

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

In re:)	
)	No. _____
Petition to Vacate or Modify)	
Tenn. Sup. Ct. Rule 13,)	
Section 5(e)(4)-(5))	
)	

PETITION TO VACATE OR MODIFY
TENNESSEE SUPREME COURT RULE 13, SECTION 5(e)(4)-(5)

This Court “welcomes the continuing criticisms of its Rules,” which “never become final, and are always subject to change.” *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn. 1976). “When any individual deems any Rule of Court to be objectionable from any standpoint, it is his privilege to petition the Court for its elimination or modification.” *Id.*

Petitioners are members of the Tennessee bar who seek to ensure that only judges exercise judicial power when the constitutional rights of criminal defendants and post-conviction capital petitioners are at stake. Tennessee Supreme Court Rule 13, § 5(e)(4)-(5) currently allows the Director of the Administrative Office of the Courts (a non-judicial officer) and the Chief Justice (who lacks the authority to unilaterally exercise judicial power) to overrule orders of presiding courts in criminal and post-conviction proceedings. These court orders are of the utmost importance, authorized by statute when the presiding judge finds that indigent defendants and capital post-conviction petitioners require funds “in order to ensure that the

constitutional rights of the defendant are properly protected.” Tenn. Code Ann. § 40-14-207(b). Although the General Assembly empowered the Court to promulgate rules to administer the statute, those rules cannot violate the constitutional separation of powers by allowing non-judicial officers to overrule court orders. Because Tenn. Sup. Ct, Rule 13, § 5(e)(4)-(5) does just that, this Court should vacate or modify that portion of Rule 13.

BACKGROUND

This Court has recognized the need to fund investigative, expert, or similar services for indigent criminal defendants and capital post-conviction petitioners. Tennessee Supreme Court Rule 13 provides as follows:

In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel and in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, the court, in an *ex parte* hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant proper authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court.

Tenn. Sup. Ct., Rule 13, § 5(a)(1). This rule authorizes lower courts to exercise core judicial functions – conducting hearings, exercising discretion, protecting defendants’ or petitioners’ constitutional rights, determining the reasonableness of requests, and issuing written orders.

As relevant to this petition, Rule 13 provides for funding “[i]n the trial of all criminal cases in which the defendant is entitled to appointed counsel.” Tenn. Sup. Ct., Rule 13, § 5(a)(1). Rule 13 also sets a \$25,000 limit for all expert services in each

capital post-conviction case unless the trial court, within “its sound discretion,” determines “that extraordinary circumstances exist that have been proven by clear and convincing evidence.” *Id.* at § 5(d)(5).

In 2004, the Court amended Rule 13, adding § 5(e)(4)-(5), to create an Administrative Office of the Courts (“AOC”) review process. This process requires that a court’s funding order “provide for the payment or reimbursement of reasonable and necessary expenses by the [AOC] director.” Tenn. Sup. Ct., Rule 13, § 5(a)(1). Counsel for the indigent defendant or capital post-conviction petitioner must transmit the court’s signed order to the AOC Director, and the petitioner must receive “prior approval” from the Director before he can access the funds authorized in the court’s order. *Id.* at § 5(e)(4). If the Director does not approve the order, the Chief Justice then reviews it. *Id.* at § 5(e)(5). If the Chief Justice does not approve the court’s funding order, Rule 13 § 5(e)(4)-(5) forecloses an indigent defendant or capital petitioner from accessing the funds the court authorized and determined were necessary to protect the indigent person’s constitutional rights. *Id.*

Rule 13 § 5(e)(4)-(5) purports to authorize the AOC Director and the Chief Justice to overrule a presiding court’s funding order without regard to the discretion vested in the court by statute and the Rule. In practice, these “reversals” of court orders have occurred in at least two types of circumstances.

The first circumstance involves indigent criminal defendants who are appointed counsel during proceedings in General Sessions courts, and whose cases are not yet indicted. In these cases, courts with jurisdiction over the case have

authorized funding for expert or investigative services when time is of the essence—such as the need to observe accident or crime scenes, or to locate transient witnesses—and the expert or investigator is necessary to pursue and evaluate that evidence, which may be essential to the defense at trial. These courts (including General Sessions Courts and Criminal Courts) have interpreted Rule 13 to authorize orders for investigative and expert funding when the criminal trial proceedings are still within the jurisdiction of the General Sessions court, or have been bound over but are not yet indicted. They have also done so upon a finding that the Due Process and Equal Protection Clauses require it. But the AOC Director and Chief Justice interpret Rule 13, §5(a) as having no applicability to cases in which the defendant has not yet been indicted. As a result, they regularly vacate such funding orders.¹

The second circumstance involves capital defendants who have demonstrated to the trial court by clear and convincing evidence that extraordinary circumstances justify exceeding the \$25,000 cap. The trial court ordered funding for services above the cap, in accord with the discretion afforded the trial court under the rule, but those orders were reversed by the AOC Director and Chief Justice under the AOC review process.² This AOC review process effectively overruled the trial court's finding that

¹ See e.g., Collective Exhibit 1 (documents from *State v. Vondre Allen*, Case No. @1365959, Knox County General Sessions Court, Felony Division (Sept. 2020) (denying investigative services approved by General Sessions Court), *State v. Danny Frazier*, Case No. @1372993 and @1373983, Knox County General Sessions Court, Felony Division (Oct. 2020) (denying expert services approved by General Sessions Court), and *State v. Zachari Moore*, Case Nos. @1279181-82, @1279185-87, Knox County Criminal Court (Nov. 2018) (denying expert services approved by Criminal Court in bound over case).

² See Exhibit 2 (Declaration of Assistant Post-Conviction Defender Kelly Gleason).

the petitioner had presented clear and convincing evidence of extraordinary circumstances that justified exceeding the \$25,000 cap, as provided by the rule.

In both types of circumstances, the AOC Director and the Chief Justice exercised a power they do not hold, a power which only an appellate court can hold – the ability to reverse the decision of a lower court judge.

ARGUMENT

“The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace.” Tenn. Const., Art. VI, § 1. An independent judiciary is “one of the most fundamental principles of American constitutional government.” *Summers v. Thompson*, 764 S.W.2d 182, 188 (Tenn. 1988) (Drowota, J., concurring). “This section [Article VI], along with Article II, § 1, clearly guarantees the independence of the judiciary.” *State v. Barrett*, 840 S.W.2d 895, 897 (Tenn. 1992) (citing *Summers*, 762 S.W.2d at 196 (Drowota, J., concurring)). “A court is an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries. The presence of a judge or judges is necessary as an essential element of a court.” *Mengel Box Co. v. Fowlkes*, 186 S.W. 91, 92 (Tenn. 1916).

The General Assembly established the General Sessions courts and provided them jurisdiction over the initial stages of criminal trial proceedings. Tenn. Code Ann. § 16-15-501(a). Likewise, the General Assembly established the post-conviction

trial court and gave it jurisdiction over post-conviction proceedings. Tenn. Code Ann. §§ 16–10–101, 102, 104(a). Once it did so, the Tennessee Constitution vested those courts with the State’s judicial power. *See McCulley v. State*, 53 S.W. 134, 180 (Tenn. 1899). As a result, when a General Sessions court authorizes investigative or expert services for potential use at trial, or when a post-conviction trial court grants a motion to authorize expert services in excess of the \$25,000 cap, they are exercising judicial power under Article VI. Thus, only a judge (or properly constituted judicial panel) qualified under Article VI has the authority to overrule a presiding court’s written order that has been issued on a finding that the constitutional rights of an indigent defendant or capital petitioner require it. *See Owens v. State*, 908 S.W.2d 923 (Tenn. 1995) (reversing the trial court’s denial of an indigent capital post-conviction petitioner’s motion for funding for expert services).

There is no question that the AOC Director fails to meet the constitutional requirements to exercise judicial power under Article VI. *See* Tenn. Const., Art. VI, § 3 (requiring judges of the Supreme Court or any intermediate appellate court to be appointed by the governor and confirmed by the legislature); Tenn. Const., Art. VI, § 4 (requiring the election of inferior court judges).

And although the Chief Justice obviously meets the constitutional qualifications to act as a judge, he cannot do so sitting alone. 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 justice. Article VI, § 2 provides that the “Supreme Court shall consist of five

Judges,” and the “concurrence of three of the Judges shall in every case be necessary to a decision.” As a result, Rule 13 § 5(e)(4)-(5), purporting to give the Chief Justice jurisdiction to review a presiding court’s funding orders, violates Article II, §§ 1 & 2, and Article VI, §§ 1 & 2, of the Tennessee Constitution. The Chief Justice may act alone in exercising administrative powers as head of the judicial branch, but the review of a court’s order on a motion filed in a criminal or post-conviction proceeding is not an administrative act. It is a judicial one that requires the exercise of judicial power.

The unconstitutional nature of the AOC review process is further confirmed by examining what happens when a trial court *denies* a capital petitioner’s *ex parte* motion for expert funding. Such denials must be appealed to the Court of Criminal Appeals, either by appeal as of right (Tenn. R. App. P. 3), interlocutory appeal with permission of the trial court (Tenn. R. App. P. 9), or extraordinary appeal on original application in the appellate court (Tenn. R. App. P. 10). *See State v. Scott*, 33 S.W.3d 746 (Tenn. 2000); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Because a motion for expert funding is part of a petition pending before a state trial court, any review of the trial court’s decision to deny the motion must be heard in the Court of Criminal Appeals. The fact that a trial court’s *granting* of the same motion results in substantive review by a non-judicial figure—the AOC Director—signals the glaring constitutional defect with the AOC review process.

Though the General Assembly has authorized lower courts to provide expert funding for indigent criminal defendants and post-conviction capital petitioners,

undersigned counsel appreciate that the legislature also has placed limits on moneys appropriated for that purpose. Undersigned counsel also appreciate the obligation of the AOC Director and the Chief Justice (acting in his administrative capacity) to ensure fiscal discipline within parameters set by the legislature. But those considerations must yield when the independence of the judicial branch is at stake.

As this Court has aptly observed:

[There is a] danger posed to an independent judiciary and the impartial administration of justice through the exercise of arbitrary power by a separate branch of the government motivated by policy and political concerns inimical to an independent system of justice. Judicial independence is essential to the effective operation of constitutional government.

Barrett, 840 S.W.2d at 899. The AOC review process undermines an independent system of justice by allowing budgetary and administrative concerns to undermine constitutional protections that courts presiding over individual cases have deemed necessary.

CONCLUSION

There are no greater due process rights than those that attach when the State seeks to deprive someone of his or her liberty, or in the case of capital post-conviction petitioners, his or her life. In those circumstances, the General Assembly has authorized lower court judges to approve funds they find necessary to ensure that an indigent person receives the protections of the state and federal constitutions. As a matter of constitutional law and fundamental fairness, only an appellate court can overrule a lower court's decision. Because Tenn. Sup. Ct. Rule 13, § 5(e)(4)-(5) takes that power out of the appellate court's hands and puts it in the hands of the AOC

Director and Chief Justice, it should be vacated or modified. The Court should either vacate the rule entirely or modify it to make clear that the review of a court's decision under Rule 13 must be made by a tribunal that possesses Article VI judicial power pursuant to the generally applicable laws and rules governing appellate procedure.

Dated: March 1, 2021.

Respectfully submitted,

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Collective Exhibit 1

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

v.

VONDRE ALLEN,

Defendant.

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Warrant No. @1365959
First Degree Murder

ORDER APPROVING FUNDS TO HIRE AN INVESTIGATOR

It appearing to the Court that Vondre Allen is in need of an investigator and that counsel for Mr. Allen has secured a commitment for the services of Gary Lamb, a licensed private investigator in Knoxville, and whose present business address is 6900 Hospitality Circle, Knoxville, TN 37909. Counsel has demonstrated by his investigation as detailed in his AFFIDAVIT IN SUPPORT OF EX PARTE SEALED MOTION FOR FUNDS FOR AN INVESTIGATOR that the services of Mr. Lamb are necessary and required by both the State and Federal Constitutions.

This Court is of the opinion that the services requested by undersigned counsel are necessary in order for counsel to provide the effective assistance required by the United States Constitution, as well as the Tennessee Constitution and that the approval of the services comports with the purpose of *Tenn. Code Ann.* § 40-14-207(b) as well as the purpose of Rule 13 of the *Rules of the Tennessee Supreme Court*. These funds are the minimum required in order to provide the constitutionally required level of services to the defendant in this cause.

Specifically, this court finds as follows:

1. There are a number of civilian witnesses who need to be located and interviewed to ensure that their statements are identified and preserved. Counsel cannot conduct these interviews alone without making themselves necessary witnesses

and therefore creating the very real possibility of a conflict of interest developing later in the case.

2. The American Bar Association's Standards for Criminal Justice assert that counsel must follow prevailing professional norms in making the decision about how an investigation be conducted and must "avoid the prospect of having to testify personally about the content of a witness interview" or other discovery during investigation. *See* ABA Standards for Criminal Justice 4-4.3(f) (4th ed. 2017).
3. The proposed investigator, Mr. Gary Lamb is well-known to the Court, has a long career of investigative work, and has been approved as an investigator through the courts and the Administrative Office of the Courts in hundreds of cases over many years. Mr. Lamb performs his services at a rate of \$50.00 per hour, and believes that this stage of the case will require a budget of \$2,000 to perform all of the necessary witness interviews and other related investigative tasks (such as locating the witnesses and reporting on the interview results).
4. Without this service, counsel for Mr. Allen cannot provide the effective assistance of counsel to him. Without this service, Mr. Allen will be deprived of due process of law at a critical stage in the proceedings.
5. It is a well-established rule that "when the State brings its judicial power to bear against an indigent defendant in a criminal proceeding, it must take steps to ensure that the accused has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, 61 (1984). The United States Supreme Court, in *Ake*, held that this principle of law is grounded in the Fourteenth Amendment's due process guarantee of fundamental fairness

and “derives from the belief that justice cannot be equal where, simply as a result of this poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Id. See also, Britt v. North Carolina*, 404 U.S. 226, 95 S.Ct. 431, 30 L.Ed.2d 400 (1971).

6. Specifically, the United States Supreme Court instructs us:

A criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake, 470 U.S. at 77. Further, it is well settled that fundamental fairness requires that an indigent defendant have “an adequate opportunity to present their claims fairly within the adversary system.” *Id.*

7. The preliminary hearing is a critical stage of the criminal trial process, “at which certain rights may be sacrificed or lost.” *McKeldin v. State*, 516 S.W.2d 82, 85 (Tenn. 1974) (superseded by statute on other grounds).
8. As far back as 1974, our Tennessee Supreme Court observed:

Every criminal lawyer ‘worth his salt’ knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution’s case, and to engage in that happy event sometimes known as a ‘fishing expedition’, would be an inexcusable dereliction of duty, in the majority of cases.

To hold that an indigent defendant is not entitled to counsel during this critical event, is to ignore basic standards of competency and to disregard the accumulated learning and experience of the defense bar.

Id. at 85-86.

9. Other courts have recognized “provision for experts reasonably necessary to assist indigents is now considered essential to the operation of a just judicial

system.” *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980). The denial of funding for expert services has been held a deprivation of the effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments. *Id.* at 1027; *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974).

10. Further, the Supreme Court has held that the right to counsel extends to all critical stages of a criminal prosecution. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). The Court considered a critical stage to be any point that “the defendant would be subject to ‘potential’ prejudice without counsel.” *Peoples v. Lafler*, 734 F.3d 503, 518 (6th Cir. 2013) (emphasis added).

11. Having established that the defendant at a preliminary hearing is entitled to counsel, and to the effective assistance of counsel, and further that an indigent defendant is entitled to funds to permit him to put together the building blocks of a defense, the inexorable conclusion is that an indigent defendant is entitled to funding for necessary experts and services at the preliminary hearing stage of the criminal trial process.

12. At the initial stage of the proceeding, critical evidence can be lost if not properly preserved. This Court is mindful that it is not uncommon for periods of several months to pass between the time of arrest and indictment. In that time witness statements must be taken from people who could otherwise move away or have their memories fade. Evidence, such as security videos from stores, can be lost simply because the video owner does not preserve it.³

13. These witness interviews are the necessary building blocks of an adequate preliminary hearing and the effective assistance of counsel at the preliminary

³ This Court recognizes that law enforcement has no duty to obtain evidence, and so often it falls to the defense to obtain these types of videos or statements. *See State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

hearing. It would be inapposite for this Court to hold that conducting a preliminary hearing without making an effort to locate and interview the witnesses and/or located and examine video or other proof was effective assistance of counsel. In cases where there are witnesses to interview and an indigent defendant is denied the services of an investigator to conduct those interviews, that defendant cannot receive effective assistance of counsel and is denied what the basic standards of fundamental fairness set forth by the United States Supreme Court in *Ake*.

14. In terms of the preservation of evidence, the denial of an investigator can result in the defendant's inability to gather and preserve evidence, such as store videos, which would otherwise be lost to the passage of time between the arraignment in Sessions Court and indictment. To deny the defendant the ability to gather and preserve evidence, especially exculpatory evidence, is to deny that defendant a fundamentally fair trial process.
15. It is on this point that there is an unfortunate chasm between the resources made available to indigent persons who are appointed the Public Defender and those who are appointed members of the private bar. While the Public Defender's office is funded through a budget and has investigators on staff who can be assigned to any case at any time, the private bar is only granted access to resources on a case-by-case basis. The denial of this motion will result in an equal protection violation, as Mr. Allen will be deprived of useful and necessary services which are available to defendants who are represented by the Public Defender's office.

16. If Mr. Allen is not provided with the funds to obtain an investigator, he will be deprived of due process of law, the equal protection of the laws, the effective assistance of counsel, the right to present a defense, and his rights under the Sixth, Eighth, and Fourteenth Amendments to the United State Constitution, and Article I, §§ 8, 9. and 16 of the Tennessee State Constitution will be violated.

17. Further, Mr. Lamb's hourly rate and the estimated total costs of the investigation are reasonable in comparison with the rates charged by similar experts in this field.

After discussing this case with undersigned counsel, this Court has been advised that Mr. Lamb performs his services at a rate of \$50.00 per hour and that a budget of \$2,000 will be sufficient for this stage of the investigation. The Court finds that this hourly rate and the total estimated charges for these services are reasonable and competitive based on comparisons with the rates and amounts charged by other similar board-certified experts in this field. The Court further finds that these expenditures are a necessary amount required to meet minimal constitutional standards for the performance of the defense function in this cause.

IT IS, THEREFORE, ORDERED, that counsel be allowed to retain the services of Gary Lamb, a private investigator, whose present business address is 6900 Hospitality Circle, Knoxville, TN 37909, to provide investigative services in this case.

Total expenditures for Mr. Lamb under this order should not exceed Two Thousand Dollars (\$2,000) at a rate of Fifty Dollars (\$50) per hour plus his necessary expenses.

Expenses, such as copying and other incidentals, shall be compensated and otherwise paid consistent with the regular rates established by the Administrative Office of the Courts

and/or the Tennessee Supreme Court. The total authorization under the previous paragraph is \$2,000.00 plus expenses.

Additional expenses such as long-distance telephone charges, mileage, meals, parking, photocopying, computerized research, and miscellaneous expenses as defined in Rule 13 of the Tennessee Rules of the Supreme Court, § 4(a)(3)(1), shall be compensated by the regular rates established by the State of Tennessee.

The Court will allow counsel for Mr. Allen to approach the Court with an additional request for funding should the allocated funds prove to be insufficient.

ENTER this the 9 day of September 2020.



Judge, Knox County General Sessions Court

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CLERK OF COURT
KNOX COUNTY, TENN.

APPROVED FOR ENTRY:



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Attorneys for Mr. Allen

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

v.

VONDRE ALLEN,

Defendant.

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Warrant No.: @1365959
First Degree Murder

EX PARTE SEALED MOTION FOR FUNDS FOR INVESTIGATOR

Comes now Vondre Allen, by and through undersigned counsel, and moves this Court, *ex parte*, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8, 9, and 16 of the Tennessee Constitutions, *Tenn. Code Ann.* § 40-14-207(b) and Rule 13 of the *Rules of the Tennessee Supreme Court*, for an order that he be provided funds for the services of a private investigator to assist in the preparation of his defense.

In support of this Motion, Mr. Allen would show as follows:

1. Mr. Allen is charged in the above-captioned warrant with the offense of first-degree murder. If convicted, he faces a punishment of life imprisonment.
2. As is more fully set forth in the attached uniform affidavit of indigency, Mr. Allen is an indigent defendant, without the means to hire the requested investigator.
3. Mr. Allen is in custody and unable to afford bail.
4. It is apparent from Counsels' initial investigation into the facts of this matter that there are a number of civilian witnesses who need to be located and interviewed to ensure that their statements are identified and preserved. Counsel cannot conduct these interviews alone without making themselves necessary witnesses

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and therefore creating the very real possibility of a conflict of interest developing later in the case.

5. Specifically, Counsel are advised by the American Bar Association's Standards for Criminal Justice which assert that counsel must follow prevailing professional norms in making the decision about how an investigation be conducted and must "avoid the prospect of having to testify personally about the content of a witness interview" or other discovery during investigation. *See* ABA Standards for Criminal Justice 4-4.3(f) (4th ed. 2017).
6. Counsel request these funds to retain the services of Mr. Gary Lamb, a licensed private investigator who works in Knoxville, Tennessee. Mr. Lamb has a long career of investigative work and has been approved as an investigator through the courts and the Administrative Office of the Courts in hundreds of cases over many years. Mr. Lamb performs his services at a rate of \$50.00 per hour, and believes that this stage of the case will require a budget of \$2,000 to perform all of the necessary witness interviews and other related investigative tasks (such as locating the witnesses and reporting on the interview results).
7. Without this service, counsel for Mr. Allen cannot provide the effective assistance of counsel to him. Without this service, Mr. Allen will be deprived of due process of law at a critical stage in the proceedings.
8. It is a well-established rule that "when the State brings its judicial power to bear against an indigent defendant in a criminal proceeding, it must take steps to ensure that the accused has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, 61 (1984). The United States Supreme Court, in *Ake*, held that this principle of law is grounded

in the Fourteenth Amendment's due process guarantee of fundamental fairness and "derives from the belief that justice cannot be equal where, simply as a result of this poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id. See also, Britt v. North Carolina*, 404 U.S. 226, 95 S.Ct. 431, 30 L.Ed.2d 400 (1971).

9. Specifically, the United States Supreme Court instructs us:

A criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake, 470 U.S. at 77. Further, it is well settled that fundamental fairness requires that an indigent defendant have "an adequate opportunity to present [his] claims fairly within the adversary system." *Id.*

10. The preliminary hearing is a critical stage of the criminal trial process, "at which certain rights may be sacrificed or lost." *McKeldin v. State*, 516 S.W.2d 82, 85 (Tenn. 1974) (superseded by statute on other grounds).

11. As far back as 1974, our Tennessee Supreme Court observed:

Every criminal lawyer 'worth his salt' knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution's case, and to engage in that happy event sometimes known as a 'fishing expedition', would be an inexcusable dereliction of duty, in the majority of cases.

To hold that an indigent defendant is not entitled to counsel during this critical event, is to ignore basic standards of competency and to disregard the accumulated learning and experience of the defense bar.

Id. at 85-86.

12. Other courts have recognized “provision for experts reasonably necessary to assist indigents is now considered essential to the operation of a just judicial system.” *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980). The denial of funding for expert services has been held a deprivation of the effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments. *Id.* at 1027; *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974).
13. Further, the Supreme Court has held that the right to counsel extends to all critical stages of a criminal prosecution. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). The Court considered a critical stage to be any point that “the defendant would be subject to ‘*potential*’ prejudice without counsel.” *Peoples v. Lafler*, 734 F.3d 503, 518 (6th Cir. 2013) (emphasis added).
14. Having established that the defendant at a preliminary hearing is entitled to counsel, and to the effective assistance of counsel, and further that an indigent defendant is entitled to funds to permit him to put together the building blocks of a defense, the inexorable conclusion is that an indigent defendant is entitled to funding for necessary experts and services at the preliminary hearing stage of the criminal trial process.
15. In the initial stages of a criminal proceeding, critical evidence can be lost if not properly preserved. As this Honorable Court is well aware, it is not uncommon for periods of several months to pass between the time of arrest and indictment. In that time witness statements must be taken from people who could otherwise

move away or have their memories fade. Evidence, such as security videos from stores, can be lost simply because the video owner does not preserve it.¹

16. Witness interviews and evidence collection are the necessary building blocks of an adequate preliminary hearing and the effective assistance of counsel at the preliminary hearing. It would be inapposite to hold that conducting a preliminary hearing without making an effort to locate and interview the witnesses and/or locate and examine video or other proof was effective assistance of counsel. In cases where there are witnesses to interview and an indigent defendant is denied the services of an investigator to conduct those interviews, that defendant cannot receive effective assistance of counsel and is denied the basic standards of fundamental fairness set forth by the United States Supreme Court in *Ake*.
17. In terms of the preservation of evidence, the denial of an investigator can result in the defendant's inability to gather and preserve evidence, such as store videos, which would otherwise be lost to the passage of time between the arraignment in Sessions Court and indictment. To deny the defendant the ability to gather and preserve evidence, especially exculpatory evidence, is to deny that defendant a fundamentally fair trial process.
18. It is on this point that there is an unfortunate chasm between the resources made available to indigent persons who are appointed the Public Defender and those who are appointed members of the private bar. While the Public Defender's office is funded through a budget and has investigators on staff who can be assigned to any case at any time, the private bar is only granted access to

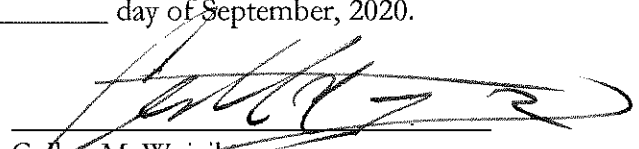
¹ As this Honorable Court knows, law enforcement has no duty to obtain evidence, and so often it falls to the defense to obtain these types of videos or statements. *See State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

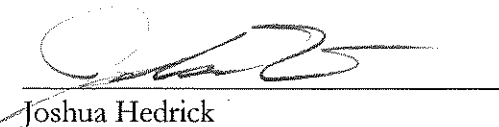
resources on a case-by-case basis. The denial of this motion will result in an equal protection violation, as Mr. Allen will be deprived of useful and necessary services which are available to defendants who are represented by the Public Defender's office.

19. If Mr. Allen is not provided with the funds to obtain an investigator, he will be deprived of due process of law, the equal protection of the laws, the effective assistance of counsel, and the right to present a defense. Such denial would also be a violation of Mr. Allen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United State Constitution, and Article I, §§ 8, 9, and 16 of the Tennessee State Constitution.
20. Undersigned counsel respectfully submit that the United States and Tennessee Constitutions and well-established federal and Tennessee case law clearly mandate that Mr. Allen be provided the necessary funding to secure an investigator to assist him in fully exploring, developing, and preserving the necessary building blocks of his defense.
21. Mr. Allen relies on the accompanying affidavit of undersigned counsel, which sets forth the specific and immediate needs for the requested expert services in his case.

For the foregoing reasons, Vondre Allen respectfully requests this Court to order that he be provided sufficient funds to obtain an investigator and that those funds be made available to undersigned counsel immediately.

Respectfully submitted this the 9th day of September, 2020.


Cullen M. Wojcik
BPR #030564


Joshua Hedrick

BPR # 025444

Whitt, Cooper, Hedrick & Wojcik

607 Market St.

Suite 1100


Knoxville, TN 37902

(865) 524-8106

Attorneys for Mr. Allen

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has **NOT** been forwarded to the District Attorney General for the Sixth Judicial District of the State of Tennessee as this motion was filed under seal.


Joshua D. Hedrick,
Attorney for Mr. Allen

IN GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

DOCKET NO. 01365959

vs.

Allen, Vondre be 219

UNIFORM AFFIDAVIT OF INDIGENCY

Part I

Comes the defendant, subject to the penalty and perjury, makes oath of the following facts

1. Full Name: Vondre Allen
 2. Any other names ever used: _____
 3. Address: 3200 W. 10th St
 4. Telephone No(s): (Home) 606-386-4651 (Work) _____ (Email) _____
 5. Are you currently employed? ☐ Yes ☒ No Where? _____
 6. Income \$ 0 ☐ Weekly ☐ Bi-weekly ☐ Monthly 7. Date of Birth: 02/21/1996
 8. Do you receive government assistance or pensions? ☐ Disability/SSI ☐ AFDC ☐ Other: _____
 9. Do you own property? ☐ Yes ☒ No What kind of property do you own? ☐ House ☐ Car ☐ Other: _____
 10. Are you or your family going to be able to post bond and/or hire an attorney? ☐ Yes ☒ No
 11. Are you now in custody? ☒ Yes ☐ No If so, how long have you been in custody? 2 weeks
- If a defendant is in custody, unable to make bond and the answers to questions one (1) through eleven (11) make it clear that the defendant has no resources to hire a private attorney, skip Part II and complete Part III. If Part II is to be completed, do not list items already listed in Part I.

Part II

12. Name and ages of all dependents: Name: _____ Age: _____ Relationship: _____
Name: _____ Age: _____ Relationship: _____
Name: _____ Age: _____ Relationship: _____
13. I have met with the following lawyer(s), have attempted to hire said lawyer(s) to represent me, and having been unable to do so:
Name: _____ Address: _____
14. All income from all sources, including, but not limited to wages, interest, gifts, AFDC, SSI, Social Security, retirement, disability, pension, unemployment, alimony, worker's compensation, etc.: \$ _____ per _____ from: _____
\$ _____ per _____ from: _____
15. All money available to me from any source: ☐ Cash ☐ Checking ☐ Savings ☐ CD Accounts-give Acct. No. & balances
16. Debts owed to me: \$ _____ Credit Card(s): Account Numbers, Balance, Credit Limit, Visa/MasterCard, etc.
17. All vehicles/vessels/real estate owned by me, solely or jointly, within the last six months (including, but not limited to cars, trucks, motorcycles, farm equipment, boats, land, lots, houses, mobile homes, etc.)
Value \$ _____ Amt. Owed: _____
Value \$ _____ Amt. Owed: _____
Value \$ _____ Amt. Owed: _____
18. All assets or property not already listed owned within the last six months or expect in the future:
Value: _____ \$ Amt. Owed: _____
19. The last income tax return filed was the year _____, and it reflected a net income of \$ _____, I will file a copy if required
20. I am out of jail on bond of \$ _____ made by _____, the money to make bond, was paid by _____

Part III

21. Acknowledging that I am still under oath, I certify I have listed in Parts I and II all assets in which I hold or expect to hold any legal or equitable interest.
22. I am financially unable to obtain the assistance of a lawyer and request the Court to appoint a lawyer for me.
23. I understand that it is a Class A Misdemeanor for which I can be sentenced to jail for up to 11 months and 29 days or be fined up to \$2500.00 or both if I intentionally or knowingly misrepresent, falsify, or withhold any information required in the affidavit. I also understand that I may be required by the Court to produce other information in support of my request for an attorney.

This 07 day of August, 2020. Vondre Allen
Defendant

Sworn to and subscribed before me, this 7 day of August, 2020.

JUDGE/MAGISTRATE

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

v.

VONDRE ALLEN,

Defendant.

Warrant No. @1365959
First Degree Murder

**AFFIDAVIT IN SUPPORT OF DEFENDANT'S EX-PARTE SEALED MOTION
FOR FUNDS FOR AN INVESTIGATOR**

The affiant, Joshua D. Hedrick, being duly sworn, states as follows:

1. I received a law degree from the University of Memphis in 2006. I have practiced in the State of Tennessee since 2006.
2. My co-counsel, Cullen M. Wojcik, received his law degree from the University of California, Hastings College of the Law in 2011. He has practiced in the State of Tennessee since 2011.
3. My co-counsel and I represent Mr. Vondre Allen, who is an indigent defendant without the means to hire the requested investigator.
4. I have included with these pleadings a uniform affidavit of indigency which demonstrates that Mr. Allen is an indigent person. Mr. Allen is also in custody and unable to afford bail.
5. Mr. Allen is charged with the offense of first-degree murder, and this case is currently pending before the General Sessions Court for Knox County, Tennessee.
6. It is apparent from our initial investigation into the facts of this matter that there are a number of civilian witnesses who need to be located and interviewed to ensure that their statements are identified and preserved.

7. We cannot conduct these interviews alone without making ourselves necessary witnesses and therefore creating the very real possibility of a conflict of interest developing later in the case.
8. We are advised by the American Bar Association's Standards for Criminal Justice which assert that counsel must follow prevailing professional norms in making the decision about how an investigation be conducted and must "avoid the prospect of having to testify personally about the content of a witness interview" or other discovery during investigation. *See* ABA Standards for Criminal Justice 4-4.3(f) (4th ed. 2017).
9. We request funds to retain the services of Mr. Gary Lamb, a licensed private investigator who works in Knoxville, Tennessee. I have worked with Mr. Lamb for more than 13 years, and know that he has a long and successful career of investigative work. Mr. Lamb has been approved as an investigator through the courts and the Administrative Office of the Courts in hundreds of cases over many years. Mr. Lamb performs his services at a rate of \$50.00 per hour, and believes that this stage of the case will require a budget of \$2,000 to perform all of the necessary witness interviews and other related investigative tasks (such as locating the witnesses and reporting on the interview results).
10. Without this service, we cannot provide the effective assistance of counsel to him. Without this service, Mr. Allen will be deprived of due process of law at a critical stage in the proceedings.
11. We know the preliminary hearing to be a critical stage of the criminal trial process, "at which certain rights may be sacrificed or lost." *McKeldin v. State*, 516 S.W.2d 82, 85 (Tenn. 1974) (superseded by statute on other grounds).

12. We agree wholeheartedly and fully adopt the words of our Tennessee Supreme Court when they wrote:

Every criminal lawyer ‘worth his salt’ knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution’s case, and to engage in that happy event sometimes known as a ‘fishing expedition’, would be an inexcusable dereliction of duty, in the majority of cases.

To hold that an indigent defendant is not entitled to counsel during this critical event, is to ignore basic standards of competency and to disregard the accumulated learning and experience of the defense bar.

Id. at 85-86.

13. We know that other courts have recognized “provision for experts reasonably necessary to assist indigents is now considered essential to the operation of a just judicial system.” *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980). The denial of funding for expert services has been held a deprivation of the effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments. *Id.* at 1027; *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974).
14. We also know that the Supreme Court has held that the right to counsel extends to all critical stages of a criminal prosecution. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). The Court considered a critical stage to be any point that “the defendant would be subject to ‘potential’ prejudice without counsel.” *Peoples v. Lafler*, 734 F.3d 503, 518 (6th Cir. 2013) (emphasis added).
15. We believe that an indigent defendant is entitled to funding for necessary experts and services at the preliminary hearing stage of the criminal trial process. It does

a disservice to our client, to fundamental fairness, and to our system of justice as a whole for counsel to essentially “wing it” on a first-degree murder preliminary hearing.

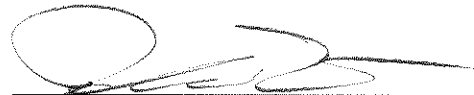
16. In the initial stages of a criminal proceeding, critical evidence can be lost if not properly preserved. As this Honorable Court is well aware, it is not uncommon for periods of several months to pass between the time of arrest and indictment. In my career this time period has usually run from four to six months, although sometimes longer.
17. In that time witness statements must be taken from people who could otherwise move away or have their memories fade. Evidence, such as security videos from stores, can be lost simply because the video owner does not preserve it.²
18. I have personally taken over cases in criminal court only to find that the witnesses now cannot be located, or have died, or simply do not have a very clear memory of what they saw last year.
19. Witness interviews are the necessary building blocks of an adequate preliminary hearing and the effective assistance of counsel at the preliminary hearing. It would be inapposite to hold that conducting a preliminary hearing without making an effort to locate and interview the witnesses and/or locate and examine video or other proof was effective assistance of counsel. In cases where there are witnesses to interview and an indigent defendant is denied the services of an investigator to conduct those interviews, that defendant cannot receive effective assistance of counsel and is denied what the basic standards of fundamental fairness set forth by the United States Supreme Court in *Ake*.

² As this Honorable Court knows, law enforcement has no duty to obtain evidence, and so often it falls to the defense to obtain these types of videos or statements. See *State v. Ferguson*, 2 S.W.3d 91, (Tenn. 1999).

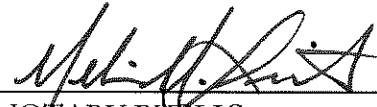
20. The denial of an investigator can result in the defendant's inability to gather and preserve evidence, such as store videos, which would otherwise be lost to the passage of time between the arraignment in Sessions Court and indictment. To deny the defendant the ability to gather and preserve evidence, especially exculpatory evidence, is to deny that defendant a fundamentally fair trial process.
21. While the Public Defender's office is funded through a budget and has investigators on staff who can be assigned to any case at any time, the private bar is only granted access to resources on a case-by-case basis. The denial of this motion will result in an equal protection violation, as Mr. Allen will be deprived of useful and necessary services which are available to defendants who are represented by the Public Defender's office.
22. If Mr. Allen is not provided with the funds to obtain an investigator, he will be deprived of due process of law, the equal protection of the laws, the effective assistance of counsel, the right to present a defense. Such a denial would also violate his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 9, and 16 of the Tennessee State Constitution.
23. We respectfully submit that the United States and Tennessee Constitutions and well-established federal and Tennessee case law clearly mandate that Mr. Allen be provided the necessary funding to secure an investigator to assist him in fully exploring, developing, and preserving the necessary building blocks of his defense.
24. Without this funding, we cannot properly explore, investigate, preserve, and present a defense on behalf of our client, Mr. Vondre Allen.

25. We respectfully request that this Court authorize funding to allow Mr. Allen to secure the services of an investigator.

Further, affiant saith not.


Joshua D. Hedrick, Affiant

Sworn to and subscribed before me
This 9th day of September, 2020.


NOTARY PUBLIC
My commission expires: 10.10.2020



IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE

v.

VONDRE ALLEN,

Defendant.

Warrant No.: @1365959
First Degree Murder

NOTICE OF DENIAL OF FUNDING

Comes now Vondre Allen, by and through undersigned counsel, and gives notice that the Administrative Office of the Courts has declined to honor the order entered by this Honorable Court. Filed along with this notice is the response from the Administrative Office of the Courts.

Respectfully submitted this the 30th day of September, 2020.

Cullen Wojcik by SDH

Cullen M. Wojcik
BPR #030564



Joshua Hedrick
BPR # 025444
Whitt, Cooper, Hedrick & Wojcik
607 Market St.
Suite 1100
Knoxville, TN 37902
(865) 524-8106

Attorneys for Mr. Allen

FILED
BY MIREHAYMOND

2020 SEP 30 AM 11:37

CLERK OF THE COURT
DIVISION

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been forwarded to the District Attorney General for the Sixth Judicial District of the State of Tennessee on the date the foregoing was filed with the clerk.

A handwritten signature in black ink, appearing to read 'Joshua D. Hedrick', written over a horizontal line.

Joshua D. Hedrick,
Attorney for Mr. Allen

Vondre Allen Order

From: Lacy Wilber <lacy.wilber@tncourts.gov>

To: hedrick@knoxdefense.com <hedrick@knoxdefense.com>

Mr. Hedrick,

The AOC cannot approve this order because it is in General Sessions Court.

Please contact me if you have any questions.

Thank you,

Lacy

Lacy Wilber | Assistant General Counsel

Tennessee Supreme Court

Administrative Office of the Courts

511 Union St, Suite 600

Nashville, TN 37219

615-741-2687

Fax: 615-253-0017

Re: Vondre Allen Order

From: Joshua D. Hedrick <hedrick@knoxdefense.com>
To: Lacy Wilber <lacy.wilber@tncourts.gov>

Lacy-

Thanks for getting back to me.

Is that a result of the language of Rule 13 or some other regulation?

Is there a process by which that decision can be reviewed by the Court or the Chief Justice?

- Josh

Joshua D. Hedrick
607 Market Street, Suite 1100
Knoxville, Tennessee 37902

hedrick@knoxdefense.com
www.knoxdefense.com
(865) 524-8106



THIS ELECTRONIC TRANSMISSION CONTAINS INFORMATION PROTECTED BY THE ATTORNEY-CLIENT OR ATTORNEY WORK-PRODUCT PRIVILEGES, OR IS OTHERWISE CONFIDENTIAL INFORMATION BELONGING TO THE SENDER WHICH IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT YOU MAY NOT REVIEW THE CONTENTS BELOW, AND THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR THE TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS INFORMATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TRANSMISSION IN ERROR, PLEASE IMMEDIATELY DELETE THIS MESSAGE

On Sep 22, 2020, at 3:23 PM, Lacy Wilber <Lacy.Wilber@tncourts.gov> wrote:

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Tennessee Supreme Court

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From: Lacy Wilber <lacy.wilber@tncourts.gov>

To: hedrick@knoxdefense.com <hedrick@knoxdefense.com>

No. There's been no change in the Rule. Rule 13, section 5(a)(1) provides that funds shall be available "in the trial." Sessions courts are not trial courts.

To my knowledge, funds for investigators or experts have never been available at Sessions level. Chief Justice Bivins has previously clarified to the AOC that there are no funds for investigators or experts at Sessions level.

I hope this helps. Please let me know if you have further questions.

Lacy

Lacy Wilber | Assistant General Counsel
Tennessee Supreme Court
Administrative Office of the Courts
511 Union St, Suite 600
Nashville, TN 37219
615-741-2687
Fax: 615-253-0017

>>> "Joshua D. Hedrick" <hedrick@knoxdefense.com> 9/22/2020 2:53 PM >>>

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- Josh

Joshua D. Hedrick
607 Market Street, Suite 1100
Knoxville, Tennessee 37902

hedrick@knoxdefense.com
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(865) 524-8106



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Lacy Wilber | Assistant General Counsel
Tennessee Supreme Court
Administrative Office of the Courts
511 Union St, Suite 600
Nashville, TN 37219
615-741-2687
Fax: 615-253-0017

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE,

Plaintiff

v.

VONDRE ALLEN,

Defendant.

Warrant No.: @1365959
First Degree Murder

ORDER UNSEALING SEALED DOCUMENT

Upon oral motion by counsel for the Defendant, and for good cause shown, it is hereby ORDERED that the Order Approving Funds to Hire an Investigator entered and sealed by this Honorable Court on September 9, 2020, be hereby unsealed.

ENTER this the 15 day of December, 2020.

Judge, Knox County General Sessions Court

APPROVED FOR ENTRY:

Nathaniel H. Evans

Nathaniel H. Evans (BPR #026292)
THE EVANS LAW FIRM
625 Market Street, Suite 404
Knoxville, TN 37902
(865) 523-2755
nate@evanslawfirm.legal
Attorney for Vondre Allen

2020 DEC 15 AM 9:44

FILED
BY MIKE HAMMOND

CERTIFIED TRUE COPY
MIKE HAMMOND CLERK
GENERAL SESSIONS COURT
CRIMINAL DIVISION
KNOX COUNTY, TN
BY *[Signature]* DEPUTY CLERK
XVI
KNOX COUNTY, TENNESSEE

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
FELONY DIVISION

2020 OCT 14 AM 9:01

STATE OF TENNESSEE)

v.)

DANNY FRAZIER)

No. @1372993, @1373983

NOTICE OF DENIAL OF FUNDING

The defendant, Danny Frazier, by and through undersigned counsel, hereby gives notice that the Tennessee Administrative Office of the Courts has declined to honor this Court's order approving funding to retain a necessary expert in this case. The letter denying funding is attached to this notice.

RESPECTFULLY SUBMITTED,

ERIC M. LUTTON
PUBLIC DEFENDER, SIXTH JUDICIAL DISTRICT

BY: _____

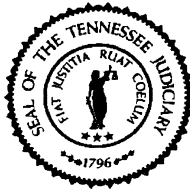
TYLER M. CAVINESS, BPR# 030273
ASSISTANT DISTRICT PUBLIC DEFENDER
1101 Liberty Street
Knoxville, TN 37919
Phone: (865) 594-6120
(This signature was electronically generated
pursuant to Tenn. Code Ann. § 16-1-115.)

CERTIFICATE OF SERVICE

I, Tyler Caviness, do hereby certify that a true and exact copy of this motion has been delivered to the Office of the District Attorney General for the Sixth Judicial District, 400 W. Main Street, Knoxville, TN 37902, on this, the 14th day of October, 2020.



TYLER M. CAVINESS



Supreme Court of Tennessee

Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970

DEBORAH TAYLOR TATE
Director

Assistant Public Defender Tyler Caviness
1101 Liberty Street
Knoxville, TN 37919
Via email

October 13, 2020

Mr. Caviness,

This letter is to inform you that Chief Justice Bivins has held that Tennessee Supreme Court Rule 13, section 5 does not provide for expert or investigative funds in General Sessions Courts. The Rule allows for expert and investigative funds "at trial," so once a grand jury has indicted the defendant or there has been a presentment and the case is in Circuit or Criminal Court, you may then submit your motion and order for AOC prior approval review.

Sincerely,

A handwritten signature in cursive script that reads "Lacy Wilber".

Lacy Wilber
Assistant General Counsel

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION _____

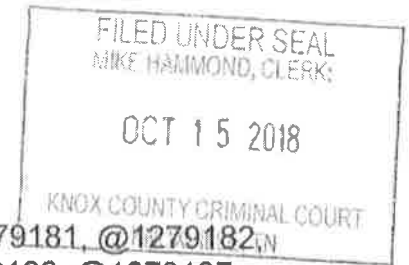
STATE OF TENNESSEE

v.

ZACHARI TYLER MOORE

)
)
)
)
)

Warrant Nos. @1279181, @1279182,
@1279185, @1279186, @1279187
(IN GRAND JURY)



ORDER APPROVING FUNDS TO HIRE AN
ACCIDENT RECONSTRUCTIONIST FILED UNDER SEAL

Counsel for Mr. Moore has advised this Court that he is in need of an expert to reconstruct the facts and circumstances of a fatal automobile accident which occurred on or about September 30, 2018 in Knox County, Tennessee to determine if this accident was the result of his client's reckless behavior and/or impairment, or if it was the result of faulty road design and or ordinary negligence. Counsel has contacted James E. Norris II, PE, a practicing civil engineer and accident reconstruction expert. Mr. Norris has previously been qualified in the field of accident reconstruction in the Knox County Criminal Courts as well as other Tennessee courts and courts around the country. Mr. Norris has previously served as an accident reconstruction expert for undersigned counsel. Having listened to the statements and arguments of undersigned counsel, hearing a summary of the facts of this case, reviewing Mr. Norris' qualifications as set out in his curriculum vitae, and reviewing Mr. Stephens' Affidavit and the Affidavit of Mr. Norris, the Court is convinced, and so finds, that Mr. Moore has made a particularized showing of need for the requested expert services and that Mr. Norris possesses the qualifications to perform the requested work.

Having found that undersigned counsel has made a particularized showing of need for the requested services, the Court now turns its attention to the issue of timing for this request.

It is obvious to this Court that Rule 13 intends to impose time constraints regarding the availability of expert funding to indigent defendants. This limitation is contained in the opening sentence of Rule 13, Section 5(a)(1), **Experts, Investigators, and other support services**, "In the trial and direct appeal ... " This Court has been advised by undersigned counsel regarding conversations he has had with representatives of the Administrative Office of the Courts who have indicated that funding for expert services is not available unless and until an Indictment is returned against an indigent defendant. An Indictment is not expected in this case for months.

Undersigned counsel's proof regarding his particularized showing of need included two Affidavits, one from undersigned counsel himself and a second from Affiant's proposed accident reconstruction expert, Mr. Norris. Both Affidavits maintain that with regard to the requested funding request, time is of the essence.

In Mr. Norris' Affidavit, he maintained that travelling to the accident scene where he would conduct a thorough inspection including photographing, measuring, and collecting data is a "critical portion" of any accident analysis and reconstruction. Further, travelling to the location where the vehicles are stored and inspecting, photographing, taking measurements, and collecting data is likewise a "critical portion" of any accident analysis and reconstruction. Mr. Norris maintains in his Affidavit that with passing time and exposure to weather, physical evidence such as tire marks, furrow marks, scrapes, gouges, debris, fluid stains, etc. **"will deteriorate and/or completely disappear."**

Further, Mr. Norris points out that paint marks and measurements made as a part of the police investigation will, with the passing of time, deteriorate. Mr. Norris states that the area where this accident occurred is "an area that has a high frequency of vehicular accidents." He maintains that a thorough inspection of the accident scene, in a timely manner, would help him evaluate and eliminate evidence from other vehicular accidents.

In Mr. Stephens' Affidavit, he advises this Court that he has discussed this case with the Assistant District Attorney responsible for the prosecution of Mr. Moore. This Prosecutor informed Mr. Stephens that he will delay taking the case to the Grand Jury until the toxicological work-up on the defendant's blood has been completed by the Tennessee Bureau of Investigations. Though only an estimate, that time period could be six (6) months. While this Prosecutor advised Mr. Stephens that he has asked for the work to be expedited, there is no assurance that the Tennessee Bureau of Investigation will be able to honor this request. In fact, no reason was offered by the Prosecutor why the Tennessee Bureau of Investigation would move this case ahead of others "in the pipeline" other than they have been asked to do so. The Prosecutor advised Mr. Stephens that even with expedited toxicology, it will likely be February 2019 before Mr. Moore will be arraigned in criminal court. Counsel for Mr. Moore voiced skepticism that the state would make that time period but, counsel argued that even if they did, a four-month delay in getting his expert to the crime scene would result in a material loss and/or alteration of the accident scene.

This Court has been convinced that with regard to this funding request, time is of the essence. Counsel has demonstrated by his investigation as detailed in his

AFFIDAVIT IN SUPPORT OF DEFENDANT'S EX PARTE MOTION FOR FUNDS TO HIRE AN ACCIDENT RECONSTRUCTION EXPERT FILED UNDER SEAL as well as the AFFIDAVIT OF JAMES E NORRIS, II, PE that the requested expertise is needed to fully protect the rights of Mr. Moore. The Court is of the opinion that the services to be provided by Mr. Norris are necessary, and that they should be provided at this time in order for counsel to provide the effective assistance required by the United States Constitution, as well as the Tennessee Constitution. Further, this Court believes that counsel has complied with *Tenn. Code Ann. § 40-14-207(b)*, as well as *Rule 13, Supreme Court Rules*.

IT IS, THEREFORE, ORDERED, that counsel be allowed to retain the services of Mr. James E. Norris a practicing civil engineer and accident reconstruction expert employed by Parham Engineering Consultants, 4038 Gap Road, Suite 201, Knoxville, TN 37914, to conduct a full and complete reconstruction of the accident scene. Though Mr. Norris' normal hourly wage exceeds One Hundred Fifteen Dollars (\$115.00), he has agreed to work for that rate. This Court orders that the State of Tennessee reimburse James E. Norris II, PE for his work in an amount not to exceed Ten Thousand Dollars (\$10,000.00) and at an hourly rate of One Hundred Fifteen Dollars (\$115.00) per hour, which will include an on-site inspection of the accident scene, inspection of the cars involved in the accident, reviewing the investigative work of the Knoxville Police Department, consulting with counsel for Mr. Moore, preparing any and all reports, meeting with counsel in preparation for trial, and testifying at trial if necessary. This Court finds that Mr. Norris' charges of One Hundred Fifteen Dollars (\$115.00) per hour for his work and consultation is appropriate. Undersigned counsel believes Mr. Norris'

work in this case should take approximately eighty (80) to one hundred (100) hours.
This Court finds Mr. Norris' hourly rate to be reasonable. Additionally, this Court will
allow counsel for Mr. Moore to approach the Court with an additional request for
compensation, should the evaluation and report of Mr. Norris appear to counsel to be
necessary to present as evidence in the trial or sentencing of Mr. Moore.

ENTER this the 15th day of October, 2018.



JUDGE

****Denied****

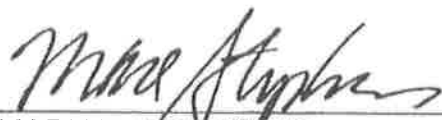
Per Chief Justice on 11/2/18



Lacy Wilber

11/5/18

APPROVED FOR ENTRY:



MARK E. STEPHENS

CERTIFIED TRUE COPY
MIKE HAMMOND, CLERK
CRIMINAL COURT
KNOX COUNTY, TN

BY: 
DEPUTY CLERK

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

DIVISION _____

STATE OF TENNESSEE

v.

ZACHARI TYLER MOORE

)
)
)
)
)

Warrant Nos. @1279181, @1279182,
@1279185, @1279186, @1279187
(IN GRAND JURY)

FILED UNDER SEAL
MIKE HAMMOND, CLERK

OCT 15 2018

KNOX COUNTY CRIMINAL COURT
KNOXVILLE, TN

**EX PARTE MOTION FOR FUNDS TO HIRE AN
ACCIDENT RECONSTRUCTION EXPERT FILED UNDER SEAL**

Comes the defendant, Zachari Tyler Moore, by and through undersigned counsel, and moves this Court, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 8, 9, and 16 of the Tennessee Constitution, *Tenn. Code Ann.* § 40-14-207, and Rule 13 of the *Tennessee Supreme Court Rules* for an Order authorizing the disbursement of adequate funds to provide defense counsel the opportunity to hire an accident reconstruction expert for the purposes of conducting an independent analysis of the crime scene in question and to assist the jury in determining whether Mr. Moore's actions were the result of his reckless driving and/or impairment, as the State alleges, or were accidental, as Mr. Moore maintains.

1. The State alleges that Zachari Tyler Moore committed the offenses of vehicular homicide, driving under the influence, simple possession, possession of drug paraphernalia and driving on roadways laned for traffic. These charges arose out an accident that occurred on Sunday, September 30, 2018, at Woodland Drive under the I-275 overpass in Knoxville, Tennessee. One person was killed in the accident.

2. Later that same day, September 30, 2018, warrant number @1279187 was issued charging Mr. Moore with the offense of vehicular homicide. In addition, warrant numbers @1279186, @1279185, @1279181 and @1279182 were issued

charging Mr. Moore with driving under the influence, driving on roadways lined for traffic, unlawful possession of drug paraphernalia, and simple possession respectively. Bonds have been set in Mr. Moore's cases totaling Fifty-Four Thousand Dollars (\$54,000.00).

3. Mr. Moore was arraigned on the above-captioned charges on October 1, 2018. The Judicial Commissioner determined Mr. Moore was indigent and appointed the Public Defender for the Sixth Judicial District to represent him. Mr. Moore cannot make bail and has remained in custody since the date of his arrest, September 30, 2018.

4. On October 11, 2018, Mr. Moore was scheduled to have a Preliminary Hearing. This hearing was waived and Mr. Moore's cases were bound over to the Knox County Grand Jury.

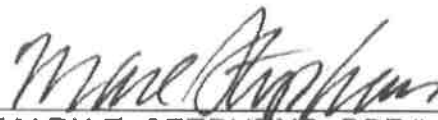
5. Because undersigned counsel is without sufficient knowledge and expertise to perform the necessary tests that an independent accident reconstruction expert would conduct, undersigned counsel believes it necessary to employ the services of such an expert to fully explore and develop the circumstances surrounding the accident in question. Further, undersigned counsel maintains that time is of the essence. An accident reconstruction expert, able to go to the crime scene now while physical evidence of the accident still exists, offers Mr. Moore the ability to challenge the state's allegations as to how this accident occurred. The jury will then be able to apply science to the allegations, facts and circumstances of this case and more fully understand Mr. Moore's conduct. If provided immediate access to an accident reconstruction expert, Mr. Moore's right to a fair trial, and other critical constitutional rights will be more fully protected.

6. If Mr. Moore is not provided with the funds to obtain an accident reconstruction expert, valuable evidence will be lost and Mr. Moore will be forced to simply accept the findings and conclusions of law enforcement with regard to how this accident occurred. Mr. Moore will be deprived due process of law, the equal protection of the laws, and counsel will be ineffective in his representation. Further, a delay in providing these essential services will most certainly violate Mr. Moore's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 9, and 16 of the Tennessee Constitution.

7. Mr. Moore relies on the accompanying affidavit of undersigned counsel as well as an affidavit of Mr. James Norris, a practicing civil engineer and accident reconstruction expert, setting forth the specific need for services in this case.

For the foregoing reasons, Zachari Tyler Moore respectfully requests that this Court order that he be provided sufficient funds to hire an accident reconstruction expert in order to conduct a detailed reenactment of the conduct in question to assist the jury in the determination of whether, at the time of this offense, Mr. Moore's actions were the result of his reckless and/or intentional behavior, or were accidental.

Respectfully submitted,



MARK E. STEPHENS, BPR# 007151
District Public Defender
1101 Liberty Street
Knoxville, Tennessee 37919
Telephone: (865) 594-6120
(This signature was electronically
generated pursuant to T.C.A. §16-1-115.)

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION _____

STATE OF TENNESSEE)	
)	
v.)	Warrant Nos. @1279181, @1279182,
)	@1279185, @1279186, @1279187
ZACHARI TYLER MOORE)	(IN GRAND JURY)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S EX PARTE MOTION FOR
FUNDS TO HIRE AN ACCIDENT RECONSTRUCTION EXPERT FILED UNDER SEAL

The affiant, Mark Stephens, after first being duly sworn as required by law, does hereby make oath and affirm that the following is a true and correct representation of the facts:

1. That I am the elected District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee, having assumed that position on September 1, 1990. I was re-elected on September 1, 1998, on September 1, 2006, and again on September 1, 2014. My current business address is 1101 Liberty Street, Knoxville, Tennessee 37919.

2. That on October 1, 2018, I was appointed to represent Zachari Tyler Moore following the issuance of warrant numbers @1279187, @1279186, @1279181, @1279185 and @1279182, charging Mr. Moore with vehicular homicide, driving under the influence, possession of drug paraphernalia, driving on roadways laned for traffic, and simple possession.

3. The charges in this case stem from an accident that occurred on Sunday, September 30, 2018, on Woodland Drive under the I-275 overpass in Knoxville,

Tennessee. Mr. Moore was driving a gray Ford SUV south bound on Interstate 275 south when that vehicle left the roadway ultimately striking another automobile on Woodland Ave. The vehicle struck by Mr. Moore's car was driven by Mr. Franklin Bates who was killed in the accident.

4. In order to properly defend against the State's allegations that this accident was caused as a result of Mr. Moore's reckless behavior or his impairment, Affiant needs to hire an accident reconstruction expert who possesses the expertise to look at the road design and construction, as well as the interaction of those conditions with the vehicle that Mr. Moore was operating, to assist in determining whether this accident was caused by Mr. Moore's alleged reckless behavior and/or impairment as opposed to faulty roadway design or Mr. Moore's negligence.

5. Affiant has consulted with James E. Norris II, PE, a civil engineer and accident reconstruction expert. Affiant has used Mr. Norris in the past and he has been qualified as an expert in the field of accident reconstruction in Knox County Criminal Courts. He has testified in numerous courts and has been declared an expert in numerous states in the field of accident reconstruction, including Tennessee. Mr. Norris possesses the necessary expertise to perform the requisite analysis and to assist Affiant in providing Mr. Moore with the effective assistance of counsel to which he is constitutionally entitled (See Affidavit of James E. Norris, II, PE. Attached).

6. Mr. Norris has emphasized the need to travel to the accident scene where he plans to conduct a thorough inspection including photographing, measuring, and collecting data from the scene. Mr. Norris maintains this "at-the-scene" work is a critical portion of any accident analysis and reconstruction. Further, if provided adequate

funding, Mr. Norris intends to travel to the location where the vehicles are stored and inspect, photograph, take measurements, and collect data there as well. Likewise, Mr. Norris deems these functions to be a "critical portion" of any accident analysis and reconstruction. Mr. Norris warns Affiant that with passing time and exposure to weather, physical evidence such as tire marks, furrow marks, scrapes, gouges, debris, fluid stains, etc. **"will deteriorate and/or completely disappear."** Further, Mr. Norris points out that paint marks made as a part of the police investigation will, with the passing of time, deteriorate. Finally, Mr. Norris informed Affiant that the area where this accident occurred is "an area that has a high frequency of vehicular accidents." He maintains that a thorough inspection of the accident scene, in a timely manner, would help him evaluate and eliminate evidence from other vehicular accidents. Mr. Norris believes time is of the essence.

7. Affiant has discussed this case with the Assistant District Attorney responsible for the prosecution of Mr. Moore. During this discussion, this Prosecutor informed Affiant that he will delay taking the case to the Grand Jury until the toxicological work-up on the defendant's blood has been completed by the Tennessee Bureau of Investigations. Delays of over six (6) months to obtain toxicology results are the norm, not the exception. While this Prosecutor advised Affiant that he has asked for the work to be expedited, there is no assurance that the Tennessee Bureau of Investigation will be able to honor this request. In fact, no reason was offered by the Prosecutor why the Tennessee Bureau of Investigation would move this case ahead of others "in the pipeline" other than they have been asked to do so. The Prosecutor advised Mr. Stephens that even with expedited toxicology, it will likely be February 2019

before Mr. Moore will be arraigned in criminal court. Affiant is skeptical that the state will make that time period but, even if they do, a four-month delay in getting his expert to the crime scene will result in a material loss and/or alteration of the accident scene.

8. Mr. Norris advises Affiant that his customary hourly rate exceeds Rule 13 limitations, but, if approved to work in this case, he will agree to work at the reduced hourly rate of One Hundred Fifteen Dollars (\$115.00). The estimated total cost associated with hiring Mr. Norris should not exceed Ten Thousand Dollars (\$10,000.00).

Further, Affiant saith not.


MARK STEPHENS, Affiant

Sworn to and subscribed before me
this 15th day of October, 2018.


NOTARY PUBLIC
My commission expires: 4-28-20



Date: 11/05/2018 [01:03:55 PM EST]
From: Mark Stephens <mstephens@pdknox.org>
To: Rachel Harmon <Rachel.Harmon@tncourts.gov>
Subject: Re: Order - Zachari Moore

Thank you. however, I will need a written finding that the denial was based on timing (not being Indicted) and not a failure on my part to make a particularized showing of need.

Thanks.

--

Mark

Mark Stephens
District Public Defender
1101 Liberty Street
Knoxville, TN 37919
(865) 594-6120 (Office)
(865) 594-6169 (Fax)
mstephens@pdknox.org

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Rachel Harmon wrote on 11/5/18 12:39 PM:

Mark,

Because Mr. Moore has not been indicted, attached is the order denying the request for expert services pursuant to Tenn. Sup. Ct. R. 13, Section 5(a)(1).

Respectfully,

Rachel Harmon | General Counsel
Tennessee Supreme Court
Administrative Office of the Courts
Nashville City Center Suite 600
511 Union Street
Nashville, Tennessee 37219
Ph: 615.741.2687
Fax: 615.741.6285

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE,

v.

NO. 114965

ZACHARI TYLER MOORE

ORDER UNSEALING PLEADINGS

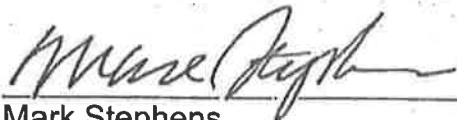
Upon oral motion of counsel, and for good cause shown, it is hereby ORDERED that the Motion, Affidavit and Order approving funds for an accident reconstruction expert in the above-styled case entered and sealed by this Honorable Court on the 15th day of October 2018, and the 8th day of March 2019, and the 15th day of April 2019 be hereby unsealed.

ENTER this the 19th day of January, 2021.



JUDGE G. SCOTT GREEN
SIXTH JUDICIAL DISTRICT
CRIMINAL COURT, DIVISION III

APPROVED FOR ENTRY



Mark Stephens
Attorney for Mr. Moore
606 W. Main Street, Ste 100
Knoxville, TN 37902

Exhibit 2:
Declaration of Kelly A. Gleason

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

In re:)	
)	No. _____
Petition to Vacate or Modify)	
Tennessee Supreme Court)	
Rule 13, Section 5(e)(4)-(5))	

DECLARATION OF KELLY A. GLEASON

COUNTY OF DAVIDSON)	
)	
STATE OF TENNESSEE)	

Declarant Kelly A. Gleason declares as follows:

1. I am an adult resident citizen of Nashville, Davidson County, Tennessee.

I base the following statements on personal knowledge.

2. I am a member in good standing of the Tennessee Supreme Court bar. My Board of Professional Responsibility number is 022615.

3. I am employed by the Tennessee Office of the Post-Conviction Defender as an Assistant Post-Conviction Defender (APCD). I have been an APCD since August 2004.

4. In my capacity as an APCD, I represented Jessie Dotson before the Shelby County Criminal Court in a state post-conviction proceeding that challenged the constitutional propriety of Mr. Dotson's first-degree murder convictions and resulting death sentences.

5. Prior to the evidentiary hearing in Mr. Dotson's case, the post-conviction court entered an order authorizing funds for the services of James R. Merikangas, M.D. 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 § 5(d)(5) authorized courts to exercise discretion to exceed that limit. The court exercised that discretion upon finding by clear and convincing evidence that extraordinary circumstances existed.

6. Complying with the Tennessee Supreme Court Rule 13 § 5(e)(4)-(5) review process (AOC Review Process), our office forwarded the post-conviction court's funding order to the Administrative Office of the Courts (AOC) Director. AOC Assistant General Counsel Lacy Wilber subsequently informed me that the AOC Director and Tennessee Supreme Court Chief Justice did not approve the post-conviction court's order authorizing funds for Dr. Merikangas's services. As a result, Mr. Dotson lost funding for those services.

7. Prior to the evidentiary hearing in Mr. Dotson's case, the post-conviction court entered an order authorizing funds for the services Richard Leo, Ph.D., J.D. 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. Leo's services, it also recognized that § 5(d)(5) authorized courts to exercise discretion to exceed that limit. The court exercised that discretion upon finding by clear and convincing evidence that extraordinary circumstances existed.

8. Complying with the AOC Review Process, our office forwarded the post-conviction court's funding order to the AOC Director. Ms. Wilber subsequently

informed my co-counsel Andrew Harris that the AOC Director did not approve the post-conviction court's order authorizing funds for Dr. Leo's services. Ms. Wilber subsequently informed me that the Chief Justice also did not approve that order. As a result, Mr. Dotson lost funding for Dr. Leo's services.

9. Prior to the evidentiary hearing in Mr. Dotson's case, the post-conviction court entered an order authorizing funds for the services James Walker, PhD. 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. Walker's services, it also recognized that § 5(d)(5) authorized courts to exercise discretion to exceed that limit. The court exercised that discretion upon finding by clear and convincing evidence that extraordinary circumstances existed.

10. Complying with the AOC Review Process, our office forwarded the post-conviction court's funding order to the AOC Director. I received notification that the AOC Director did not approve the post-conviction court's order authorizing funds for Dr. Walker's services. Our office was afterwards informed that the Chief Justice also did not approve that order. As a result, Mr. Dotson lost funding for Dr. Walker's services.

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

Kelly A. Gleason
Kelly A. Gleason, BPR #022615

Date: January 8, 2021