to effective assistance of counsel during this critical stage, which requires his sentences be vacated. *See Mazzan v. State*, 675 P.2d 409, 412 (Nev. 1984).

In denying relief on Mr. Dotson's claim, the post-conviction court recounted trial counsel's beliefs that (1) if the jury convicted Mr. Dotson of the crimes it would be difficult to

obtain sentences less than death; (2) they needed to maintain credibility with jurors and, as a result, they could not deny that the aggravating circumstances applied; and (3) residual doubt was a strong mitigating circumstance. (PC Vol. 2, 389). But as Mr. Dotson discusses previously, trial counsel's defense strategy was fundamentally flawed, and it cannot provide a basis for any decision counsel made. Even if it could, by the time of the sentencing hearing jurors had already credited the State's assertions that Mr. Dotson's lawyers were engaged in various form of chicanery aimed at confusing the jurors. (*See, e.g.,* Trial Vol. 13, 2363-64 (defense counsel deploying smoke and mirrors to confuse jurors); *id.* at 2386 (defense counsel throwing unfounded possibilities at jurors in an effort to confuse them); *id.* at 2388-89 (defense counsel bashing the victims and the police to make up for a lack of a defense); *id.* at 2390-91 (defense counsel throwing ridiculous possibilities against the wall); *id.* at 2395 (defense counsel offering ridiculous explanations)). As a result, defense counsel had no credibility left for the sentencing hearing, and there was nothing that counsel's opening statement could salvage. Counsel rendered ineffective assistance by informing jurors he believed the prosecution had shown his client was the worst of the worst. *See Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) (ineffective assistance found when, among other things, counsel admits in opening statement that the prosecution had made its case); *State v. Harbison*, 337 S.E.2d 504, 507–08 (N.C. 1985) (counsel renders ineffective assistance when he admits the defendant's guilt to the jury without the defendant's consent).

XVII. Mr. Dotson's counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution when they failed to prevent and/or challenge the prosecution's improper closing argument.

Tennessee courts recognize that a prosecutor commits misconduct during closing argument when he:

(1) intentionally misstates or misleads jurors about the evidence;

(2) expresses a personal belief or opinion as to the defendant's guilt;

(3) expresses a personal belief about the truth or falsity of any evidence, including vouching for the trustworthiness of State witnesses;

(4) expresses a personal desire or any desire of the district attorney's office;

(5) makes statements calculated to make jurors fearful or otherwise inflame their passions or prejudices, including arguments that jurors must act in a specified way to protect the community, protect themselves, or provide justice to a victim's family members;

(6) injects broader issues in the trial other than the guilt or innocence of the accused;

(7) intentionally refers to or argues facts outside the record that are not matters of common public knowledge;

(8) tells jurors that they have a duty or obligation to vote for a specified result; or

(9) refers to a defendant in abusive terms, directs argument at the defendant or his counsel, or disparages defense counsel and/or the defendant's trial strategy.

State v. Sexton, 368 S.W.3d 371, 419-20 (Tenn. 2012); *State v. Bigbee,* 885 S.W.2d 797, 812 (Tenn. 1994); *State v. West*, 767 S.W.2d 387, 395 (Tenn. 1989); *State v. Beasley,* 536 S.W.2d 328, 330 (Tenn. 1976); *Vines v. State*, 231 S.W.2d 332, 334–35 (1950); *Knight v. State,* 229 S.W.2d 501, 503-04 (Tenn. 1950); *Watkins v. State*, 203 S.W. 344, 345-46 (Tenn. 1918); *State v. Goltz*, 111 S.W.3d 1, 5-7 (Tenn. Crim. App. 2003); *State v. Lunati,* 665 S.W.2d 739, 747-48 (Tenn. Crim. App. 1983); *State v. Smith*, 639 S.W.2d 677, 682 (Tenn. Crim. App. 1982); *State v. Hicks*, 618.S.W.2d 510, 519–20 (Tenn. Crim. App. 1981); *Jenkins v. State*, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

Given the substantial history of Shelby County prosecutors making improper closing arguments in criminal trials, *see State v. Jackson*, 444 S.W.3d 554, 590 (Tenn. 2014), trial counsel were on notice that the attorneys prosecuting Mr. Dotson would engage in misconduct during argument. Prior to trial, counsel made no effort to prevent the foreseeable from

transpiring, such as filing a motion in limine. This failure, in and of itself, constitutes a deficient performance. *See* White, J. Penny, *Tennessee Capital Case Handbook*, at 298, 625 (Tennessee Association of Criminal Defense Attorneys, 2014) (prior to trial, defense counsel in a capital case should file a comprehensive motion in limine seeking to preclude the prosecution from making improper comments during closing argument); *State v. Brobeck*, 751 S.W.2d 828, 832-34 (Tenn. 1998).

Because trial counsel failed to file a motion in limine, the prosecution was able to again engage in its historical practice of misconduct. At the guilt stage prosecutors made the following improper statements during closing argument:

(1) "C.J. knows what happened because he was there and he saw Jessie Dotson do it." (Trial Vol. 30, 2305 (personal belief about the truth of a witness's testimony, vouching));

(2) Prosecutor asks jurors to consider why defense counsel did not ask C.J. and Cedrick "Who did this to you?" and offers his answer: "Because they didn't want the answer." (*Id.* at 2307 (comment on defense strategy));

(3) "Never once, not once did they say C.J., can you tell me what happened and describe." (*Id.* (comment on defense strategy));

(4) Regarding the defense suggestion that Gangster Disciples were responsible for the murders, the prosecutor argues, "[Y]eah, the GDs did this. Lie after lie after lie . . . ." (*Id. at* 2310 (personal belief about veracity of witness testimony));

(5) "[W]e know who the killer is." (*Id.* at 2313 (personal belief));

(6) Cecil was "[t]urned face over in his own house with his pants pulled down." (*Id.* at 2362 (fact not in evidence, factually inaccurate));

(7) "The defense doesn't have to put on any proof, but they still get to do some things. And they did them in this trial. Smoke and mirrors." (*Id.* at 2363–64 (comment on defense strategy));

(8) "There's so much smoke in this courtroom right now I'm surprised you can even see Jessie Dotson sitting over there, taking your attention off of the facts and the proof in this case and putting it on everyone else." (*Id.* at 2364 (comment on defense strategy));

(9) "Using confusion and mere possibility to make you think there's reasonable doubt in this case." (*Id.* (comment on defense strategy));

(10) "And it's interesting to me how the defense can stand up here and talk about Vernon Motley and the Gangster Disciples and all these things with some gusto and then when they talk about his confession, oh, you need to throw that out." (*Id.* at 2364–65 (comment on defense strategy));

(11) Regarding Roderick: "We've got to pull him out of school." (*Id.* at 2366 (fact not in evidence));

(12) "The women would have been in shock." (*Id.* at 2369 (fact not in evidence));

(13) "As soon as he shot Cecil, [Shindri] was jumping up to the back. That's why she's up on the chair. She's like oh, my God. She's in shock." (*Id.* at 2369–70 (facts not in evidence));

(14) "What do you think the women are going to do? They don't have a gun. They just saw two men murdered in front of them. You don't think they're going to be scared to death and maybe hoping, hoping he would stop there and not kill women. They might have believed in their hearts that they wouldn't die. What are they going to do?" (*Id.* at 2371 (facts not in evidence));

(15) "And I don't care what gang members and we're not here defending gang members. That's ridiculous." (*Id.* at 2374 (comment on defense strategy));

(16) "Cecil Dotson, Senior's, pants were pulled down. If you look at the blood, Jessie turned him and then pulled his pants down. What's the purpose of that?" (*Id.* at 2376 (facts not in evidence, incorrect));

(17) "You want to bring in experts and confuse kids? Fine. You want to sit a chair here in front of that poor kid and lead him through things so he says yes, sir, which their expert told them not to do, fine. But don't not believe that kid. Because he took courage to come in here and he survived this for a reason." (*Id.* at 2382 (comment on defense strategy, personal belief, vouching));

(18) "[W]hat do you have to do to somebody to make them confess to that? I don't think that exists. I don't think there is anything a human being could do to another human being to make them confess to slicing up kids, sorry." (*Id.* (personal belief, vouching));

(19) "Why did [Skahan] leave ["a doubt that may arise from possibility"] out? Because that's exactly all they've done in this case, is try to throw possibilities at you, try to take your focus away from Jessie Dotson." (*Id.* at 2386 (comment on defense strategy));

(20) "Now when there is no defense in a case, this is the kind of stuff you're going to see. You judge whether or not you've seen this in this trial. You judge it. Bash the victim. Well that's not hard, right, because Cecil was a gang member." (*Id.* at 2388 (comment on defense strategy));

(21) "The big one, attack the police. That's defense 101. If they've got a strong case, if they've got a strong case, go after the police because they're a bunch of big, bad mean people that don't care about anybody. Really?" (*Id.* at 2389 (comment on defense strategy));

(22) "They're getting blamed for a case they didn't solve. C.J. solved it." (*Id.* (comment on defense strategy, personal belief, vouching));

(23) "The rabbit did it theory. I came up with that one because these hairs, no pun intended. Think about it. They found a rabbit hair clutched in one of the women's hands. Does that mean the rabbit did it? And I'm not trying to insult your intelligence. What I'm trying to show you is how ridiculous it is what they're throwing up on the wall and trying to get you to grab." (*Id.* at 2390–91 (comment on defense strategy));

(24) "Wow. I lost count, ladies and gentlemen. I think we had the Asian heroin cartel, Mexican drug cartel, Craig Petties, Vernon Motley, Roderick and Cassandra, guy in a bloody mask and I'm not sure if that's Roderick. . . . Every bit of that was to take your focus off the guy sitting over there." (*Id.* at 2393 (comment on defense strategy));

(25) "Because [Jessie Dotson] lied to you and you know he did [in his testimony]." (*Id.* (personal belief re witness testimony));

(26) "The first thing you need to look at and I don't think it's dispositive. I don't think he could have fit under (a bed in the master bedroom.)" (*Id.* (personal belief));

(27) "So [Jessie's] lying. . . . But see, when you're going to get up on the witness stand and lie in a case like this, you're going to get caught. " (*Id.* at 2394 (personal belief re witness testimony));

(28) "The bleach explanation is ridiculous. The coerced statement is ridiculous." (*Id.* at 2395 (personal belief re witness testimony, comment on defense strategy));

(29) "Did you see the cross of his mother? He didn't touch her. A couple questions and sat down. Why? Because truth that strong you can't touch, not even with good lawyering skills." (*Id.* (personal belief re witness testimony, comment on defense strategy));

(30) "And his mother did something that she had to do. She had to tell you the truth. Just like Jessie told her the truth." (*Id.* (personal belief about the truthfulness of witness testimony));

(31) "And any other verdict than guilty just tells those boys they survived for nothing." (*Id.* at 2397 (inflammatory - suggesting jurors should provide victim's justice)); and

(32) "It's time. It's time for everybody to get out of this house. It's time for every victim to leave this house. And there's only one way, justice. It's the only way. It's the only way." (*Id.* at 2397. (inflammatory - suggesting jurors should provide victims justice)).

For the reasons set out in the parentheticals following the incidents inventoried above, the prosecution's statements constituted misconduct. Given the repeated nature of the prosecution's improper statements, these statements violated Mr. Dotson's rights to due process and a fair trial.

Defense counsel rendered a deficient performance when they failed to file a motion in limine seeking to preclude the prosecution's improper comments, to object to those comments, to move for a mistrial, and to challenge them on direct appeal. Had counsel done so, a reasonable probability exists that the trial court would have granted a mistrial or the appellate court would have granted a new trial due to the prosecution's due process violations. *See Tappan v. State*, 2010 WL 3463310 at *7–8 (Tenn. Crim. App. Sept. 3, 2010); *Johnson v. State*, 2006 WL 721300 at *15–18 (Tenn. Crim. App. 2006); *Holmes v. State*, 2004 WL 2253991 at *4 (Tenn. Crim. App. 2004); *Taylor v. State*, 2004 WL 350641 at *9 (Tenn. Crim. App. 2004).

In its sentencing rebuttal closing argument, the State made the following improper remark: "And now Jessie is begging for his [life]? Did Marissa get a jury? What about Shindri? Did she get a jury? Did somebody have to find aggravating circumstances for her to get the death penalty?" (Trial Vol. 31, 2547). These remarks improperly commented on Mr. Dotson's invocation of his constitutional right to a jury trial. *See State v. Bond*, 2006 WL 2689688 at *8–9

(Tenn. Crim. App. Sept. 20, 2006) (finding that the prosecutor's remarks blaming the defendant for the lengthy trial and jury sequestration were "improper" insofar as they asked the jury to penalize the defendant for exercising his constitutional right to a jury trial). *See also State v. Hines*, 919 S.W.2d 573 (Tenn. 1995) (a violation of the defendant's right to counsel occurs when a prosecutor seeks to penalize the defendant for exercising his constitutional right); *State v. Jackson*, 444 S.W.3d 554, 590 (Tenn. 2014) (improper comment on right not to testify).

Because counsel failed to object to the prosecution's sentencing comment and other additional instances of prosecutorial misconduct, on direct appeal this Court concluded that it was limited to plain error review of them, and it denied relief under that review standard. *Dotson*, 450 S.W. 3d at 99-101. Had this Court not been limited to plain error review, a reasonable probability exists that it would have concluded that the cumulative effect of the State's intentional, inflammatory comments designed to prejudice the jurors during closing and rebuttal arguments required reversal of Mr. Dotson's convictions and/or death sentences. *See, e.g., Delk v. State*, 590 S.W.2d 435 (Tenn. 1979) (improper comment on defendant's failure to call witness and improper questions designed to suggest presence of inadmissible evidence); *see also State v. Sexton,* 368 S.W.3d 371, 413–26 (Tenn. 2012). As a result, counsel's failure to object to the prosecution's misconduct and challenge it on direct appeal constitutes ineffective assistance.

In denying relief on Mr. Dotson's ineffective assistance of counsel claim, the post-conviction court expressed its belief that the challenged prosecution comments were based on the evidence presented at trial and reasonable inferences drawn therefrom. (PC Vol. 2, 387-88). But the lower court does nothing to explain the basis for its belief. It provides no record cites supporting its belief, nor does it explain how its belief overcomes the impropriety of the comments Mr. Dotson identified. As a result, the lower court's ruling does not comply with the

Post-Conviction Procedures Act's requirement that post-conviction decisions must state findings of facts and conclusions of law with regard to each ground a petitioner raises. Tenn. Code Ann. § 40-30-111(b). This failure is more than a technicality, given that the lower court's basis for denying relief cannot apply to prosecution comments vouching for a witness's credibility, comments expressing the prosecutor's personal beliefs, and comments seeking to inflame the jurors' passions or prejudices. Because the lower court's explanation for its decision fails to provide the grounding Section 111(b) requires, it fails to provide a legitimate basis for the lower court's denial of relief. *See Nance*, 2006 WL 1575110 at *3.

XVIII. The prosecution violated Article I, §§ 8, 9 and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it made improper remarks during closing argument.

For the reasons expressed above, the prosecution's closing argument violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In denying relief on Mr. Dotson's prosecutorial misconduct claim, the post-conviction court stated without any analysis or citation to authority that "these claims have been waived and/or previously determined." (PC Vol. 2, 383, 388). This cursory statement does not comply with the Post-Conviction Procedures Act. Section 40-30-111(b) required the lower court to state its findings of facts and conclusions of law with regard to each ground Mr. Dotson raised in his petition. Tenn. Code Ann. § 40-30-111(b). As to Mr. Dotson's misconduct claim, the lower court's cursory order does not do so. The order does not identify which portions of Mr. Dotson's misconduct claim the court believed were waived. Nor does it identify those portions the court believed previously determined. Nor does it find facts or set out legal conclusions as to any portion of Mr. Dotson's misconduct claim. As a result, the lower court's cursory "waived and/or

previously determined" ruling provides no basis for denying Mr. Dotson relief. *See Nance*, 2006 WL 1575110 at *3.

XIX. Mr. Dotson's counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to challenge/request jury instructions.

Counsel's negligent failure to object to a proposed jury instruction can provide the basis for an ineffective assistance of counsel claim, *see Dean v. State*, 59 S.W.3d 663, 666–67 (Tenn. 2001), as can counsel's failure to request a specified instruction. In Mr. Dotson's case, counsel rendered ineffective assistance in regard to the following jury instructions.

A. Trial counsel failed to object to the instruction requiring jurors to consider the court's substantive instructions in a specific order.

Counsel failed to object to (1) the order of the jury instructions which listed first degree murder as the first option and not guilty as the final option; and (2) the instructions' requirement that, before jurors could consider the lesser included offenses of first degree murder, the jury had to unanimously agree that Mr. Dotson was not guilty of first degree murder. (Trial Vol. 6, 15–16; Trial Vol. 30, 2400–03).

When lesser included offenses are charged, as occurred in this case, the highest degree should not be the first instruction. Rather, the order must begin with the lesser charges to ensure that the defendant's defense is reliably considered by the jurors. *See Falconer v. Lane*, 905 F.2d 1129, 1136–37 (7th Cir. 1990). The order and manner in which a jury is asked to consider degrees of guilt is critical to their determination, and the instructions here created a presumption in favor of for first degree murder convictions.

The post-conviction court rejected this claim, citing *State v. Davis*, 266 S.W.3d 896, 901–05 (Tenn. 2008), where the Tennessee Supreme Court upheld "acquittal-first" jury instructions. (PC Vol. 2, 391). Mr. Dotson respectfully asserts that *Davis* was wrongly decided and that

acquittal-first instructions are inherently coercive. *See Davis*, 266 S.W.3d at 912 (Wade, J., concurring in result only) (finding that "acquittal-first instructions" are inherently coercive and therefore erroneous and recommending the adoption of a "reasonable efforts" instruction in which jury could consider lesser offense if unable to agree); *see also* Tenn. Op. Atty. Gen. No. 06-006 at *2 (2006) (instruction that allows jury to consider lesser offense if unable to agree on greater is consistent with Tennessee law). The instructions violated Mr. Dotson's rights to a fair trial and to due process under that state and federal constitutions.

B. Trial counsel failed to object to the eyewitness identification instruction.

At trial, the State presented C.J. and Cedrick's testimony that they had purportedly seen Mr. Dotson commit the Lester Street attacks. But for the reasons Mr. Dotson sets out in Section IV.E of his Statement of Facts, *supra*, both of these identifications were fundamentally flawed, and their testimony was unreliable. Accordingly, it was critical for Mr. Dotson's jurors to have the proper tools to weigh their credibility. The jurors, however, were instructed to consider several factors regarding the credibility of identification testimony, among which was "the degree of certainty expressed by the witness regarding the identification . . . ." (Trial Vol. 18, 62). Trial counsel rendered ineffective assistance by failing to object to the eyewitness identification instruction. Not only did counsel fail to object to the improper instruction, they compounded this error by telling the jury, during closing argument, to consider the degree of certainty. (Trial Vol. 30, 2320).

More than fifty years ago, in *United States v. Wade*, 388 U.S. 218, 229 (1967), the United States Supreme Court recognized that "the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of misidentification." *Id.* Eyewitness misidentification is "the single most important factor leading to wrongful convictions in the United States." *United States v. Brownlee*, 454 F.3d 131, 141 (3d Cir. 2006) (quoting C. Ronald

Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 524 (1986)). Many jurists agree that eyewitness identifications are the most devastating and persuasive evidence in criminal trials. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (stating that "[t]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'") (Brennan, J., dissenting) (citations omitted). Up to eighty percent of the time, juries believe witnesses making eyewitness identifications, regardless of whether the witnesses are correct in their identification. Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 Law & Hum. Behav. 275, 278 (1980).

Decades of social science research—published before Mr. Dotson's trial—has confirmed the lack of connection between the certainty of an eyewitness identification and its accuracy. *See, e.g.*, Wells & Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psych. 277, 285–90 (2003) (reviewing major developments in experimental literature relating to the accuracy of eyewitness identification). One survey concluded that 74 percent of eyewitness identification experts agreed that confidence does not predict accuracy. Brewer, Keast & Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. Experimental Psych. 44–56 (2002). Some studies have even indicated that there is a negative correlation between a witness's memory of events surrounding an incident and the accuracy of their identification. Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 L. & Hum. Behav. 233, 253–54 (1987); Pigott & Brigham, *The Relationship Between the Accuracy of Prior Description and Facial Recognition*, 70 J. Applied Psych. 547 (1985).

These developments in the social sciences have led several states' highest courts to conclude that instructions that jurors should consider an eyewitness's certainty about their identification are based on fallacy and are unfairly harmful to defendants, as it was to Mr. Dotson. In determining that courts should not instruct the jury to consider the certainty of the eyewitness, the Massachusetts Supreme Court explained:

> [I]n cases tried hereafter, the challenged language should be omitted from the standard instruction concerning eyewitness testimony. It is probably true that the challenged instruction has merit so far as it deals with the testimony of a witness who expressed doubt about the accuracy of her identification, whether that identification was made during her testimony, or at a "showup" or lineup. Where, however, the witness has expressed great confidence in her identification of the defendant, the challenged instruction may pose a problem because . . . there is significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection.

Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997). *See also New Jersey v. Henderson*, 27 A.3d 872, 917, 926–27 (N.J. 2011) (citation omitted) (the New Jersey Supreme Court, based on scientific research, ordered lower courts to utilize jury instructions that did not mention the consideration of witness certainty, observing that when "social scientific experiments in the field of eyewitness identification produce 'an impressive consistency in results,' those results can constitute adequate data on which to base a ruling"); *People v. LeGrand*, 867 N.E.2d 374, 380 (N.Y. 2007) (the New York Court of Appeals noted research findings showing that "the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions") (citing 1 McCormick, Evidence §206, 880 (6th ed. 2006)); *Brodes v. State*, 614 S.E.2d 766, 770–72 (Ga. 2005) (the Georgia Supreme Court held that the eyewitness certainty factor be omitted from the standard instruction because empirical studies showed no correlation between eyewitness certainty and accuracy).

Federal courts have also acknowledged the lack of correlation between a witness's certainty and their accuracy in identifying a suspect. *See, e.g., United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009); *Brownlee*, 454 F.3d at 142–44. Trial counsel should have objected to the eyewitness identification instruction and refrained from furthering its false implications.

The failure to ensure that the jury is properly instructed constitutes prejudicially deficient performance in violation of Article I, §§ 9, and 16 of the Tennessee Constitution and the Sixth and Fourteenth Amendments to United States Constitution. *See Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002) (trial counsel ineffective for failing to object to jury instructions that lessened the prosecution's burden of proving specific intent); *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001) (finding ineffective assistance where counsel failed to request a curative cautionary jury instruction); *Combs v. Coyle,* 205 F.3d 269, 286 (6th Cir. 2000) (counsel ineffective for failing to object to jury instruction on both state law and constitutional grounds); *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996) (counsel was constitutionally ineffective for failing to request a cautionary instruction on accomplice testimony that was available under state law); *Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979) (counsel was ineffective for failing to move for a mistrial which would have been mandatory under state law).

Trial counsel could not have any strategic basis for failing to object to an eyewitness identification instruction that bolstered the questionable eyewitness testimony and was in conflict with a wealth of social science research and studies. Nor could trial counsel have a strategic reason for compounding this error during closing argument. As the federal court held in *Whitney v. Horn*, 280 F.3d 240, 258 (3d Cir. 2002), where counsel had failed to object to an erroneous intoxication instruction, "we cannot imagine any justification for a defense attorney not attempting to correct this type of error in an instruction . . . ." *Id.* As a result, Mr. Dotson was

prejudiced, as the jury could have followed the court's instruction and convicted Mr. Dotson of first degree murder based on the degree of certainty C.J. and Cedrick expressed regarding their identifications of Mr. Dotson. Accordingly, Mr. Dotson's rights to due process and a fair trial were violated.

The post-conviction court denied relief because in 1995 the Tennessee Supreme Court issued an opinion in *State v. Dyle* approving eyewitness jury instructions that encourage juror consideration of an eyewitness's claim of certainty. (PC Vol. 2, 392); *see State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995). But, as Mr. Dotson sets out above, research and court opinions since then, and prior to Mr. Dotson's trial, combine to establish flaws in the assumptions underlying the Court's *Dyle* opinion. As a result, counsel had available arguments that "time and subsequent cases have washed away the logic of [*Dyle*,]" *see Hurst v. Florida*, 577 U.S. 92, 102 (2016), and counsel were ineffective for failing to make them in an effort to keep jurors from receiving the eyewitness certainty instruction. *See Woodson*, 428 U.S. at 305 (the Eighth Amendment mandates a heightened need for reliability in capital cases).

C. Trial counsel failed to object to confusing sentencing instructions regarding unanimity and failed to request an instruction explaining the consequences of a hung sentencing jury.

The trial court gave Mr. Dotson's sentencing jury two different instructions on what it should do upon unanimously finding an aggravating circumstance or circumstances. First, the court told the jury that upon unanimously finding an aggravating circumstance or circumstances, jurors "shall" sentence Mr. Dotson to either life imprisonment without the possibility of parole or imprisonment for life. (Trial Vol. 6, 57-58). But after doing so, the trial court gave the jurors a contradictory instruction that should they unanimously find an aggravating circumstances or circumstances, they should then go on to consider whether they should sentence Mr. Dotson to

death. (*Id.* at 58-59). These two confusing instructions are impossible to reconcile, and they could only foster confusion among the sentencing jurors. Trial counsel's failure to take measures aimed at letting jurors know the legal effect of their confusion further impugned the jurors' sentencing hearing deliberations.

The Tennessee death penalty statute provides that

> If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and the judge shall impose a sentence of imprisonment for life.

Tenn. Code Ann. § 39-13-204(h). Even though a hung sentencing jury meant a sentence less than death for Mr. Dotson, trial counsel failed to ask the trial court to inform jurors of this reality. As a result, jurors facing the confusing unanimity instructions pointing to two different paths upon their finding of an aggravating circumstance or circumstances had no idea of the results that their subsequent actions or inactions would trigger. Counsel could have remedied this defect by requesting that the trial court instruct the jurors about the legal effects of their inability to agree on a sentence as a result of their confusion.

Mr. Dotson acknowledges that the Tennessee death penalty statute provides that the trial court cannot inform a capital sentencing jury on the effect of its failure to agree on a punishment. Tenn. Code Ann. § 39-13-204(h). But trial counsel could have argued that under the circumstances present in Mr. Dotson's case, failure to instruct the jury of the consequences of a hung sentencing verdict would violate Mr. Dotson's constitutional rights.

Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution require that capital sentencing procedures must

provide a process that will guarantee, as much as is humanly possible, that a death sentence will not be imposed out of whim, passion, prejudice, or mistake. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982)(O'Connor, J., concurring). Without knowing the legal effect of their failure to agree on a punishment, jurors could allow into their sentencing deliberations mistaken beliefs about what could happen if they do not agree. Jurors could misbelieve that their failure to agree might require a new trial, and that misbelief's added pressure could convince a juror holding out for life to vote for death. As a result, the Section 204(h) prohibition introduces the possibility of mistaken information entering into a capital sentencing jury's deliberation, and it therefore violates Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. *See Mak v. Blodgett,* 970 F.2d 614, 624 (9th Cir. 1992). Had trial counsel requested a hung sentencing jury instruction, they could have presented this argument, and a reasonable probability exists that either (1) the trial court would have instructed the jurors on the consequences of their inability to agree unanimously on Mr. Dotson's punishment; or (2) an appellate court would have vacated Mr. Dotson's death sentence had the trial court not given the hung jury instruction. *See McFarland v. Yukins,* 356 F.3d 688, 710 (6th Cir.2004); *Tappan v. State*, 2010 WL 3463310 at *7–8 (Tenn. Crim. App. 2010); *Johnson v. State*, 2006 WL 721300 at *15–18 (Tenn. Crim. App. 2006); *Holmes v. State*, 2004 WL 2253991 at *4 (Tenn. Crim. App. 2004).

In denying relief on Mr. Dotson's ineffective assistance of counsel claim, the post-conviction court cited *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006), to support a statement that the Tennessee Supreme Court has upheld the constitutionality of capital sentencing unanimity instructions. (PC Vol. 2, 391). As to federal constitutional issues, however, the United States Supreme Court is the final arbiter. *See State v. Gomez,* 163 S.W.3d 632, 650-51 (Tenn. 2005). In

addition, the lower court failed to recognize that a valid ineffective assistance of counsel claim does not require counsel's act or omission to involve a violation of another constitutional right. *Dean*, 59 S.W.3d at 667. For the reasons discussed above, irrespective of whether the Tennessee Supreme Court has rejected challenges to confusing unanimity instructions such as those given Mr. Dotson's sentencing jury, and irrespective of whether those violations violated the State and/or federal constitutions, counsel rendered ineffective assistance when they failed to take action aimed at removing uncertainty and misinformation from the jurors' sentencing decision.

D. Trial counsel failed to object to defective reasonable doubt instructions.

Prior to the jurors' guilt stage deliberations, the trial court instructed them that

> A reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every element of proof necessary to constitute the offense.

(Trial Vol. 6, 5-6). Prior to the jurors' sentencing deliberations, the trial court gave them an identical instruction, adding that "Reasonable doubt does not mean a doubt that may arise from a possibility." (Trial Vol. 6, 45). These instructions violated Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Because all doubt arises from possibilities, the trial court's instruction that reasonable doubt does not include a doubt arising from a possibility excluded jurors from considering any doubt, including a reasonable one, in their deliberations. After precluding jurors from considering any doubt, the trial court improperly told them to base their guilt and sentencing decisions on a "moral certainty" as opposed to an evidentiary certainty. Individually and in combination, these instructions gave rise to a reasonable likelihood that jurors believed they

could convict Mr. Dotson of first degree murder and sentence him to death on proof insufficient to meet the reasonable doubt standard. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990); *In re Winship*, 397 U.S. 358, 363-64 (1970).

Trial counsel made no effort to secure for Mr. Dotson necessary instructions ensuring his right to conviction and capital sentence only upon proof beyond a reasonable doubt. As a result, jurors convicted Mr. Dotson and sentenced him to death in violation of due process, and counsel did not perfect a challenge to the trial court's instructions for appeal. *See State v. Dotson*, 450 S.W.3d at 95-96 (noting that because trial counsel did not object to the reasonable doubt instructions, the Court's direct appeal review of them was limited to plain error). In failing to do so, counsel performed deficiently, and a reasonable likelihood exists that, had they not done so, the trial court's judgment convicting him of first degree murder and sentencing him to death would not exist today. *See McFarland,* 356 F.3d at 710 (6th Cir.2004); *Ratliff*, 999 F.2d at 1026.

In denying Mr. Dotson relief on his ineffective assistance of counsel claim, the post-conviction court stated that the Tennessee Supreme Court has upheld the constitutionality of "moral certainty" instructions. (PC Vol. 2, 391-92). But as discussed above, the United States Supreme Court is the final arbiter of federal constitutional issues. *See Gomez,* 163 S.W.3d at 650-51.

In addition, as discussed above, a valid ineffective assistance of counsel claim does not require counsel's act or omission to involve a violation of another constitutional right. *Dean,* 59 S.W.3d at 667. Prior to Mr. Dotson's trial the Tennessee Supreme Court discouraged use of that portion of the reasonable doubt instruction given Mr. Dotson's jury providing that a reasonable doubt does not arise from a possibility. *See State v. Rimmer*, 250 S.W.3d 12, 31 (Tenn. 2008). Given the Court's recognition that the possibility instruction is suspect, and given the United

State Supreme Court's disfavor of the "moral certainty" instruction, irrespective of whether the Tennessee Supreme Court has rejected challenges to "moral certainty" jury instructions, counsel's failure to secure appropriate reasonable doubt instructions constituted ineffective assistance.

E. Appellate counsel were ineffective for failing to raise challenges to the trial court's jury instructions.

The post-conviction court also denied Mr. Dotson's claim that appellate counsel rendered ineffective assistance of counsel in failing to raise instructional issues on direct appeal as plain error. (PC Vol. 2, 104). Mr. Dotson maintains that failure to object to these instructions constituted ineffective assistance of counsel as his instruction claims are meritorious and should have been reviewed on direct appeal. *See State v. Henretta*, 325 S.W.3d 112, 129 (Tenn. 2010) ("Appellate review of a patently incomplete instruction is available in capital cases despite the defendant's failure to raise the issue below under the plain error doctrine.")

XX. Mr. Dotson's convictions and death sentences are the product of a coerced verdict targeting the sole black male juror, racial animus, extraneous prejudicial information, outside influences, and premature deliberations.

Jury misconduct impacted and infringed upon the fundamental fairness of Mr. Dotson's trial. As a result, the verdicts were a product of an unfair process, in violation of Mr. Dotson's constitutional rights to due process, to a fair trial, to an impartial jury, and to be free from cruel and unusual punishment as guaranteed by Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to United States Constitution.

A. Coerced verdict.

Gerald Copeland was the only black male who served on Mr. Dotson's jury. He experienced undue pressure from other jurors to reach a decision which should have been an individual, measured consideration of the available penalties. As Mr. Copeland explained:

During the first few days of the trial, the jury was very friendly with each other when we ate our meals together. As time went by, we became less friendly with each other. Most of the jurors were very vocal about wanting the whole process to end and were ready to go home. I believe at least 9 out of the 12 jurors were more concerned about themselves and going home than about the trial and the sentencing.

* * *

During the second deliberation, I wanted to discuss what had been presented in court and the other jurors did not want to have any discussion. I had grown up around things like gang violence, which had been a big part of the trial, and I thought I had a perspective I could share that was important. But the other jurors did not seem to be interested in a black man's perspective on these issues. I felt that the sentencing deliberations were rushed and that the verdict was too quick because the other jurors did not want to have any discussion about the sentencing.

As soon as I expressed that I wanted to have a discussion about the sentencing, the other jurors came after me. I was cursed at by the other jurors. One female juror even called me a "bastard. . . ." Other jurors cursed at me too. They were very vocal about wanting to get the whole thing over with and wanting to go home. Because of the way the other jurors treated me, I felt pressured to vote to impose a death sentence on Mr. Dotson, even though I was not one hundred percent sure that that is how I wanted to cast my vote.

There were other instances throughout the trial where I also felt like I was being treated unfairly by the other jurors. For example, the places we went to eat were selected by the other jurors, and I got sick to my stomach a few times after eating. The other jurors laughed at me for getting sick, and told me it was because I wasn't used to eating good food.

The jury foreman was particularly rude to me. He would single me out and make comments about me in front of the other jurors that made me uncomfortable. For example, he once made fun of what I was wearing in front of the entire group of jurors. He singled me out in many other ways at many other times throughout the trial. I am not sure, but I think the reason he singled me out specifically may have been that I was the only black male on the jury.

* * *

I do not think the jury fairly discussed or deliberated during the sentencing part of Mr. Dotson's hearing. Although I tried to get the other jurors to discuss the evidence that had been put on during the sentencing phase, they were more interested in getting the whole thing over with and going home than fairly considering the case. Based on the way that the jury foreman and other jurors treated me, I felt pressured to vote to impose a death sentence on Mr. Dotson. I do not think that Mr. Dotson got a fair trial based on the way jury acted.

Affidavit of Juror Gerald Copeland, ¶¶ 3, 6–9, 12. (Sealed Offer of Proof).

Mr. Copeland reported his experience to alternate juror James Brown.[26] As Mr. Brown described:

> After the sentencing, all of the jurors, including the alternates, went out to dinner. At dinner, I noticed that one of the jurors—an African-American male around my age—seemed uncomfortable. When I ran into this juror in the restaurant restroom, I asked him if he was ok. He told me he was not, and that he felt abused by the other jurors during deliberations. He told me that other jurors had called him every name imaginable, including multiple profanities. This juror told me he attempted to get the other jurors to evaluate and discuss the details of the evidence presented by both the prosecution and the defense. He further told me the other jurors appeared disinterested in proceeding beyond their current decision and wanted to vote guilty without additional deliberations. Regarding his vote, the juror told me that as a result of the verbal abuse and pressure by the other jurors, he just wanted to be out of there, and he told me that he was tired and felt abused. I feel bad about the fact that this happened to this juror, and that nobody stood up for him or stopped the mistreatment during deliberations.

Affidavit of Alternate Juror James Brown, ¶ 6 (Sealed Offer of Proof).

More than a century ago, the United States Supreme Court made clear that a defendant has a right to a unanimous verdict based solely on the conscientious decision of each juror. *Allen v. United States*, 164 U.S. 492, 501 (1896). Thus, although the "very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves[,]" "the verdict . . . should represent the opinion of each individual juror" based on deliberations conducted inside the jury room." *Id.* The death sentences in this case do not represent the opinion of each individual juror. Mr. Copeland was pressured to sentence Mr. Dotson to death by other jurors who wanted the deliberations to end so that they could go home.

[26] In this case, while the alternate jurors did not deliberate on culpability or sentencing, they listened to all of the evidence presented. (PC Vol. 10, 21).

B. Racial Animus.

In addition, Mr. Copeland's description of events suggests that racial animus infected the deliberations, in violation of core principles of our justice system. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017) (juror's indication that he or she relied on racial stereotypes or animus to convict a criminal defendant may result in denial of a fair jury trial); *Buck v. Davis*, 137 S.Ct. 759, 777 (2017) (In a case involving testimony suggesting race or ethnicity as evidence of criminality, the Court noted that "[s]ome toxins can be deadly in small doses."); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."). State and federal courts have further recognized that racial bias can operate to deny fairness to the accused. *Turner v. Murray*, 476 U.S. 28, 42 (Brennan, J, concurring in part and dissenting in part); *Butler v. State*, WL 63526 at *3 (Tenn. Crim. App. 988), *aff'd on reh'g*, 1988 WL 93001 (Tenn. Crim. App. 1988), *rev'd on other grounds*, 789 S.W.2d 898 (Tenn. 1990) (recognizing that racial prejudice "may creep into the decisional process of the individual juror" and that "some citizens still cling to stereotyped notions and biased attitudes which thwart their unqualified acceptance of the basic truth that all men are created equal."). The sworn statements of Messrs. Copeland and Brown demonstrate that jurors expressed racial animus toward Mr. Copeland. Recognizing that they likely directed such animus toward Mr. Dotson requires little effort.

C. Extraneous prejudicial information and outside influences.

Mr. Copeland also indicated that the jurors were exposed to extraneous prejudicial information and/or subjected to improper outside influences. The Tennessee Supreme Court has defined extraneous prejudicial information as "information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case" and

improper outside influence as "any unauthorized private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *State v. Adams*, 405 S.W.3d 641, 650–51 (Tenn. 2013). Here, Mr. Copeland thought that another juror used a cell phone while the trial was ongoing, even though the jury was sequestered. Affidavit of Juror Gerald Copeland, ¶ 10. (Sealed Offer of Proof). Mr. Copeland was also able to watch the television in his hotel room, even though the televisions were supposed to be disconnected. *Id.* at ¶ 11. These observations also raise concerns that the jury's verdict was not solely based on the evidence presented at trial.

D. Premature deliberations.

Additionally, Mr. Brown reports members of the jury engaging in premature deliberations throughout the trial. As he detailed:

> During breaks throughout the trial, I overheard conversations in which jurors discussed the case before both sides had finished putting on their evidence. On occasions, I myself had to rebuff attempts by other jurors to discuss the case with me, including one attempt by a gentleman who would later become the jury foreman. Knowing that jurors are forbidden from discussing the case until deliberations, I reported the activity to a Deputy Sherriff. After I reported the other jurors' conduct, the judge gave a friendly but clear warning to the jury not to discuss the case until deliberations.
>
> I specifically remember that one white female juror made comments about the trial prior to hearing all the evidence from both sides . . . . I remember clearly that after the prosecution had rested its case but before the defense had put on any of its case, this female juror entered the jury room proclaiming that she was ready to vote and go home. From jury selection and throughout the trial, this juror by her random statements appeared much more concerned about her personal needs than her responsibility to hear the case. On one occasion, she solicited the other jurors to ask the court to work through the weekend so the trial could conclude and she could go home sooner. Having served as a juror before, I know it was highly inappropriate for her to not only be ready to vote before hearing the defense's case, but for verbalizing as much to other jurors. Throughout the trial, this juror seemed particularly negative about her requirement to be involved.

Affidavit of Alternate Juror James Brown, ¶¶ 4–5. (Sealed Offer of Proof). Premature discussions raise the possibility that the jurors will view the evidence through a distorted lens. Hence, the impropriety of premature deliberations is well-rooted in caselaw with numerous courts holding that improper juror communications before the close of proof may warrant a new trial. *See United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993) ("It is well established that [external jury influences] pose a . . .serious threat to the defendant's right to be tried by an impartial jury"); *see also United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2002); *United States v. Logan*, 250 F.3d 350, 381 (6th Cir. 2001); *United States v. Bertoli*, 40 F.3d 1384, 1393 (3d Cir. 1994); *United States v. Wiesner*, 789 F.2d 1264 (7th Cir. 1986); *United States v. Yonn*, 702 F.2d 1341, 1345 (11th Cir. 1983); *United States v. Richman*, 600 F.2d 286, 295–96 (1st Cir. 1979).

Mr. Dotson had the right to a fair trial before an impartial jury. Jurors Copeland and Brown, however, describe a trial that was rife with juror misconduct that went unchecked, and a jury that failed to follow the court's instructions. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrence and to determine the effect of such occurrence when they happen."). Accordingly, the proper remedy is for this Court to vacate Mr. Dotson's convictions and/or death sentences or, failing to do so, it should remand the case for hearing on this issue.

E. The post-conviction court erroneously denied relief.

At the evidentiary hearing, the post-conviction court determined that the proposed testimony of Jurors Copeland and Brown was inadmissible and denied Mr. Dotson the right to call them to testify. (PC Vol. 10, 26–28). The lower court then relied on its in-court ruling in denying the claim. (PC Vol. 2, 396). Once again, the post-conviction erred.

Tennessee Rule of Evidence 606(b) generally precludes jurors from testifying about the deliberation process.[27] A general rule, often referred to as the "no-impeachment rule," gives substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. *See Pena-Rodriguez*, 137 S.Ct. at 861. Rule 606(b), however, recognizes several exceptions to the "no-impeachment rule." A party challenging the validity of a verdict is permitted to present juror testimony to show that the jury was exposed to extraneous prejudicial information and/or subjected to an improper outside influence. Tenn. R. Evid. 606(b); *State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013).

Moreover, the United States Supreme Court recently recognizes thatm even if juror testimony is inadmissible under Rule 606(b), a defendant's rights to due process and to a fair and impartial jury can outweigh the policy considerations underlying limitations on juror testimony and compel the admission of such testimony. *See Pena-Rodriguez*, 137 S.Ct. at 869. Furthermore, jurors may testify about conduct that occurs outside of deliberations. *See, e.g., Tanner v. United States*, 483 U.S. 107, 138 (1987) (holding that when "petitioners' claim of juror misconduct and incompetency involves objectively verifiable conduct occurring prior to deliberations, juror testimony in support of the claims is admissible under Rule 606(b)").

Indeed, jurors have testified in several Tennessee capital post-conviction cases regarding a variety of issues. *See, e.g., Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (juror testified about his experience with crime victimization); *State v. Faulkner*, 2014 WL 4267460 (Tenn. Crim. App. 2014) (juror testified about her experiences with domestic violence); *Rollins v. State*, 2012 WL 3776696 (Tenn. Crim. App. 2012) (juror testified about his relationship with the victim in

[27] Tennessee formally adopted this rule in 1984 and it is identical to Federal Rule of Evidence 606(b). *State v. Blackwell*, 664 S.W.2d 686 (Tenn. 1984).

the case and his views on punishment). *See also Smith v. State*, 2020 WL 5870566 at *9 (Tenn. Crim. App. 2020) (juror statements indicative of bias were "disturbing if take as true," but no procedural vehicle was available to adjudicate juror misconduct claim); *Sexton v. State*, 2019 WL 6329518 (Tenn. Crim. App. 2019) (double homicide case where *pro se* litigant was granted a new trial due to the presence of a biased juror who failed to disclose that she was a victim of domestic violence).

In this case, Rule 606(b) did not preclude the proffered juror testimony. First, *Pena-Rodriguez* provides a basis to allow the admission of the testimony that the verdict was coerced, given the magnitude of that constitutional violation. Second, the *Pena-Rodriguez* Court specifically found that the Sixth Amendment requires that Rule 606(b) give way to allow the trial court to consider evidence of a juror's reliance on racial animus to convict a defendant. *Id.* at 869. Third, testimony concerning the use of a cell phone and watching television during the trial concerns extraneous prejudicial information that was improperly brought to the jury's attention and/or outside influence that was improperly brought to bear upon the jury and is an exception to the "no-impeachment rule." Lastly, testimony concerning premature deliberations obviously occurred prior to the course of the jury's deliberations and is clearly not barred by Rule 606(b).

For all of these reasons, the Rules of Evidence did not preclude the proposed testimony of Jurors Copeland and Brown. The lower court erred when it denied Mr. Dotson the right to present these witnesses. This Court should vacate Mr. Dotson's convictions and/or death sentences or, failing to do so, it should remand the case for hearing where Jurors Copeland and Brown can testify.

XXI. The Tennessee Supreme Court's proportionality review violated Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

A. The Tennessee Supreme Court's consideration of only those cases in which the State sought the death penalty deprived Mr. Dotson of an adequate proportionality review.

Proportionality review seeks to ensure that a death sentence in a particular case is not disproportionate to sentences rendered against similar defendants in similar cases. *See Gregg v. Georgia*, 428 U.S. 153, 198 (1976). In making this determination in Mr. Dotson's case, the Tennessee Supreme Court limited its "similar case" analysis to those in which the State sought the death penalty. *See Dotson*, 450 S.W.3d at 83-84. This limitation deprived Mr. Dotson of the proportionality review to which he was entitled.

Proportionality review strives to determine whether similar defendants, committing similar acts, are receiving similar sentences—not whether similar defendants, who prosecutors have charged with similar crimes, are receiving similar sentences. Thus, the appropriate sample for proportionality comparison must be every case in which the State charges a crime in which an element is the death of a human being. Any other rule renders the sample invalid because it allows Tennessee prosecutors' standardless charging decisions to control the sample.

Infinite variables affect a local prosecutor's decision on what to charge for alleged conduct. For example, the variables at work in a judicial district containing a large metropolitan area don't exist in a rural judicial district that is unaccustomed to the daily violence inherent in a large city. Thus, a prosecutor in a rural judicial district might well view the facts and circumstances of a homicide as among the worst s/he's ever encountered—and certainly death worthy—while a prosecutor in a large metropolitan area might view the same facts and circumstances as unexceptional. Similarly, given that prosecutors are unique individual human

beings, one prosecutor might harbor a view that only a multiple murder merits a capital charge, while another prosecutor might harbor a view that only a murder accompanying a sex crime does so. These differences demonstrate that by limiting its proportionality review to cases in which the State sought a death sentence, the Court allowed the standardless, divergent, charging decisions of prosecutors to invalidate the comparative sample that it relied on for its proportionality inquiry. As a result, the proportionality review the Court conducted did not comport with due process.

B. Trial counsel's ineffective assistance deprived Mr. Dotson of his right to proportionality review.

Tennessee's death penalty statute specifically instructs courts performing proportionality review to consider the defendant's background and character. Tenn. Code Ann. § 39-13-206(c)(1)(D); *see Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). To fulfill its purpose, proportionality review must consider all available evidence respecting a defendant's background and character. Any impediment to a court's consideration of such evidence invalidates the court's review. *See Eddings v. Oklahoma,* 455 U.S. 104, 113–15 (1982); *Lockett*, 438 U.S. at 604-05.

As discussed in Section VIII, above, trial counsel rendered ineffective assistance when they failed to put into evidence Dr. Walker's report of his evaluation of Mr. Dotson. As a result, when the Tennessee Supreme Court performed its proportionality review, it did not have before it, among other things, evidence that (1) as a child and adolescent Mr. Dotson had suffered head trauma (PC Ex. 19, 5-6); (2) Mr. Dotson has a history of losing consciousness (*id.* at 6); (3) Mr. Dotson may experience visual hallucinations (*id.* at 7); (4) as a child, Mr. Dotson was placed in special education classes (*id.* at 8); (5) psychological evaluation report the Mr. Dotson has limited intellectual functioning (*id.* at 11-12, 14-17, 20); (6) Mr. Dotson's mother regularly beat

him (*id.* at 9); and (7) Mr. Dotson suffers from significant mental health disorders. (*Id.* at 19). Trial counsel's constitutional violation thus improperly precluded the Court from considering evidence about Mr. Dotson's background and character, and the Court's direct appeal proportionality review is therefore constitutionally infirm.

In addition, due to trial counsel's ineffective assistance, the Rule 12 report indicates that while a psychiatric or psychological evaluation was performed, "no mental disease or defect or significant mental health or neurological impairments were found." (Trial Vol. 26, 8). As Mr. Dotson demonstrates above, we know that is wrong.

Furthermore, as Mr. Dotson discusses in Section X, above, the actions of the AOC Director and Tennessee Supreme Court Chief Justice improperly denied Mr. Dotson the ability to present additional mental health evidence in support of his ineffective assistance of counsel claim. This additional evidence would have also supported the conclusion that the Tennessee Supreme Court had inadequate evidence before it when it conducted its proportionality review of Mr. Dotson's case.

C. The post-conviction court erroneously denied relief.

The post-conviction court denied Mr. Dotson relief believing that (1) Mr. Dotson waived his proportionality challenge by not raising it in prior proceedings (PC Vol. 2, 394); and (2) Tennessee cases have rejected Mr. Dotson's arguments. (*Id.* at 394-95).

As to waiver, Mr. Dotson's claim did not arise until the Tennessee Supreme Court conducted its constitutionally marred proportionality review, and it will not be fully available until Mr. Dotson has access to the expert assistance the post-conviction court authorized. As a result, Mr. Dotson's claim was not available during prior proceedings, and it was therefore not subject to a waiver determination. *See* Tenn. Code Ann. § 40-30-106 (g) (a ground for relief is

waived only if the petitioner did not present it in a proceeding in which the ground could have been presented).

As to the cases the post-conviction court cites, none of them address the challenges Mr. Dotson presents. As a result, they do not support the lower court's decision denying Mr. Dotson relief.

XXII. Mr. Dotson's death sentences violate Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the judge made factual findings necessary to impose the death penalty.

A. *Hurst v. Florida* precludes judges from finding facts necessary for the imposition of a death sentence.

In *Hurst*, the Supreme Court held that Florida's death penalty statute was unconstitutional because it required the sentencing judge—not the jury—to make independent factual findings required for the imposition of the death penalty. *See Hurst*, 577 U.S. at 102-03. Specifically, a defendant was not eligible for death under Florida's statute until the trial judge made findings regarding the sufficiency of aggravating circumstances, mitigating circumstances, and the relative weight of each. *Id.* at 99-100. *Hurst* held that these judicial findings violated the Sixth Amendment because they deprived Hurst of his right to have a jury find any fact that exposed him to a greater punishment than the punishment that the jury's guilty verdict authorized. *Id.* at 98-99. In doing so, *Hurst* reiterated that at a capital sentencing hearing a jury—not a judge—must "find each fact necessary to impose a sentence of death." *Id.* at 94.

B. Acting as a thirteenth juror, the trial court rendered findings required for imposition of Mr. Dotson's death sentences.

In Tennessee, the trial judge has a "mandatory duty to serve as the thirteenth juror." *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). The thirteenth juror must make certain evidentiary findings before imposing the final judgment. *Id.* In doing so, the judge does not merely consider

whether the evidence is constitutionally sufficient, but instead must "'weigh the evidence himself as if he were a juror and determine the credibility of the witnesses and the preponderance of the evidence.'" *State v. Ellis*, 453 S.W.3d 889, 899 (Tenn. 2015) (quoting *State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting)). Such findings are a "necessary prerequisite to the imposition of a valid judgment." *Ellis*, 453 S.W.3d at 900 (quoting *State v. Moats*, 906 S.W.2d 431, 434 (Tenn. 1995)); *see also Carter*, 896 S.W.2d at 122.

Tennessee's thirteenth juror rule applies at capital sentencing hearings. *See, e.g., Smith v. State,* 357 S.W.3d 322, 339 (Tenn. 2011). Thus, a court cannot impose a death sentence until the judge makes thirteenth juror findings that (1) the State had proved at least one aggravating circumstances beyond a reasonable doubt; (2) the State had proved that aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt; and (3) the jury's verdict was legally sound. *See* Tenn. Code Ann. § 39-13-204(g)(1). The judge made these findings at the conclusion of Mr. Dotson's sentencing hearing (Trial Vol. 31, 2573-74), and the court thereafter imposed Mr. Dotson's death sentences. (*Id.* at 2574).

Hurst demonstrates that application of Tennessee's thirteenth juror rule at Mr. Dotson's capital sentencing hearing violated Mr. Dotson's right to a jury trial. As in *Hurst*, the court could not sentence Mr. Dotson to death until the judge made findings that the death penalty was appropriate. As in *Hurst,* Tennessee's thirteenth juror rule required these judicial findings before the court could sentence Mr. Dotson to a punishment beyond the minimum his first degree murder convictions allowed. As in *Hurst*, the trial court violated Mr. Dotson's right to a jury trial when it imposed his death sentences upon the judge's thirteenth juror findings.

C. The post-conviction court erroneously denied relief.

The post-conviction court denied Mr. Dotson's *Hurst* claim believing that (1) Mr. Dotson waived it by not raising it at trial; and (2) Tennessee cases have rejected Mr. Dotson's argument. (PC Vol. 2, 394-95).

As to waiver, Mr. Dotson's trial occurred in 2010. The Court decided *Hurst* in 2016. As a result, the *Hurst* opinion was not available during Mr. Dotson's trial, and Mr. Dotson's *Hurst* claim is therefore not subject to a waiver determination. *See* Tenn. Code Ann. § 40-30-106 (g). Assuming *arguendo* that prior counsel could have raised this claim, they rendered ineffective assistance in failing to do so.

As to the cases the post-conviction court cites, they are unpublished orders affirming denials of motions to reopen. (*See* PC Vol. 2, 394-95); *see* Tenn. Code Ann. § 40-30-117. No published case applies *Hurst* to Tennessee's thirteenth juror rule in an initial post-conviction proceeding.

XXIII. Mr. Dotson's death sentences violate his fundamental right to life.

The State and federal constitutions recognize that Mr. Dotson has a fundamental right to live. *Ford v. Wainwright*, 477 U.S. 399, 409 (1986). As a result, this Court must subject the State's intention to deprive Mr. Dotson of that fundamental right to strict scrutiny. *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). To survive strict scrutiny review, the State must demonstrate that executing Mr. Dotson advances a legitimate State interest by the least restrictive means available. *Doe*, 751 S.W.2d at 841 (Tenn. 1988); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

While Mr. Dotson presented his fundamental right to life claim in the lower court, the State made no effort to carry its burden of demonstrating that taking from Mr. Dotson his life is

narrowly tailored to achieve a legitimate State interest. The State's failure to carry its burden entitled Mr. Dotson to relief on his fundamental right to life claim, *see Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010), and the lower court erred in denying Mr. Dotson relief.

Even if the State had made an attempt to carry its strict scrutiny burden, it could not have done so. The strict scrutiny test strongly favors the individual right in question. *See Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799 (2011). It carries a strong presumption that the challenged law is invalid and places a thumb on the scales in favor of the individual right. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004). Under strict scrutiny, "a heavy burden of justification is on the State." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Deterrence and retribution provide the only two potential bases for the State's intention to deprive Mr. Dotson of his fundamental right to life. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Neither of these survive strict scrutiny analysis.

As to deterrence, no evidence suggests that exacting from Mr. Dotson his life will further the State's interest of deterring homicide within Tennessee's borders. *See* Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 Conn. L. Rev. 765, 768 (2001); National Research Council of the National Academies, *Deterrence and the Death Penalty 2* (Daniel S. Nagin & John V. Pepper Eds., 2012) ("[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates."); Bradley A. MacLean & H. E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 Tenn. Journal of Law & Policy, 85, 181 (2018). And no evidence suggests that depriving Mr. Dotson of his life is

necessary to deter him from committing a homicide during his incarceration. Indeed, the evidence demonstrates the opposite. The State has incarcerated Mr. Dotson since March 7, 2008, and in those twelve plus years Mr. Dotson has not taken the life of another, nor has he threatened to do so.

As to retribution, Tennessee law provides life without the possibility of parole (LWOP) as a potential punishment for first degree murder. *See* Tenn. Code Ann. § 39-13-204(a). Courts, lawyers, jurors, and defendants validate the view that an LWOP sentence is worse than a death sentence. *See, e.g., Cox v. Ayers*, 613 F.3d 883, 898-99 (9th Cir. 2010); *People v. Armstrong*, 433 P.3d 987, 1010, 1017 (Cal. 2019); *People v. Hardy*, 418 P.3d 309, 328 (Cal. 2018); *Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky. App. 2001). As a result, the State cannot show that sentencing Mr. Dotson to death is the only means it has to exact retribution.

In denying Mr. Dotson's fundamental right to life claim, the post-conviction court first concluded that Mr. Dotson had waived it by failing to raise it during trial and direct appeal. (PC Vol. 2, 396). But as Mr. Dotson argued below, because his right to life claim involves a fundamental right explicitly enumerated in the due process provisions of the State and federal constitution, before a court can deem his claim waived the record must reflect that Mr. Dotson made a personal, affirmative, voluntary, and intelligent decision to forego it. (*See* PC Vol. 1, 155-56); *Gonzalez v. United States*, 553 U.S. 242, 248 (2008); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). The record contains no evidence that Mr. Dotson personally, affirmatively, voluntarily, and intelligently made a decision to forego his fundamental right to life claim. As a result, the lower court erred when it concluded that Mr. Dotson had waived it.

While the post-conviction court also addressed the merits of Mr. Dotson's claim, it misinterpreted his claim, and, as a result, it applied the wrong law and relied on irrelevant

evidence to deny relief. The post-conviction court first cites *State v. Mann* for the proposition that Tennessee courts have concluded that when a defendant rejects a plea offer of a sentence less than death, the State does not burden the defendant's trial right when it thereafter seeks a death sentence. (PC Vol. 2, 396); *State v. Mann*, 959 S.W.2d 509-11 (Tenn. 1997). The court then goes on to express its belief that the record before it did not demonstrate that the State offered Mr. Dotson an opportunity to plead guilty for sentences less than death. (PC Vol. 2, 396-97). But Mr. Dotson's claim does not require a less than death offer from the State. Rather, it simply asserts that the State cannot show that depriving Mr. Dotson of his fundamental right to life is the least restrictive means to accomplishing a legitimate State interest. Because that is so, irrespective of whether the State offered Mr. Dotson an opportunity to plead for sentences less than death, the post-conviction court's reliance on *Mann* and the lack of evidence establishing a plea offer is misplaced. This Court should therefore reverse the post-conviction court's decision denying Mr. Dotson relief on his fundamental right to life claim.

XXIV. Mr. Dotson's convictions and death sentences violate Article VI, Clause 2, of the United States Constitution.

A State violates the Supremacy Clause of the United States Constitution when it disregards a person's rights under customary international law and under treaties to which the United States is bound. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Belmont*, 301 U.S. 324 (1937); *Breard v. Greene*, 523 U.S. 371, 375–76 (1998). Such is the case here.

The post-conviction court did not dispute that in seeking and obtaining Mr. Dotson's convictions and death sentence, the State violated rights secured to Mr. Dotson by (1) The International Convention on the Elimination of All Forms of Racial Discrimination; (2) The International Covenant on Civil and Political Rights; and (3) The Convention Against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment. Rather, the court denied Mr. Dotson relief by ruling that he waived his claims by not presenting them to the trial court and on direct appeal. (PC Vol. 2, 394). But the conventions on which Mr. Dotson bases his claims provide that legal systems must ensure that persons claiming rights under them have access to tribunals where they can seek redress for their violation. *See* The International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; The International Covenant on Civil and Political Rights Article 2, § 3(b); The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14, § 1. As a result, the conventions preclude application of the waiver doctrine to Mr. Dotson's Supremacy Clause claims.

Mr. Dotson acknowledges that the Tennessee Supreme Court has rejected Supremacy Clause claims such as those he presents. *See State v. Odom*, 137 S.W.3d 572, 591, 597-600 (Tenn. 2004). Mr. Dotson raises them here to preserve them for further review.

XXV. Tennessee's death penalty scheme violates Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

The post-conviction court determined that Mr. Dotson's challenges to Tennessee's death penalty scheme were meritless due to the failure of repeated challenges in the past. (PC Vol. 2, 394-95).

Evolving standards of decency have precipitated a withering away of the death penalty in this country. *See* Death Penalty Information Center, Sentencing Data, https://deathpenaltyinfo.org/facts-and-research/sentencing-data (last visited November 18, 2020) ("the number of death sentences in the U.S. has plummeted since 2000 while the county's murder rate has remained fairly stable"). Many jurisdictions are abandoning the death penalty in recognition of the inherent problems that Justice Breyer identified in *Glossip v. Gross*, 135 S.Ct.

2726, 2761 (2015) (Breyer, J., dissenting) (the lack of reliability, the arbitrary application of a serious and irreversible punishment, the individual suffering caused by long delays, and the lack of penological purpose); *see also State v. Gregory*, 427 P.3d 621, 633–37 (Wash. 2018) (finding the application of Washington's death penalty unconstitutional because it was imposed in an arbitrary and racially biased manner, and failed to serve legitimate penological goals); *State v. Santiago*, 122 A.3d 1, 86–120 (Conn. 2015) (holding Connecticut's capital punishment scheme unconstitutional because it no longer comported with contemporary standards of decency and was devoid of any legitimate penological justifications). Tennessee's death scheme is plagued with the same problems identified by Justice Breyer rendering our capital punishment system unreliable, unfair, and failing to serve a legitimate penological purpose. This unconstitutional scheme resulted in Mr. Dotson's convictions and death sentences.

Mr. Dotson's right to equal protection was violated by Tennessee's lack of statewide standards for pursuing the death penalty and the different treatment of persons' fundamental right to life. *Bush v. Gore*, 531 U.S. 98 (2000); *Furman v. Georgia*, 408 U.S. 238 (1972). Moreover, Mr. Dotson's death sentences were imposed in an arbitrary and capricious manner for the following reasons: (1) no uniform standards or procedures for jury selection existed to ensure open inquiry concerning potentially prejudicial subject matter; (2) Mr. Dotson was prohibited from addressing each juror's popular misconceptions about matters relevant to sentencing; and (3) Mr. Dotson was prohibited from presenting a final closing argument in the sentencing trial since only the State is permitted a second argument.

Instructional problems also contributed to the arbitrary and capricious imposition of Mr. Dotson's death sentences: (1) the jury was required to agree unanimously to a life verdict in violation of *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S.

433 (1990); (2) a reasonable likelihood exists that jurors believed that they were required to unanimously agree as to the existence of mitigating circumstances; and (3) the jury was not required to make the ultimate determination that death is the appropriate penalty. (*See, e.g.,* Trial Vol. 31, 2558–59, 2561–62).

Tennessee also denied Mr. Dotson's rights under Article I, §§ 8, 14, and 16 of the Tennessee Constitution, and the Fifth Eighth, and Fourteenth Amendments to the United States Constitution, because the aggravating factors making him eligible for a death sentence were neither in the indictment nor returned by the grand jury. (Trial Vol. 1, 1-11). *See Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. U.S.*, 526 U.S. 227 (1999). *But see State v. Berry*, 141 S.W.2d 549 (Tenn. 2004)

In addition, Mr. Dotson's proportionality review process was not conducted in a manner sufficient to satisfy the federal due process clause or the state constitutional law of the land clause. *See, e.g., Olim v. Wakinkona*, 461 U.S. 238 (1983). The appellate review process was not meaningful because: (1) the courts could not reweigh proof due to the absence of written findings concerning mitigating circumstances, (Trial Vol. 34, 56–174); (2) the information relied upon for comparative review was inadequate and incomplete; and (3) the methodology, in which only cases where a death sentence was upheld are reviewed, is fundamentally flawed. *State v. Pruitt*, 415 S.W.3d 180, 212–17 (Tenn. 2013).

The legal bases for each these claims have been apparent since the reinstitution of the death penalty in the 1970s and have been extensively litigated in capital cases. Trial counsel's and appellate counsel's failures to raise these issues at trial or on direct appeal, and at least preserve these issues, constitutes ineffective assistance of counsel.

XXVI. Tennessee's execution methods violate Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

For the reasons Mr. Dotson sets out in his Amended Post-Conviction Petition, the State would violate Article I, §§ 8 and 16 of the Tennessee Constitution, and Eighth and Fourteenth Amendments to the United States Constitution if it executed him by lethal injection or electrocution. (*See* PC Vol. 1, 147). Mr. Dotson recognizes that courts have rejected these claims, and he raises them to preserve them for further review.

XVII. Cumulative error invalidates Mr. Dotson's convictions and/or sentences.

Each of the errors Mr. Dotson presents this Court are prejudicial and material and, therefore, each serves as an individual ground for granting relief. If this Court nonetheless concludes that a constitutional error was harmless, and/or if this court concludes that one or more instances of counsel's deficient performance did not prejudice Mr. Dotson, and/or if this Court concludes that one or more instances of prosecutorial misconduct did not keep material evidence from Mr. Dotson's jury, this Court must consider whether the cumulative impact of all such errors requires it to set aside Mr. Dotson's convictions and/or death sentences. *See State v. Sexton*, 368 S.W.3d 371, 429-30 (Tenn. 2012); *Whitehead v. State*, 2020 WL 2026010 at *6 (Tenn. Crim. App. 2020); *Arnold v. State*, 569928 at *39 (Tenn. Crim. App. 2020); *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010); *McKinney v. State*, 2010 WL 796939 at *37.

In addition, this Court should employ cumulative error analysis when considering Mr. Dotson's claims that he received ineffective assistance of counsel and that the prosecution engaged in misconduct during closing arguments. Given trial counsel's deficient performance, on direct appeal the Tennessee Supreme Court employed plain error analysis to address only limited comments prosecutors made during closing arguments which were part of a much broader pattern of improper argument.

Finally, this Court should employ cumulative error analysis to review the multiple instances of constitutional error that were reviewed only on plain error analysis on direct appeal due to trial counsel's failure to object at the time of trial and/or in the motion for new trial.

CONCLUSION

For the foregoing reasons this Court should:

(1) reverse the post-conviction court's decision denying Mr. Dotson relief and either (a) vacate Mr. Dotson's convictions and/or sentences; or (b) grant him a second direct appeal during which he may present specified issues; or

(2) vacate the post-conviction court's decision denying Mr. Dotson post-conviction relief and remand his case to the post-conviction court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Andrew L. Harris
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CERTIFICATE OF SERVICE

I certify that I placed a copy of the foregoing in the United States mail, first-class postage prepaid, addressed to Courtney N. Orr, Assistant Attorney General, Criminal Appeals Division, Office of the State Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202-0207 on this the 20th day of November 2020.

/s/ Andrew L. Harris
Andrew L. Harris

Appendix E

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

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

ON APPLICATION FOR PERMISSION TO APPEAL FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

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?

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STATEMENT OF THE CASE

This is a capital post-conviction case in which Mr. Dotson was forced to proceed to an evidentiary hearing without the services of any mental health experts.[1] Prior to the post-conviction evidentiary hearing, Mr. Dotson moved the court to authorize the services of Bhushan S. Agharkar, M.D. (psychiatrist); James R. Merikangas, M.D. (psychiatrist/neurologist); Richard Leo, Ph.D., J.D. (false confession expert); and Dr. James S. Walker (neuropsychologist).[2] Pursuant to Tenn. Code Ann. § 40–30–207(b) and Tennessee Supreme Court Rule 13, the trial court found these services necessary to protect Mr. Dotson's constitutional rights, and it therefore authorized funding for those experts. However, when Mr. Dotson submitted the trial court's funding orders for approval pursuant to Tennessee Supreme Court Rule 13 § 5(e)(4)–(5), the AOC Director and Tennessee Supreme Court Chief Justice vacated them.

Mr. Dotson objected to proceeding through an evidentiary hearing without access to the experts who were found to be necessary to protect his constitutional rights. (PC Vol. 10, 29–34; PC Vol. 15, 5–7, 14, 27–28); PC Vol. 16, 15, 36). The hearing proceeded nonetheless, and, on May 16,

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[1] As undersigned counsel stated at the beginning of the post-conviction hearing, all previous capital post-conviction clients in the last two decades have had access to mental health experts to establish their claims. (PC Vol. 10, 29).

[2] Drs. Leo and Walker were retained by trial counsel, but neither were presented as witnesses at Mr. Dotson's 2010 trial. Mr. Dotson's convictions and death sentences were affirmed on direct appeal. *State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014).

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2019, the post-conviction court filed its Findings of Facts and Conclusions of Law denying Mr. Dotson post-conviction relief. (PC Vol. 2, 289–397).

Mr. Dotson appealed. The Court of Criminal Appeals entered its opinion in this case affirming the post-conviction trial court's denial of Mr. Dotson's post-conviction petition on March 23, 2022. *Jessie Dotson v. State,* No. W2019–01059–CCA–R3–PD, 2022 WL 860414 (Tenn. Crim. App., Jackson, March 23, 2022).

The Court of Criminal Appeals held that it was without jurisdiction or authority to address the constitutional challenges Mr. Dotson raised in his Rule 3 appeal regarding the denial of expert services. *Dotson*, 2022 WL 860414, at *63–65. The Court also held that "the law does not provide an appeal of the Chief Justice's decision to deny the Petitioner's requests for funding of various expert witnesses." *Id.*, at *65. Mr. Dotson filed a petition for rehearing on April 14, 2022, which was denied on April 18, 2022.

Mr. Dotson timely filed his Application for Permission to Appeal in this Court on June 16, 2022. This Court granted Mr. Dotson's Application on October 25, 2022, and subsequently granted Appellant's unopposed motion to extend the time to file his opening brief to January 27, 2023.

STATEMENT OF THE FACTS

A. Trial counsel retained a mental health expert and a leading expert in false confessions.

Mr. Dotson's trial counsel engaged neuropsychologist James Walker to evaluate their client. (PC Vol. 10, 107). Counsel "knew that there were some deficits" and hired Dr. Walker to conduct

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neuropsychological testing. (PC Vol. 10, 107–08). After interviewing Mr. Dotson, administering tests, and reviewing documents, Dr. Walker provided trial counsel a draft report informing counsel, among other things, that (1) as a child Mr. Dotson suffered severe physical abuse at the hands of his mother and father; (2) Mr. Dotson's childhood environment subjected him to violence and the constant threat of violence; (3) Mr. Dotson was intoxicated at the time of the offense; (4) Mr. Dotson suffered from significant mental health disorders, including cognitive disorder not otherwise specified; and (5) Mr. Dotson expressed antisocial characteristics. (PC Ex. 19, 19–22). He did not diagnose Mr. Dotson with antisocial personality disorder. (*Id.*, 19).

Dr. Walker did not testify at trial, nor did any mental health expert.

Mr. Dotson's trial counsel engaged Richard Leo, Ph.D., J.D., to investigate "challeng[ing] the false confession." (PC Vol. 10, 78). Counsel had heard that he was one of the leading experts in that field and wanted to challenge the voluntariness of Mr. Dotson's statement. (*Id.*, 78–79). Dr. Leo was approved for $150 per hour, for a total of $18,750 and 125 hours of work, plus reasonable and necessary travel expenses. (*Id.*, 79; PC Ex. 6). However, Dr. Leo only billed for $1,200 (or 8 hours) of work. (PC Ex. 49). Most of his consultations were with defense team investigator Rachael Geiser, not trial counsel. (*Id.*).

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B. Post-conviction counsel attempted to engage multiple mental health experts and the trial false confession expert, all of whom were approved in orders entered by the trial judge which were then vacated by the AOC and Chief Justice.

In his amended post-conviction petition, Mr. Dotson asserted that his trial counsel provided ineffective assistance when they failed to utilize mental health experts to investigate Mr. Dotson's neurological, psychiatric, and cognitive impairments. (PC Vol. 1, 92–97). Mr. Dotson alleged that, as a result, trial counsel failed to present evidence that challenged the reliability and voluntariness of Mr. Dotson's statements and mitigated his culpability for the crimes charged. (*Id.*, 97–100). Although trial counsel retained a neuropsychologist, they did not retain a psychiatrist or neurologist—mental health experts who can provide services that a neuropsychologist cannot.

1. Dr. Agharkar was approved to provide mental health services.

To establish his allegations, Mr. Dotson moved the trial court to authorize funding for the services of Bhushan S. Agharkar, M.D., a forensic psychiatrist specializing in the areas of traumatic brain injury and post-traumatic stress disorder. (*See* 3/8/17 Sealed, *Ex Parte* Motion for Expert Services of Bhushan S. Agharkar, M.D.).[3] Mr. Dotson explained that trial counsel did not present expert mental health testimony, and he required Dr. Agharkar's services to present his claim

[3] The Court of Criminal Appeals granted Appellant's motion to supplement the record with designated *ex parte* funding motions. (Order filed 1/27/20). They are under seal. (*Id.*).

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that as a result of counsel's lapse, jurors did not hear evidence regarding his mental health disorders, traumatic childhood, and cognitive impairments. (*Id.*, 4–15).

The trial court concluded that fifty hours of Dr. Agharkar's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 3/8/17 Sealed, *Ex Parte* Order). While Dr. Agharkar's $350 hourly rate[4] exceeded Rule 13 § 5(d)(1)(e)'s $250 maximum hourly rate, the trial court found Dr. Agharkar's rate "reasonable, within the range charged by similar experts [and] justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*Id.*, 1–2).[5] As a result, the trial court authorized $17,500 plus travel expenses for Dr. Agharkar's work. (*Id.*, 2).

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[4] Dr. Agharkar's usual *discounted* rate in indigent cases is $400 per hour. (See 3/8/17 Sealed, *Ex Parte* Motion for Expert Services of Bhushan S. Agharkar, M.D., 15).

[5] This Court recently conducted an inquiry into Tennessee's indigent funding system and the deficiencies in the current expert funding scheme contained in Tenn. Sup. Ct. R. 13, sec. 5. In September 2015, then-Chief Justice Sharon Lee announced the formation of a task force to study the delivery of services to indigent defendants across the state. On April 3, 2017, the Task Force issued its report to this Court with recommendations across the spectrum of indigent defense. *See* Task Force Report: *Liberty and Justice for All: Providing Right to Counsel Services in Tennessee*, available at https://www.tncourts.gov/IndigentRepresentationTaskForce.
Issue Seven in the report addresses the process of securing defense experts as currently set forth in Rule 13. (*Id.*, 52–53). The Task Force found that "[l]awyers and judges appearing before the Task Force stated that the current rates for paying certain experts under Tenn. Sup. Ct. R.

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Pursuant to the current version of Tennessee Supreme Court Rule 13, counsel forwarded the trial court's order to the AOC for processing.[6] The AOC Director and the Chief Justice denied Dr. Agharkar's services at that rate, vacating the post-conviction's order. Without expert services which were found by the post-conviction court, the AOC, and Chief Justice Bivins to be necessary to protect Mr. Dotson's constitutional rights,[7] Mr. Dotson filed a motion to vacate his death sentences. (PC Vol.

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13 are below the market rate." (*Id.*, 52). As a result, "it is becoming difficult to find experts in a number of fields who will agree to serve as expert witnesses." (*Id.*) The task force recommended that payment for experts be adjusted to market rates. (*Id.*, 53). After carefully reviewing the report and its recommendations, the Court expressed support for the recommendations and began efforts to implement the recommendations. https://www.tncourts.gov/press/2017/07/12/tennessee-supreme-court-expresses-support-indigent-representation-task-force.

[6] In 2004, this Court amended Rule 13, adding sections 5(e)(4) and (e)(5) to create an AOC review process. This process requires an indigent petitioner to provide the AOC Director with the post-conviction court's funding order and receive "prior approval" of that order from the Director before he can access the funds the post-conviction court authorized. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director does not approve the order, the Chief Justice of the Tennessee Supreme Court reviews it. *Id.*, at § 5(e)(5). If the Chief Justice does not approve the post-conviction court's funding order, Rule 13 §§ 5(e)(4) and (e)(5) foreclose an indigent petitioner from accessing the funds the post-conviction court found necessary to protect his constitutional rights. *Id.*

[7] The post-conviction court noted that the AOC, in a March 21, 2017 letter, had "concluded that counsel has made the necessary showing of facts and circumstances supporting counsel's position that the services are necessary to ensure that the constitutional rights of Mr. Dotson are properly protected." (PC Vol. 1, 208). Further, the court noted that the

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1, 181–207). The State responded to the motion, asserting, inter alia, that the requested remedy of vacating the death sentence was not ripe since Mr. Dotson had not been denied *all* expert assistance in the area of psychiatry. (PC Vol. 13, 10–12). The post-conviction court denied Mr. Dotson's motion, noting that he had "not been denied the request of all expert assistance in the area of psychiatry." (PC Vol. 1, 208–09).

Mr. Dotson then filed an application for permission for a Rule 9 appeal of the denial of the motion to vacate, which was denied. (PC Vol. 7). Mr. Dotson unsuccessfully pursued a Rule 10 appeal to the Court of Criminal Appeals and this Court. (*See Jessie Dotson v. State*, W2017–02250–CCA–R10–PD and *Jessie Dotson v. State*, W2017–02550–SC–R10–PD).[8] Dr. Agharkar declined Mr. Dotson's offer to work for $250 an hour. (*See* PC Vol. 10, 30).

2. Dr. Merikangas was approved to provide mental health services.

Mr. Dotson then renewed efforts to retain an expert at the $250 rate and moved the court to authorize funding for the services of James R. Merikangas, M.D (psychiatrist/neurologist). (*See* 6/26/18 Sealed, *Ex*

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letter stated the Chief Justice had reviewed all the materials provided to the AOC and concurred with the AOC's decision. (*Id.*) However, the AOC denied Dr. Agharkar's reduced rate as not permissible by Rule 13. (*Id.*).

[8] The Court of Criminal Appeals took judicial notice of the pleadings and orders filed in those Rule 10 actions and directed the clerk to consolidate the records with this appeal for the panel, and then to deconsolidate the records and return them to their original location in the local archive after conclusion of this appeal. (Order filed 1/27/20). Mr. Dotson requests this Court to take judicial notice of the records in those appeals.

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Parte Motion for Expert Services of James R. Merikangas, M.D.). Mr. Dotson reiterated that he was presenting claims that involved trial counsel's failure to investigate and present mental state and mental health evidence. (*Id.*, 3–5). Mr. Dotson informed the court that Dr. Merikangas was qualified to provide counsel an expert opinion respecting Mr. Dotson's mental state at the time of the offense and any mental health disorders that may afflict him. (*Id.*, 8–9). Dr. Merikangas was willing to reduce his fee to work for the "state rate" of $250 hour. (*Id.*, 9).

The trial court concluded that Dr. Merikangas's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 6/26/18 Sealed, *Ex Parte* Order). While the court recognized that it would exceed Tennessee Supreme Court Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Merikangas's services, it also recognized that the Rule authorized courts to exercise discretion to exceed that limit. (*Id.*). Following the strictures of Rule 13, the court exercised its discretion to exceed the Rule's limit by finding by clear and convincing evidence that extraordinary circumstances existed. (*Id.*). As a result, the court authorized $10,000 plus travel expenses for Dr. Merikangas. (*Id.*).

Post-conviction counsel forwarded the trial court's funding order to the AOC Director. Lacy Wilber, Assistant General Counsel for the AOC, subsequently informed counsel that the AOC Director and Chief Justice vacated the court's funding order. (*See* PC Vol. 10, 31).

3. Dr. Leo was approved to assess the reliability and voluntariness of Mr. Dotson's statements.

Post-conviction counsel also attempted to retain Richard Leo, Ph.D., J.D., to investigate whether authorities had coerced Mr. Dotson

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into making false statements against himself—the task he was initially retained to complete. (*See* 8/15/18 Sealed, *Ex Parte* Motion for Expert Services of Richard A. Leo, Ph.D., J.D., 4.). Mr. Dotson informed the post-conviction court that after hiring Dr. Leo, trial counsel barely spoke to him, provided him minimal materials, and did not ask him for an expert opinion about the reliability and voluntariness of Mr. Dotson's statements. (*Id.*, 4). Mr. Dotson asserted that given Dr. Leo's education, training, and experience, as well as his experience with Mr. Dotson's trial counsel, Dr. Leo's services were necessary to present a claim that trial counsel were ineffective for failing to investigate and present evidence challenging Mr. Dotson's statements. (*Id.*, 8). Dr. Leo was willing to work for a reduced rate of $150 an hour. (*Id.*).

The post-conviction court concluded that Dr. Leo's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 8/15/18 Sealed, *Ex Parte* Order Authorizing the Expert Services of Richard A. Leo, Ph.D., J.D.). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Leo's services, it exercised the discretion authorized by the Rule to find by clear and convincing evidence that extraordinary circumstances existed to exceed the limit. (*Id.*). As a result, the court authorized $9,000 plus travel expenses for Dr. Leo. (*Id.*). This amount was far less than the balance of the previously approved amount at trial, $18,750, minus the $1,200 for services rendered.

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Counsel forwarded the post-conviction court's funding order to the AOC Director. Ms. Wilber subsequently informed counsel that the Chief Justice vacated the trial court's order. (*See* PC Vol. 10, 31–32).

4. Dr. Walker was approved to render his professional services as a neuropsychologist and to testify in support of Mr. Dotson's ineffective assistance of counsel claim.

Post-conviction counsel filed a motion seeking funding to present Dr. James Walker at the post-conviction hearing. (*See* 9/25/18 Petitioner's Sealed, *Ex Parte* Motion for Reimbursement of Neuropsychologist James S. Walker for Rendering Professional Services). Counsel asserted that Dr. Walker's services were necessary to establish his claims of ineffective assistance of counsel, specifically regarding the failure of trial counsel to present available mitigating evidence regarding Mr. Dotson's diagnosed mental diseases and defects. (*Id.*, 1). Counsel explained that trial counsel had retained Dr. Walker, who issued a preliminary report containing his diagnosis of cognitive disorder not otherwise specified, adjustment disorder, and verbal learning disorder. (*Id.*, 6). Dr. Walker also found that Mr. Dotson suffered severe physical abuse from his parents as a young child, was subjected to terrifying events in his neighborhood on a regular basis, and was intoxicated at the time of the offense. (*Id.*). Combined with his cognitive difficulties, his intoxication "would greatly impair a person's ability to make decisions, think reliably, or consider the consequences of his actions." (*Id.*). The preliminary report was attached to the motion with Dr. Walker's curriculum vitae. (*Id.*).

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Counsel asserted that Mr. Dotson must have the ability to present expert testimony to demonstrate trial counsel's deficiencies and prejudice, and specifically the trial expert who possessed that knowledge. (*Id.*, 7). Counsel cited to an extensive body of case law recognizing that a competent presentation of a defendant's mental health issues through the testimony of a mental health expert is critically important in capital sentencing proceedings. (*Id.*, 8–9). Counsel asserted that trial counsel's failure to properly use the assistance of Dr. Walker prejudiced Mr. Dotson. (*Id.*, 9).

Counsel explained that Dr. Walker had already met with post-conviction counsel, so the reimbursement he required was limited to two hours to review his files and prepare for testimony, and four hours for his court appearance and testimony at the rate of $150 per hour, plus seven hours of travel at $75 per hour. (*Id.*). The total among requested was $1,425 plus travel expenses. (*Id.*, 10). Counsel asserted that Dr. Walker technically was not a post-conviction expert, but rather a trial team expert whose testimony was necessary in post-conviction. (*Id.*). His testimony would primarily involve matters of specialized knowledge and opinion, as opposed to factual matters. (*Id.*). However, in addition to discussing his neuropsychological findings and conclusions, he would also testify about his communications and interactions with trial counsel and agents or lack thereof. (*Id.*, 2). Thus, his testimony would be "much different in kind than that of a lay witness being called to recount what he saw or heard." (*Id.*).

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The post-conviction court concluded that Dr. Walker's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 9/25/18 Sealed, *Ex Parte* Order Authorizing the Expert Services of James S. Walker, PH.D., Neuropsychologist, 1–2). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Walker's services, it exercised its discretion to do so by finding that extraordinary circumstances existed. (*Id.*, 2). As a result, the court authorized $1,425 plus travel expenses for Dr. Walker's services. (*Id.*).

Counsel forwarded the post-conviction court's funding order to the AOC Director. Mr. Dotson received a voicemail notification that the AOC Director and Chief Justice had vacated the trial court's order. (*See* PC Vol. 10, 33).

5. Mr. Dotson objected to proceeding to the post-conviction hearing without the expert assistance ordered by the trial court.

In advance of the post-conviction evidentiary hearing beginning October 1, 2018, counsel informed the trial court and the State at a September 12, 2018 telephonic hearing that the AOC had denied two experts approved by the trial court. (PC Vol. 15, 6). At that point, counsel had been advised by the AOC that an appeal was sent to the Chief Justice of that denial. (*Id.*). Counsel stated that one of the experts was a neurologist who is also a psychiatrist and the second was a false confession expert who also served as a trial expert. (*Id.*). Counsel also mentioned that they were speaking the next day with a trial mental health expert who potentially would be a witness at the hearing. (*Id.*, 7).

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The trial judge informed counsel that he did not know what to tell them with regard to the AOC and its director denying fundings requests. (*Id.*, 14). The court stated: "I'm sorry, you're out." (*Id.*). The court expected counsel to be ready to go to hearing regardless. (*Id.*). Counsel asserted that in the absence of expert assistance, the denial of which violated due process and Eighth Amendment guarantees, Mr. Dotson's representation was hamstrung. (*Id.*, 27). "We're not going to be able to present a lot of proof in this case." (*Id.*, 28).

In another telephonic hearing, on September 21, 2018, counsel informed the court and the State that they had attempted to retain Dr. Richard Leo because he did only eight hours of work for the trial team, his testimony was not presented, and there was nothing to explain why in trial counsel's files. (PC Vol. 16, 15). Counsel explained that, though they had filed a motion for his services that was approved by the trial court, it had been denied by the AOC and the Chief Justice. (*Id.*). Accordingly, counsel would be unable to present an expert on that ineffective assistance of counsel claim. (*Id.*). A motion to retain Dr. Walker was pending at the time. (*Id.*).

Counsel stated in the September 21 hearing that they had "been rendered ineffective in representing Mr. Dotson in his post-conviction proceeding in violation of his rights to due process, effective assistance of counsel, and his right to be free from cruel and unusual punishment by being precluded from accessing numerous experts who this Court has found to be necessary to effectuate Mr. Dotson's constitutional rights."

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(*Id.*, 36). Therefore, the hearing would be different than those that counsel and the court were used to, with limited exhibits. (*Id.*)

At the beginning of the October 1, 2018 evidentiary hearing on Mr. Dotson's post-conviction claims, counsel addressed the AOC and Chief Justice vacating multiple expert funding orders approved by the trial court. Regarding Dr. Walker, counsel explained that starting in Jerry Davidson's case,[9] the AOC had agreed to compensate trial experts for their time meeting with post-conviction counsel, traveling to court to testify, and for testimony. (*Id.*, 32–33). For the last decade, the AOC had funded such quasi-fact, quasi-expert professionals. (*Id.*, 33). However, Mr. Dotson was denied funding to produce Dr. Walker as a witness at his post-conviction hearing. (*Id.*).

Counsel asserted that the AOC and Chief Justice deprived Mr. Dotson of the assistance of multiple experts whose testimony was routinely presented in every other capital post-conviction case. (*Id.*). As a result, counsel were rendered incompetent in their representation of Mr. Dotson, in violation of their ethical duties to him and statutory duties as attorneys in the Office of the Post-Conviction Defender (OPCD). (*Id.*).

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[9] *See Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) in which post-conviction counsel presented Dr. Pamela Auble, a neuropsychologist retained by trial counsel, as a witness at the post-conviction hearing. The *Davidson* opinion states that Dr. Auble testified at a September 2009 hearing. *Id.* at *399. However, she testified on September 10, 2008. (*See Davidson v. State*, No. M2010–02663–SC–R11–PD, Vol. V, 203–31.) In addition to testifying about communications with trial counsel and her findings at that time, Dr. Auble reviewed a report by Dr. Spica (the post-conviction neuropsychologist) and testified to her expert opinions about his findings. (*Id.*, 219–20).

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Counsel asserted that Mr. Dotson was denied his rights to a fair trial, due process, and freedom from cruel and unusual punishment. (*Id.*, 33–34). Finally, counsel explained that the hearing was "a very different kind of justice tha[n] our [other] clients have been afforded." (*Id.*, 34.).

6. Mr. Dotson appealed the denial of post-conviction relief, including denial of expert assistance to establish his post-conviction claims. The court below held that Mr. Dotson had no right to appeal the denial of expert assistance.

Mr. Dotson filed his Notice of Appeal in the court below on June 14, 2019. (PC Vol. 2, 458). In his appeal, Mr. Dotson raised several challenges to the AOC and Chief Justice vacating the post-conviction court's expert funding orders. (Brief of Appellant, 11/20/20, Issue X, 91–106). The Court of Criminal Appeals held it was without jurisdiction or authority to address the constitutional challenges Mr. Dotson raised in his Rule 3 appeal regarding the denial of expert services. *Dotson*, 2022 WL 860414, at *63–65. The Court also held that the law provides Mr. Dotson no right to appeal from the Chief Justice's rulings. *Id.*, at *65.

ARGUMENT

The actions of the AOC, Chief Justice, and the Court of Criminal Appeals denied Mr. Dotson his state and federal constitutional rights to equal protection, due process, freedom from cruel and unusual punishment, a full and fair hearing, and the state constitutional right to access the Tennessee courts.

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I. The Administrative Office of the Courts' and the Chief Justice's Improper Exercise of Judicial Power in Vacating the Post-Conviction Court's Orders Granting Funding for Experts Who Were Necessary to Effectuate Mr. Dotson's Constitutional Rights and the Court of Criminal Appeals' Subsequent Denial of an Appellate Remedy Violate Mr. Dotson's State and Federal Constitutional Rights.

Mr. Dotson will first address the due process, open courts, and equal protection violations resulting from the Court of Criminal Appeals holding that Mr. Dotson was not entitled to an appeal, a right which is afforded to capital post-conviction petitioners denied expert services by trial courts. Mr. Dotson will then address the due process, Eighth Amendment, and open courts violations caused by the actions of the AOC Director and the Chief Justice—the harm of which is left unredressed due to the denial of an appeal.

A. Mr. Dotson's rights to due process, equal protection, and access to the Tennessee courts were violated by the denial of an appellate remedy for the constitutional violations occurring in his post-conviction proceedings.

All post-conviction petitioners are entitled to appeal the denial of a post-conviction petition and errors related to the denial. Tenn. Code Ann. § 40–30–116 ("The order granting or denying relief under this part shall be deemed a final judgment, and an appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure."). The right to appeal from denial of post-conviction relief is an appeal of right. Tenn. R. App. P. 3(b).

Tennessee Code Annotated § 40–14–207(b) entitles indigent capital post-conviction petitioners to expert services if a trial court finds the

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services necessary to ensure a petitioner's constitutional rights. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). A post-conviction court's denial or limitation of funding is reviewable on an appeal of right from the denial of post-conviction relief under the abuse of discretion standard. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 517 (Tenn. 2013) (affirming the lower court's holding that the post-conviction court's limitation of funding was not an abuse of discretion). This is the same standard applicable on direct appeal from denial of expert services at the trial stage. *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) (citing *State v. Barnett*, 909 S.W.2d 423, 431 (Tenn. 1995) (reviewing trial court's denial of defendant's request for appointment of a psychiatric expert for an abuse of discretion)).

Numerous capital petitioners have sought relief from the denial of expert services in their post-conviction proceedings upon a Rule 3 appeal of right from denial of the post-conviction petition.[10] Mr. Dotson also

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[10] *See Zagorski v. State*, No. 01C01–9609–CC–003971997, WL 311926 (Tenn. Crim. App., Nashville, November 3, 1997) (the decision of whether to authorize investigative or expert services lies within the sound discretion of the trial court, and there was no showing of prejudice since no experts testified and no showing as to what the expert testimony would be, so the issue was without merit); *Alley v. State*, 958 S.W.2d 138, 152 (Tenn. Crim. App. 1997) (trial court's denial of expert assistance was affirmed); *Hodges v. State*, No. M1999–00516–CCA–R3–PD, 2000 WL 1562865, at *28–29 (Tenn. Crim. App., Nashville, October 20, 2000) (trial court did not abuse its discretion in denying a fingerprint expert and denying additional funds for the expert mental health/mitigation services previously approved); *Hugueley v. State*, No. W2009–00271–CCA–R3–PD, 2011 WL 2361824, at *21–24 (Tenn. Crim. App., Jackson, June 8,

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sought review, in a Rule 3 appeal of right, of the denial of expert services which were ordered by the post-conviction court to ensure that Mr. Dotson's constitutional rights were protected. For the first time in a capital post-conviction case since the 2004 amendments to Rule 13, the Court of Criminal Appeals in *Dotson* determined it could not and would not review the denial of expert funding to a petitioner. The lower court held that it did "not have the authority to decide the Petitioner's constitutional challenges ...." 2022 WL 860414 at *65. The court also held that "the law does not provide an appeal of the Chief Justice's decision to deny the Petitioner's requests for funding of various expert witnesses." *Id.*

1. Mr. Dotson's state and federal rights to due process were denied.

"The maxim of the law is, that there is no wrong without a remedy...." *Bob v. State*, 10 Tenn. 173, 176 (1826). For "'whensoever the law giveth any right,' says Coke, 'it also giveth a remedy.' Coke on Litt. 56." *Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S.W. 635, 639 (Tenn.

2011) (trial court did not violate the petitioner's due process rights by denying funding for brain imaging, neuropsychologist, neuropsychiatrist, and pharmacologist); *Reid v. State*, Nos. M2009–00128–CCA–R3–PD, M2009–00360–CCA–R3–PD, M2009–01557–CCA–R3–PD, 2011 WL 3444171, at *35–39 (Tenn. Crim. App., Nashville, August 8, 2011) (the trial court did not abuse its discretion in denying authorization for all of the requested mental health expert funding); *Davidson v. State*, 2021 WL 3672797, at *18–27 (Tenn. Crim. App., Knoxville, August 19, 2021) (the decision of whether to grant funding for services is entrusted with the trial court and will not be disturbed absent an abuse of discretion and the court appropriately denied the requested expert services).

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1915) (quoting *McInnis v. Pace*, 29 So. 835, 835 (Miss. 1901)). The legislature created a remedy for the improper denial of a post-conviction petition and errors occurring in the post-conviction court by enacting Tenn. Code Ann. § 40–30–116 ("[A]n appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure.").

"There is no constitutional right of appeal; yet where appellate review is provided by statute, the proceedings must comport with constitutional standards." *State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994) (citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)). Those constitutional standards include implementation of the Due Process Clause of the Fourteenth Amendment. 469 U.S. at 396. In *Evitts*, the Supreme Court affirmed previous precedents finding 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. 469 U.S. at 401. Pursuant to the Fourteenth Amendment, a state affording the right to an appeal bears the obligation of making that right more than a "meaningless ritual." *Evitts v. Lucey*, 469 U.S. at 394 (citing *Douglas v. People of State of Cal.*, 372 U.S. 353, 357 (1963)).

Mr. Dotson has been denied due process by the lower court's denial of a forum to review the denial of expert services that were found by the trial court to be necessary to effectuate Mr. Dotson's constitutional rights. *See* U.S. Const. Amend. XIV; Tenn. Const. Art. I §§ 8 and 9, and Art. XI §§ 8 and 16.

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2. Mr. Dotson's right to access the courts, protected by Article I, Section 17, of the Constitution of Tennessee was denied.

The lower court's decision also violates the open courts clause of the Tennessee Constitution. Tenn. Const. Art. 1, § 17. The Tennessee Constitution provides that "all courts shall be open and every man, for an injury done him shall have remedy by due course of law, . . ." Article I, § 17.

As former Chief Justice Koch explains, this provision was "included in Tennessee's first constitution and has appeared virtually unmodified in every other version of our constitution .... [and] has a rich historical background that can be traced back more than eight centuries to the original 1215 version of Magna Carta." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconstruction of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 340 (1997). The purpose of this constitutional provision is "to ensure that all persons would have access to justice through the courts." *Id.*, at 341.

The open courts guarantee in the Tennessee Constitution has no analog in the United States Constitution and is complementary to the due process guarantees found in Article I, § 8 ("That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.") *Id.*, at 421.

The earliest decisions of the Tennessee Supreme Court interpreting the open courts provision acknowledged the Magna Carta as the source

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for that provision and emphasized that the judiciary was "required by the most solemn obligations, to see that, as to any and every citizen, they are not violated in one jot or tittle." *Id.*, at 341 (citing *Bank v. Cooper*, 10 Tenn. (2 Yer.) 599, 612 (1831) (Peck, J.)). Embodied in this concept was the idea that all branches of government are bound by the state constitution, which provides a check upon legislative power when such power exceeds the bounds of the constitution. *Id.*, at 407–08. Thus, whereas the Magna Carta provided limitations upon royal power, the Tennessee Constitution limited "legislative and all other power." *Id.*, at 408.

"[A]ll other power" includes the power of the judiciary, where invoked to deprive a citizen of a right provided by the legislature—in this case the right to appeal. The Tennessee Constitution, Article II, § 1, states that "[t]he powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and by Article II, § 2, "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." *Underwood v. State,* 529 S.W.2d 45 (Tenn. 1975).

"[T]he doctrine of separation of the powers, as set out in Article II, §§ 1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government." *Id.*, at 47. "It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct...." *Mabry v. Baxter*, 58 Tenn. 682, 689, 1872 WL 4084, at *4

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(Tenn. 1872). This Court recognized in *Mabry* that "[t]he most responsible duty devolving upon this court is to see that this injunction of the Constitution shall be faithfully observed. We have no right to go outside of statutes presented for our examination and adjudication, ...". *Id.*, at 689–90. Rather, "[w]e are to confine ourselves to the provisions of the statute itself, and in our decisions we are to presume that the Legislature not only acted upon consideration of public good, but that they have acted within the sphere of their legitimate powers." *Id.*, at 690.

The Court of Criminal Appeals' ruling that Mr. Dotson has no right to appeal the denial of expert services denies Mr. Dotson his statutory right to appeal pursuant to Tenn. Code Ann. § 40–30–116, and therefore violates the open courts provision of Article I, § 17.

3. Mr. Dotson's state and federal rights to equal protection were denied.

The Court of Criminal Appeals' ruling that Mr. Dotson's challenges to the denial of expert services cannot be appealed creates two classes of capital post-conviction petitioners. The above-listed capital post-conviction petitioners[11] who were denied expert services by the trial courts all received appellate review of those denials; but Mr. Dotson did not. The above-listed capital post-conviction petitioners had their claims reviewed on appeal under an abuse of discretion standard after their trial courts found that they had *not* established a need for expert services to effectuate their constitutional rights. Mr. Dotson has been precluded from any appellate review under any standard, although the trial court

[11] *See* footnote 10.

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found those services to be necessary to effectuate his constitutional rights. The denial of appellate review therefore violates Mr. Dotson's federal and state rights to equal protection. *See* U.S. Const. Amend. XIV; Tenn. Const. Art. XI § 8.

The Equal Protection Clause of the Fourteenth Amendment states, "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. The equal protection provisions of the federal and state constitutions demand that persons similarly situated be treated alike. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (Citizens have "substantive constitutional rights in addition to the right to be treated equally by the law."); *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988).

The Supreme Court has utilized three standards of scrutiny, depending on the underlying rights at issue, to determine if state action violates equal protection. Any classification that distinguishes between rights bestowed upon some but not other similarly situated individuals is subject to, at minimum, a rational basis review that asks whether the classification is rationally related to a legitimate government interest. *City of Cleburne*, 473 U.S. at 440. Rational basis review is the default form of scrutiny. *Id.*

Classifications based on race or national origin, *e.g., Loving v. Virginia,* 388 U.S. 1, 11, (1967), and classifications affecting fundamental rights, *e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 672 (1966), are given the most exacting scrutiny—strict scrutiny. "Strict scrutiny is a searching examination, and it is the government that bears the burden

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to prove "'that the reasons for any such classification [are] clearly identified and unquestionably legitimate.'" *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013) (citations omitted). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Finally, a heightened, intermediate, level of scrutiny applies in certain circumstances. *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988). In *Clark*, the Court ruled that to "withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Id.*, at 461. So, the relation to the objective must be more than merely non-arbitrary or rational—it must be substantial—and the objective itself must be more than merely valid or permissible—it must be important.

This Court follows "the framework developed by the United States Supreme Court for analyzing equal protection claims." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) (citing *Doe v. Norris*). "It has utilized three standards of scrutiny, depending upon the right asserted. *See City of Memphis v. International Brotherhood of Elec. Workers Union*, 545 S.W.2d 98, 101 (Tenn. 1976) (reduced scrutiny); *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980) (heightened scrutiny); *Doe v. Norris*, 751 S.W.2d at 840 (strict scrutiny)."

The Court of Criminal Appeals' decision to deny Mr. Dotson the right to appeal the denials of expert assistance—a right which is afforded all other capital post-conviction petitioners who were denied funding—

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must survive strict scrutiny analysis because the right to appeal is a fundamental right. "This Court has stated that rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citing *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 152). As discussed, *supra*, at I(A)(1), the right to appeal is statutory, but once the right is extended, the appeal must comport with constitutional standards. Thus, a non-constitutional fundamental right may be imbued with characteristics requiring strict scrutiny analysis. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 218 n. 15 (1982) ("[W]e look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though "the right to vote, *per se*, is not a constitutionally protected right.") (citing *San Antonio Independent School Dist.*, 411 U.S. 2, 35 n. 78 (1973)).

Strict scrutiny is also compelled by the nature of the underlying rights that are harmed by the lower court's denial of an appeal. The trial court found that the assistance of a psychiatrist, the trial neuropsychologist who the jury never heard, and the trial false confession expert who the jury never heard, were necessary to effectuate Mr. Dotson's constitutional rights. The denial of an appeal regarding deprivation of expert assistance necessary to effectuate Mr. Dotson's constitutional rights impacts his liberty and his life. This Court has found that an individual's right to personal liberty is a fundamental right for

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equal protection purposes. *Doe v. Norris*, 751 S.W.2d at 842. Mr. Dotson's interest in liberty (and life) is "almost uniquely compelling" and weighs heavily. *State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). By contrast, the State's interest in mitigating a fiscal burden is less substantial. *Barnett*, 909 S.W.2d at 427.

If this Court determines that the lower court's interpretation of this Court's Rule 13 section 5(e)(5) is accurate and the rule does in fact preclude an appeal of expert funding denials, then this Court's implementation of the rule to deny appellate review must be subjected to strict scrutiny for the reasons stated above.

In the alternative, if this Court should employ a heightened, intermediate, level of scrutiny to determine whether the lower court's (or this Court's Rule 13) classification of Mr. Dotson's denials of expert assistance as non-appealable, whereas other capital petitioner's denials are appealable is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. at 461. The Supreme Court has recognized that certain forms of classification, while "not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Plyler v. Doe*, 457 U.S. at 217–18. While the classification of Mr. Dotson apart from other similarly situated capital petitioners *is* facially invidious, should the Court disagree, intermediate scrutiny is warranted, rather than reduced

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scrutiny since the harm involves the underlying rights to effective assistance of counsel, a fair trial, due process, and to not be subject to cruel and unusual punishment.

However, at the reduced level of scrutiny, the State cannot show that the classification of the denial of Mr. Dotson's access to funding as unappealable, either by the lower court or by operation of this Court's Rule 13, is rationally related to a legitimate government interest. The only apparent reason to justify denying Mr. Dotson the right to appeal the AOC's and Chief Justice's vacating the post-conviction court's orders granting expert assistance is financial. Yet, the State's interest in mitigating a fiscal burden is less substantial than a person's liberty interest. *Barnett*, 909 S.W.2d at 427. Further, that would be a spurious excuse for treating Mr. Dotson differently than other capital post-conviction petitioners who appeal denial of trial courts' funding orders because a successful appeal would similarly impact the State's fiscal burden, but those petitioners are nonetheless granted the right to appeal.

In sum, this court should review the lower court's denial of an appeal to Mr. Dotson under the strict scrutiny standard. When evaluated under this standard—as well as the intermediate and reduced scrutiny standards—Mr. Dotson's state and federal rights to equal protection were violated.

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B. Mr. Dotson's rights to due process, freedom from cruel and unusual punishment, and access to the Tennessee courts were violated by the AOC Director and the Chief Justice.

In 2004 this Court amended Rule 13, adding sections 5(e)(4) and (e)(5) to create an AOC review process. The review process requires an indigent petitioner to send funding orders to the AOC Director and receive "prior approval" of the post-conviction court's orders before he can access the funds authorized by the post-conviction court. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director does not approve the order, the rule mandates that the Chief Justice of the Tennessee Supreme Court "shall" review it. *Id.*, at § 5(e)(5). If the Chief Justice does not approve the post-conviction court's funding order, Rule 13 §§ 5(e)(4) and (e)(5) prevent an indigent petitioner from accessing the funds the post-conviction court found necessary to protect his constitutional rights. *Id.* The rule states that the "determination of the chief justice shall be final." Rule 13 §§ 5(e)(4).

1. By engaging in a substantive review of the post-conviction court's funding orders and vacating them, the AOC Director and Chief Justice violated Articles II, §§ 1 and 2 and VI §§ 1, 2, and 3 of the Tennessee Constitution.

Mr. Dotson does not dispute that pursuant to Supreme Court Rule 13 § 5(e)(4) and (e)(5), the AOC Director and Chief Justice could perform administrative tasks associated with the post-conviction court's funding orders. *See State v. Garrad*, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1985) (Chief Justice acting alone has authority to perform purely administrative functions in post-conviction cases). Such tasks could

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involve, for example, establishing and monitoring the procedure through which the AOC makes payments to authorized experts. *C.f. Shelby County v. Blanton*, 595 S.W.2d 72, 80 (Tenn. App. 1978) (selection of a county depository is an administrative function). But the AOC Director and Chief Justice interpreted the AOC review process as giving them authority (1) to review the post-conviction court's substantive determination that the authorized funds were necessary to protect Mr. Dotson's constitutional rights; and (2) to vacate the post-conviction court's orders. By doing so, the AOC Director and Chief Justice unconstitutionally aggrandized their power by exercising a judicial function.

The Tennessee Constitution vests the state's judicial power in this Court and inferior courts that the General Assembly establishes. Tennessee Constitution, Art. VI, § 1. The General Assembly established the post-conviction court. Tenn. Code Ann. §§ 16–10–101, 102. Once it did so, the Tennessee Constitution vested that court with the state's judicial power. *See Carver v. Anthony*, 245 S.W.2d 422, 424, (Tenn. App. 1951) ("Jurisdiction carries with it power to determine every issue or question properly arising in the case."); Tenn. Const. Art. VI, § 2 ("The jurisdiction of this Court shall be appellate only...."); Tenn. Code Ann. § 16–3–201(a) ("The jurisdiction of this court is appellate only...."). This Court "has no original jurisdiction but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and

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court of appeals, within each division, to the supreme court as provided by this code." Tenn. Code Ann. § 16–3–201(b).[12]

The General Assembly gave the post-conviction court jurisdiction over post-conviction proceedings. *See* Tenn. Code Ann. § 40–30–104(a). By doing so, the General Assembly authorized that court to exercise the state's judicial power in Mr. Dotson's case. As a result, when the post-conviction court granted Mr. Dotson's expert funding motions, it exercised the judicial power Article VI that the General Assembly gave it.

The AOC Director and Chief Justice applied Rule 13 § 5(e)(4) and (e)(5) in a manner that gave them authority to review the funding orders the post-conviction court entered pursuant to the state's judicial power. But under Article VI of the Tennessee Constitution, only an entity vested with the state's judicial power could vacate those orders. Given this reality, the AOC Director and Chief Justice must meet the state constitutional requirements for exercising judicial power before either of them could substantively review and vacate the post-conviction court's funding orders. *See State ex rel. Newsom v. Biggers,* 911 S.W.2d 715, 717 (Tenn. 1995); *Town of South Carthage v. Barrett,* 840 S.W.2d 895, 898–900 (Tenn. 1992). Neither the AOC Director nor the Chief Justice meets those constitutional requirements.

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[12] This Court also has jurisdiction over interlocutory appeals and the authority to assume jurisdiction over an undecided case pending in any intermediate state appellate court. Tenn. Code Ann. § 16–3–201(c) and (d).

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Pursuant to Article VI, § 3 of the Tennessee Constitution, the Governor must appoint, and the General Assembly must confirm, a person who exercises the judicial power of an intermediate appellate court. The Governor did not appoint, nor did the General Assembly confirm, the AOC Director. As a result, when the AOC Director substantively reviewed the post-conviction court's funding orders, she purported to assume jurisdiction in violation of Articles II, §§ 1 and 2 and VI §§ 1 and 3 of the Tennessee Constitution.

Similarly, the Chief Justice interpreted Rule 13 § 5(e)(5) as giving him power to substantively review and vacate the post-conviction court's funding orders. But Article VI, § 1 of the Tennessee Constitution vests the state's judicial power, including the power to review inferior court decisions, in the Tennessee Supreme Court, not in any single Supreme Court judge or justice. Article VI, § 2 provides that the Supreme Court shall consist of five judges, one of whom shall preside as Chief Justice, and the concurrence of three judges is necessary for the exercise of the state's judicial power. As a result, when the Chief Justice substantively reviewed the post-conviction court's funding orders and vacated them, he violated Articles II, §§ 1 and 2 and VI §§ 1 and 2 of the Tennessee Constitution. Acting alone, the Chief Justice could not exercise the state's judicial power, and his decisions vacating the post-conviction court's funding orders are therefore invalid. Art. VI § 2 ("The concurrence of three of the [Supreme Court's] Judges shall in every case be necessary to a decision."); *Pierce v. Tharp*, 461 S.W.2d 950, 955 (Tenn. 1970); *Radford Trust Co. v. East Tennessee Lumber Co.,* 21 S.W. 329, 331 (Tenn. 1893).

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2. Because the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues and evidence they would consider, they violated Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.

Due process protects a person's legitimate entitlement to a benefit. *Board of Regents v. Roth,* 408 U.S. 564, 576–77 (1972). In determining whether a person has such an entitlement, courts look to, among other things, understandings stemming from state law sources. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985).

For example, in *Goldberg v. Kelly*, the United States Supreme Court concluded that persons qualifying to receive welfare benefits had a legitimate entitlement to them. A state statute provided that a person could obtain such benefits by making a specified showing, and once a social services official concluded that a person made that showing, the official established a legitimate entitlement to the benefits that due process protected against arbitrary deprivation. *Goldberg v. Kelly,* 397 U.S. 254, 261–62 (1970).

As in *Goldberg*, Tennessee Code Annotated § 40–30–207(b) establishes a benefit that Mr. Dotson was entitled to receive upon making a specified showing. Specifically, that statute provided that Mr. Dotson could receive authorization for expert funding upon a showing that the funding was necessary to ensure the protection of his constitutional rights. Tenn. Code Ann. § 40–30–207(b). Four separate times the post-conviction court concluded that Mr. Dotson made this showing, and it authorized funding for the services of Drs. Agharkar, Merikangas,

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Walker, and Leo. While the post-conviction court noted that Dr. Agharkar's hourly rate exceeded Rule 13 § 5(d)(1)'s maximum rate, it found Dr. Agharkar's rate "reasonable, within the range charged by similar experts (and) justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*See* 3/8/17 Sealed, *Ex Parte* Order (Agharkar), 1–2). And while the post-conviction court recognized that authorizing funds for Drs. Merikangas, Walker, and Leo would exceed Rule 13 § 5(d)(5)'s $25,000 limit for the services of all experts, it concluded that extraordinary circumstances warranted doing so. (6/26/18 Sealed, *Ex Parte* Order (Merikangas), 1–2; 8/15/18 Sealed, *Ex Parte* Order (Leo), 1–2; 9/25/18 Sealed, *Ex Parte* Order (Walker), 2). As a result, the post-conviction court entered orders authorizing funding for the services of the four experts in specific amounts. (3/8/17 Sealed, *Ex Parte* Order (Agharkar), 2; (6/26/18 Sealed, *Ex Parte* Order (Merikangas), 2; 8/15/18 Sealed, *Ex Parte* Order (Leo), 2; 9/25/18 Sealed, *Ex Parte* Order (Walker), 2).

A state statute offered Mr. Dotson a benefit, and a state actor determined that he had made the necessary showing to access that benefit. Like the welfare recipients in *Goldberg*, Mr. Dotson's legitimate entitlement to the expert funding the post-conviction court authorized created for him a benefit that due process protected.

Before a state actor can deprive a person of a protected interest, he must give the person notice of the proposed deprivation and an opportunity to contest it. *Loudermill*, 470 U.S. at 546; *In re Oliver*, 333 U.S. 257, 273 (1948). Notice includes (1) informing the property holder of

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the specific issues he must address; and (2) disclosing to him the material that the state actor will consider in making her decision. *Bowman Transportation, Inc. v. Arkansas–Best Freight System, Inc.* 419 U.S. 281, 288 n.4 (1974). Similar obligations of notice exist in cases involving a person's liberty or life. *In re Gault*, 387 U.S. 1, 33–34 (1967); *Lankford v. Idaho*, 500 U.S. 110, 120–22 (1991); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). If the state actor fails to provide the individual this basic information, she violates due process. *See Lankford*, 500 U.S. at 127; *Gardner*, 430 U.S. at 362.

The actions of the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues or evidence they would consider when they reviewed the post-conviction court's funding orders. As a result, they not only deprived Mr. Dotson of the notice required by due process but denied him the ability to contest their determinations.[13]

The AOC review process is not a court of law as established by the Tennessee Constitution, and understood by the common law, but is instead essentially a black box—a process with observable inputs and

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[13] In addition to due process, the complementary Open Courts provision was also violated. This Court has held that "[t] he obvious meaning of [Article I, § 17] is that there shall be established courts proceeding according to the course of the common law, or some system of well established judicature, to which all of the citizens of the state may resort for the enforcement of rights denied, or redress of wrongs done them." *Staples v. Brown*, 113 Tenn. 639, 85 S.W. 254, 255 (1905). In vacating the post-conviction court's orders granting expert funding in a secret, closed process, the AOC and Chief Justice deprived Mr. Dotson of his rights to due process and to access open courts.

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outputs only and unseen inner workings. In fact, unlike the courts of our state, the process is secret and closed to litigants. The AOC and Attorney General have successfully invoked attorney-client privilege regarding communications and documentation between the AOC and the Chief Justice about expert funding decisions. *See, e.g., State of Tennessee v. Luis Alexis Briceno*, E2022–00414–CCA–R3–CD, Brief of Appellant (11/04/22), 38–39, 52–53 (citing T.R. Vol. 2, 198, 232–33; R. Vol. 16, Exhibits, p. 17).[14]

No state interest supports the failure of the AOC Director and Chief Justice to provide Mr. Dotson notice of the issues and evidence they would consider in reviewing the post-conviction court's funding orders. While a state actor may summarily deprive a person of a protected property right when exigent circumstances exist, *see Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 299–301 (1981), no such circumstances existed here. And even if such circumstances existed, due process required that Mr. Dotson receive a post-deprivation hearing and notice of the issues that hearing would

[14] Appellant moves the Court to take judicial notice of the record in *State v. Briceno*. *See, e.g., Caldwell v. State*, 917 S.W.2d 662, 666 (Tenn. 1996); *Delbridge v. State*, 742 S.W.2d 266 (Tenn. 1987). At Mr. Briceno's motion for new trial proceedings, the Attorney General, on behalf of Lacy Wilber, moved to quash Mr. Briceno's subpoena to Ms. Wilber to provide testimony and produce documents related to the AOC's denial of expert funding which had been granted by the trial court. T.R., Vol. II, 198–203. The Attorney General invoked the attorney-client privilege and Tennessee Supreme Court Rule 34(1), asserting that the communications about the expert funding issues were confidential and not subject to the Tennessee Public Records Act. *Id.*, 201–02.

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address. *See Hodel,* 452 U.S. at 303. Mr. Dotson never received any notice, pre-deprivation or post-deprivation, about the issues and evidence the AOC Director and Chief Justice considered in vacating the post-conviction court's funding orders. As a result, the decisions of the AOC Director and Chief Justice summarily depriving Mr. Dotson of the property rights, which the post-conviction court's funding decisions conveyed, violated due process. *C.f. Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433–34 (1982); *Burford v. State,* 845 S.W.2d 204, 209 (Tenn. 1992); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

At its most basic level, due process means fundamental fairness. *See State v. White,* 362 S.W.3d 559, 566 (Tenn. 2012). Such fairness "can rarely be obtained by secret, one-sided determination of facts decisive of rights." *See Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Because the AOC Director and Chief Justice engaged in an opaque, one-sided review of the post-conviction court's funding orders, they violated due process.[15]

[15] As the post-conviction judge explained during the evidentiary hearing, "I do not or have not received any orders from the Administrative Office of the Court or the Supreme Court as to granting or denying. I have been advised through telephone conversations about the denial but I don't have any reasons. I haven't been given any reasons so I can't speak to the Chief Justice's opinions on why he grants or doesn't grant these things." (PC Vol. 12, at 425).

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3. The AOC Director and Chief Justice's decisions vacating the post-conviction court's funding orders violated Mr. Dotson's right to a full and fair hearing on his ineffective assistance of counsel claims and violated Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Dotson was entitled at trial to have access to a "competent psychiatrist" to "conduct an appropriate examination," and to "assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (defendant's rights to due process in death penalty trial were violated by denial of access to a psychiatrist); *see also McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) (Alabama failed to meet its obligations under *Ake* to provide defendant in death penalty prosecution with access to an independent mental health expert to assist in evaluation, preparation and presentation of his defense); *Hinton v. Alabama*, 571 U.S. 263 (2014) (defense counsel's performance constitutionally deficient in a death penalty case where he failed to seek additional funds to replace an inadequate expert).

Mr. Dotson did not receive necessary expert assistance at trial because his attorneys failed to retain a psychiatrist, in violation of his right to the effective assistance of counsel. These two important constitutional rights—the right to competent expert assistance and to competent legal representation—were both abridged by the denial of constitutionally necessary expert assistance in this post-conviction case.

Access to expert assistance, particularly in a capital case, is a fundamental necessity to protect a defendant's constitutional rights. *See*

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Ake, 470 U.S. at 77 ("The private interest in the accuracy of a criminal proceeding that places an individual's liberty or life at risk is almost uniquely compelling."). The state, as well as a post-conviction petitioner, "has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial." *Id.*, at 83–84 (right to expert assistance in capital sentencing phase of trial). Tennessee capital post-conviction petitioners are entitled to experts where the protection of constitutional rights is at stake. *See Owens v. State*, 908 S.W.2d at 928.

As a matter of clearly established constitutional law, Mr. Dotson's right to be heard in a meaningful manner includes the right to obtain and present the testimony of experts. Indeed, the Supreme Court in *Ake* found this principle to be "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, [and] derive[d] from the belief that 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." *Id.*, at 76. *See also State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake*).

"Capital defendants possess a constitutionally protected right to provide the jury with mitigation evidence that humanizes the defendant and helps the jury accurately gauge the defendant's moral culpability." *Davidson v. State*, 453 S.W.3d 386, 402 (Tenn. 2014). Evidence of psychiatric conditions is extremely important and powerful mitigating

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evidence. *See Davidson*, 453 S.W.3d at 405 (counsel ineffective for failing to investigate and present evidence of cerebral atrophy, schizophrenia, and frontal lobe dysfunction; granting sentencing relief based in large part on mental health expert testimony of a psychiatrist and neuropsychologist developed in post-conviction); *Sears v. Upton*, 561 U.S. 945, 946 (2010) (counsel ineffective for failing to investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter v. McCollum*, 558 U.S. 30, 36 (2009) (counsel ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior" that "substantially impaired . . . his ability to conform his conduct to the law" and constituted "an extreme mental or emotional disturbance" as a result of this brain damage); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (counsel ineffective for failing to investigate and present evidence that defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant "suffered damage to the frontal lobe of his brain . . . [which] can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses"); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (counsel ineffective for failing to investigate and present evidence of defendant's brain damage); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1996) (granting relief where jury did not hear of defendant's brain damage).

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Moreover, Tennessee's capital post-conviction scheme specifically encompasses a petitioner's right to present expert testimony in support of claims for relief. *See* Tenn. Code Ann. § 40–14–207(b); Tenn. Sup. Ct. R. 13 § 5(b). Because the AOC Director and Chief Justice precluded Mr. Dotson from accessing constitutionally necessary expert assistance, Mr. Dotson was unable to access the tools required to establish ineffective assistance of counsel in failing to investigate and present mental health mitigation. Therefore, he was denied the right to due process and a full and fair hearing. *See* U.S. Const. Amends. VI, VIII, and XIV; Tenn. Const. Art. I §§ 8, 9 and 16, and Art. XI §§ 8 and 16; *Ake v. Oklahoma*, 470 U.S. 68 (1985); *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Griffin v. Illinois*, 351 U.S. 12 (1956).

Mr. Dotson was entitled to a "full and fair hearing." Tenn. Code Ann. § 40–30–106(h) ("A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence."). Due process requires the "opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Tennessee recognizes this fundamental concept as well. *See Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (concluding that in Tennessee post-conviction cases, due process is a paramount concern); *Whitehead v. State*, 402 S.W.3d 615, 627 (Tenn. 2013) ("[P]ost-conviction proceedings, unlike other ordinary civil

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proceedings, warrant heightened due process protections."); *Mills v. Wong*, 155 S.W.3d 916, 924–25 (Tenn. 2005) (post-conviction "necessarily implicate[s] fundamental due process interests in life or in freedom from bodily restraint ...."); *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004) ("The fundamental right of due process is ... an over-arching issue that has been recognized as a concern in post-conviction proceedings.").

This Court also has consistently acknowledged that due process "embodies the concept of fundamental fairness." *See, e.g., Howell*, 151 S.W.3d at 461 (internal quotation omitted). The need for courts to adhere to the concept of fundamental fairness is particularly acute in capital post-conviction cases. *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011) ("heightened due process is applicable" and "heightened reliability required [given] the gravity of the ultimate penalty in capital cases."); *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001) ("As it has long been recognized, the penalty of death is qualitatively different from any other sentence and this qualitative difference between death and other penalties calls for a greater degree of reliance when the death sentence is imposed."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (same). Yet, Mr. Dotson was denied access to the tools needed to ensure that his post-conviction hearing comported with due process and fundamental fairness.

In addition to these constitutional protections, Tennessee's death-sentenced post-conviction petitioners also have a statutory right to expert assistance. *See* Tenn. Code Ann. § 40–14–207(b); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Pursuant to Tenn. Sup. Ct. R. 13, § 5(c)(1),

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funding for expert services is available based upon a showing of a "particularized need" for the requested services. "Particularized need" may be demonstrated when an "appellant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the appellant's right to a fair trial." Tenn. Sup. Ct. R. 13 § 5(c)(2); *see also State v. Barnett*, 909 S.W.2d 423, 430 (Tenn. 1995). As discussed above, the trial court found that Mr. Dotson demonstrated particularized need for the services of Drs. Agharkar, Merikangas, Leo, and Walker.

The post-conviction court found that Mr. Dotson was entitled to necessary, reasonable psychiatric expert services in post-conviction, and that the cost of those services could exceed the $25,000 cap due to extraordinary circumstances. The AOC Director and Chief Justice denied Mr. Dotson his right to those services by vacating the post-conviction court's orders without providing Mr. Dotson with a basis for their decisions or the opportunity to advocate that the post-conviction court's orders were proper. Mr. Dotson's rights to due process in the litigation of his post-conviction claims, specifically the claims of ineffective assistance of counsel, as well as his state and federal constitutional rights to be free from cruel and unusual punishment were thereby violated. Without the services of a constitutionally necessary expert, Mr. Dotson was precluded

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from developing mental health mitigation that should have been presented to the jury.[16]

CONCLUSION

For the foregoing reasons, this Court should reverse the post-conviction court's decision denying Mr. Dotson relief, reinstate the post-conviction court's orders granting expert services which were vacated by the AOC and Chief Justice, and remand the case for an evidentiary hearing on his post-conviction claims where he can present expert evidence.

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[16] Also, had Mr. Dotson not been denied access to Dr. Leo's services, he would have been able to effectively challenge Mr. Dotson's statements and prevailed on his claim that trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to pursue suppression of Mr. Dotson's statements. *See* Brief of Appellant in the Court of Criminal Appeals, Argument I. The State's case that Mr. Dotson perpetrated the Lester Street attacks would have rested on the unreliable testimony of two children, which is insufficient proof to support his convictions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of this pleading was rendered through the electronic filing system and/or email to Courtney N. Orr, Senior Assistant Attorney General, Criminal Appeals Division, Office of the State Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202-0207 on this the 26th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

I, Kelly A. Gleason, counsel for Mr. Jessie Dotson, hereby certify pursuant to Tenn. Sup. Ct. R. 46, § 3.02, that the number of words contained in the foregoing brief is 11, 528. 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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