



Administrative Office of the Courts

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MICHELLE J. LONG
Director

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MEMORANDUM

TO: Attorneys, Experts, Investigators

FROM: Joseph K. Byrd, Lead Attorney (Indigent Services Team)

DATE: November 8, 2024

RE: Guidance for Retaining Experts and Investigators

Please carefully review the content below for potential changes or clarifications made since Tenn. Sup. Ct. R. 13 (“R. 13”) was amended by order of the Tennessee Supreme Court on October 4, 2024. Policies and procedures have been established to assist the AOC staff, attorneys, investigators and experts for efficient processing of prior approval and payment for investigators and experts. Please ensure any motions, orders or invoices comply with the following policies and procedures in addition to all the requirements listed in R. 13, particularly sections 4 (expenses) and 5 (experts, investigators and other support services).¹

BACKGROUND

In *Ake v. Oklahoma*, the U.S. Supreme Court, applying a due process analysis, held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant has access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake has been expanded by many state courts to also encompass non-psychiatric assistance and assistance in non-capital cases. R. 13, Sec. 5 provides that for certain specific cases, fees and

¹ A separate memorandum contains guidance for expenses and can be found on the Indigent Representation page of the AOC website at: tncourts.gov.

expenses for some experts other than psychiatrists and investigators may be compensable for indigent criminal defendants. However, the Tennessee Supreme Court in *State v. Barnett*, notes that the Court [in *Ake*] “emphasized that **an “indigent defendant [does not have] a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.”**” Accordingly, limitations to retaining experts are imposed in approving funding request orders.

WHEN FUNDING UNDER R. 13 IS ALLOWED

R. 13, Sec. 5(a) clarifies the cases and circumstances where payment for investigators or experts may be available:

1. The trial court, in an *ex parte* hearing, must determine that investigative or expert services are necessary to ensure that the constitutional rights of the defendant are properly protected in the circumstances described in Sec. 5(a)(1)(A) – (D):
 - a. In the guilt and sentencing phases of a criminal trial in the criminal or circuit court (Sec. 5(a)(1)(A));
 - b. In the trial of post-conviction proceedings in capital cases involving indigent petitioners (Sec. 5(a)(1)(B));
 - c. In Juvenile transfer proceedings (Sec. 5(a)(1)(C); and
 - d. In Juvenile proceedings where a juvenile’s liberty is in jeopardy due to the juvenile being charged with a delinquent offense involving a serious criminal allegation, and as part of an affirmative defense, the juvenile seeks to introduce expert testimony relating to a mental disease or defect bearing upon the issue of whether the juvenile had the mental state required for the offense charged (Sec. 5(a)(1)(D).
2. Sec. 5(a)(3) specifically bars funding for experts in non-capital post-conviction proceedings, except for:
 - a. Costs for mental evaluations of a post-conviction petitioner to determine if he or she is competent to assist counsel in preparation for the post-conviction proceeding will be paid pursuant to Tenn. Code Ann. § 33-7-301(a)(4)(A).
 - b. An order issued requiring DNA analysis will be paid on behalf of a petitioner pursuant to the Post-Conviction DNA Analysis Act of 2001, Tenn. Code Ann. § 40-30-301 et seq. Payment shall be made only upon receipt by the director of a certified copy of the order and invoice from the laboratory that conducted the analysis. The bill shall set forth the name of the petitioner, the date the analysis was performed, the amount of the bill, and the name and address of the laboratory to which payment is to be made. Tenn. Code Ann. § 40-30-313.
 - c. An order issued requiring fingerprint analysis be paid on behalf of a petitioner pursuant to the Post-Conviction Fingerprint Analysis Act of 2021, Tenn. Code Ann. § 40-30-401 et seq. Payment shall be made only upon receipt by the director of a certified copy of the order and bill from the laboratory that conducted the analysis. The bill shall set forth the name of the

petitioner, the date the analysis was performed, the amount of the bill, and the name and address of the laboratory to which payment is to be made. Tenn. Code Ann. § 40-30-413.

PROCEDURE FOR PRIOR APPROVAL

Appointed counsel seeking to retain experts and investigators in the above referenced cases must have **prior approval from the trial court and the AOC**. Sec. 5 lays out a specific process that must occur **before** any proposed expert or investigator begins work. The process involves both the trial court and the AOC.

1. Approval of the Trial Court

An order must be entered by the court granting prior authorization – R. 13, Sec. 5(a)(1). The Court’s review of the request makes substantive findings under the facts of the case to determine if there is a *particularized need* for a particular expert.

Sec. 5(a)(1) provides that the trial court makes an initial determination of reasonableness of a proposed rate paid to an expert. However, as held in *In Re: Petition of Gant*, reasonable compensation under Tenn. Code Ann. § 40–14–207(a)(1) has necessarily been determined by the Supreme Court pursuant to its authority.

Sec. 5(b) contains “threshold requirements” of the motion:

- a. Location of expert or investigator should be within a 150-mile radius of the trial court (Sec. 5(b)(1)) and every effort must be made to locate an expert within that radius. The motion for prior approval must explain efforts if not within 150 miles of the trial court.
- b. A motion for **expert** (Sec. 5(b)(2)) must itemize:
 1. Nature of services;
 2. Identity and qualifications of proposed expert (C.V.);
 3. Means, date, time and location at which services are to be provided; and
 4. Statement of itemized costs – **hourly** rate and amount of any expected additional or incidental costs (Sec. 5(b)(2)).
- c. A motion for **investigative services** (Sec. 5(b)(3)) must itemize:
 1. Type of investigation to be conducted;
 2. Specific facts that suggest the investigation will result in admissible evidence;
 3. Itemized list of anticipated expenses for the investigation;
 4. Name/address of person entity to provide investigation;

5. Statement indicating the person satisfies the licensure requirement; and
6. Hourly rate and amount of expected costs should be included as well.

The AOC reviews the motion insuring it includes these elements in compliance with R. 13.

Sec. 5(b)(4) provides that the court should hold an *ex parte* hearing on the motion. The trial court must determine if requested services are necessary to protect Defendant's constitutional rights (Sec. 5(b)(4)). Under Sec. 5(c)(1), to authorize payment, the court must find:

- a. A particularized need for the requested services (see Sec. 5(c)(2) and (3));
- b. Hourly rate charged is reasonable; and
- c. Hourly rate is comparable to rates charged for similar services.

The AOC reviews the order insuring it includes these elements in compliance with R. 13. (See Sec. 5(e)(1) – (3).

2. Approval of the Administrative Office of the Courts

The order (signed by the judge presiding over the case) must be submitted to the AOC for prior approval (R. 13, Sec. 5(e)(4)). The AOC reviews the request for compliance to Rule 13 and administratively in light of fiscal (budgetary) issues to maintain uniformity as to rates paid individuals and entities. See *Dotson v. State*, 673 S.W.3d 204, 215 (2023).

To fulfill the duty to maintain uniformity as to the rates paid individuals or entities as set out in Sec. 5(d)(1), the AOC reviews the rate for the services approved by the court. A schedule of fees approved for investigators and experts is posted on the AOC website as required by R. 13, Sec. 5(d)(1) and is attached to this memorandum for ease of reference. Requests for experts not listed on the published rate list, will be considered on a case-by-case basis.

The order signed by the judge, the motion and C.V. should be submitted to the AOC for prior approval by email at indigentteam@tncourts.gov. If there are questions or concerns, staff from the AOC Legal division will reach out (generally by email). An example of a motion and order is posted on the indigent representation page of the AOC website and is attached to this memorandum.

Pursuant to R. 13, Sec. 5, the AOC will approve reasonable and necessary expenses that are in compliance with R. 13, Sec. 4. However, pursuant to Sec. 5(e)(1), the total amount authorized includes both fees and necessary expenses under section 4(a) unless otherwise indicated in the order.

If the order can be approved, the AOC approval will be added to the order near the judge's signature and emailed back to the originating email address. Some requests will be approved with an initial incremental amount. The request for the approval of the remaining amount will

be reviewed upon the attorney emailing the AOC at indigentteam@tncourts.gov indicating that the initial incremental approved amount is exhausted and there are tasks remaining to be completed.

In selecting an expert and preparing the motion and order, consider the following suggestions, which assists the AOC in the administrative review which aims at responsible management of funding:

1. If the requested expert is outside of the normal request (i.e., medical doctor, toxicologist, crime scene analyst, etc.) include an explanation why this type of expert is necessary.
2. If the expert fee exceeds the normal rate approved or the expert is out of state (beyond the 150-mile radius as well) explain why this particular expert is required and in-state experts cannot provide the services.
3. If requesting additional funds for a previously approved expert or investigator, explain why the previously approved amount(s) did not cover the costs. Particularly if it is the third or fourth request for prior approval.
4. The testimony or evidence garnered from the expert must be admissible under Sec. 5(d)(7). The AOC relies upon the trial court to determine admissibility but on the rare occasion when it is clear the evidence is not admissible (e.g., polygraph), the AOC may catch that issue assuming the court mistakenly approved it.
5. If your request is for an expert outside of the typical experts approved (included in the fee schedule) or for an hourly rate that exceeds those listed in the fee schedule, make your argument why this request should receive consideration regardless of those facts. If you anticipate the AOC will have to deny it, write your arguments in the motion for two intended recipients: the trial court Judge and the Chief Justice. Only the documents originally submitted to the AOC will be transmitted to the Chief Justice for review.

If the funding request order is denied by the AOC, the requesting attorney will be notified by email sent to the originating email address. The notification will advise the attorney that the funding request order has been denied and that pursuant to Tenn. Sup. Ct. R. 13, Sec. 5(e)(5) the attorney may, within 10 days of the notification, request review of the funding request by the chief justice. If the review by the Chief Justice is timely made, the claim will be transmitted to the chief justice for disposition and prior approval. Review by the Chief Justice is solely limited to the documents originally submitted to the AOC. The determination of the chief justice is final.

PROCEDURE FOR REVIEWING AND APPROVING INVOICES

EXPERTS: When an invoice from an expert is received, the requesting attorney must review the invoice and notate his/her approval on the amount with a signature. The attorney can provide an approval form in lieu of signing the invoice. An example of an approval form is attached to this memorandum and saved on the Indigent Representation page of the AOC website at tncourts.gov.

When the invoice for an expert is approved, it should then be submitted to the AOC at indigentteam@tncourts.gov. If there are questions or concerns, staff from the IST audit staff will reach out (generally by email).

INVESTIGATORS: Investigators enter their own claims in ACAP and in lieu of the attorney notating approval on the invoice, the investigator will provide an approval form to the attorney to sign. The investigator will upload that approval form with his/her claim in ACAP. The attorney will not need to email the approved invoice for an investigator to the AOC.

The approval process for experts is a manual process and IST staff must create a claim in ACAP after review. If there are no problems (e.g., W-9 issues), our target time to review the invoices and process them is between 30-45 days. It can take 45-60 days depending on the number of invoices received and being processed in a given period.

Fee Schedule for Experts & Investigators

<u>Type of Expert</u>	<u>Hourly Rate</u>	<u>Initial Limit</u>	<u>Hours</u>
Investigator	\$50	(See Below)	
Crime Scene	\$115	\$5750	50
Accident Reconstruction	\$115	\$5750	50
Medical Services/Doctors	\$250	\$7500	30
Psychiatrist	\$250	\$7500	30
Psychologist	\$150	\$3500	23.3
Mitigation Specialist	\$65	\$3250	50
DNA	\$200	\$6000	30
Forensic Anthropologist	\$125	\$3500	30.4
Ballistics Expert	\$75	\$1500	20
Fingerprint Expert	\$75	\$1000	13.3
Handwriting Expert	\$75	\$1000	13.3
Cell Phone Expert	\$195	\$7800	40
Pharmacist	\$150	\$4500	30
LCSW/Nurse	\$125	\$3750	30
Arson	\$115	\$5750	50
Biomechanical Eng.	\$150	\$4500	30
Archaeologist	\$150	\$1500	10
Mechanic	\$50	\$1000	20
CPA	\$125	\$2500	20
Shoeprint Expert	\$75	\$1000	13.3
Forensic Toxicologist	\$150	\$3750	
Neuropsychologist	\$250	TBD*	
Eyewitness ID	\$150	TBD*	
Jury Consultant	\$65	TBD*	
False Confession Expert	\$150	TBD*	

* TBD – To be determined and on a case-by-case basis

Investigator Initial Approvals

<u>Offense</u>	<u>Initial Limit</u>	<u>Hours</u>	<u>Classification of Offense</u>
1 st – LWOP	\$5000	100	M Felony
1 st Degree	\$5000	100	M Felony
Att. 1 st Degree	\$5000	100	A Felony
2 nd Degree	\$5000	100	A Felony
Sale of Meth in School Zone	\$5000	100	A Felony
Sale/Possession Meth	\$4000	80	B Felony
Agg Vehicular Homicide	\$4000	80	A Felony
Vehicular Homicide	\$4000	80	B/C Felony
Aggravated Rape	\$5000	100	A Felony
Rape	\$5000	100	B Felony
Especially Agg Robb	\$3500	70	A Felony
Aggravated Robbery	\$2000	40	B Felony
Aggravated Assault	\$2000	40	C/D Felony
Class A/B Felony Not Listed	\$3000	60	
Class C/D/E Felony Not Listed	\$2000	40	
Misdemeanor (Circuit/Crim)	\$1000	20	

TO BE FILED UNDER SEAL

IN THE [REDACTED] COURT FOR [REDACTED] COUNTY, TENNESSEE [REDACTED]
STATE OF TENNESSEE

v.

No(s) [REDACTED]
[REDACTED]

ORDER GRANTING DEFENSE MOTION TO APPLY *EX PARTE* FOR APPOINTED
EXPERT ASSISTANCE

THIS CAUSE came to be heard upon the above-captioned Defendant's *Motion to Apply Ex Parte for Appointed Expert Assistance* (the "Motion"). Based upon the testimony and evidence submitted to the Court, the arguments of counsel, and the record as a whole, this Court makes the following findings:

1. The Defendant has been indicted on the charge of [REDACTED] in violation of T.C.A. §§ [REDACTED]. In particular, the State alleges that, on [REDACTED], the Defendant [REDACTED]

2. As this Court has previously determined, the Defendant is indigent within the meaning of Tennessee Supreme Court Rule 13 and Tennessee Code Annotated Sections 40-14-201 et seq.

3. Pursuant to Tennessee Supreme Court Rule 13, Section 5, this Court finds that a particularized need for the appointment of a defense expert consultant in the field of [REDACTED] for the following reasons:

a. One of the central issues in this case will concern [REDACTED]

[REDACTED]

b. The Defendant requires expert assistance to determine what reasonable inferences can be made from [REDACTED]

4. The defense's proposed expert, [REDACTED], possesses the qualifications necessary to assist the defense in this case based upon his/her Curriculum Vitae attached to the Motion, which is incorporated by express reference herein. While defense counsel has made reasonable efforts to locate a suitable expert consultant within 150 miles, he has been unable to do so. Under the circumstances, [REDACTED] is therefore reasonable.

5. Dr. [REDACTED] will assist the defense in reviewing the relevant records and evidence, as well as any relevant scientific literature, and assist the defense in understanding and contextualizing the relevant scientific evidence, as well as in preparing for trial. Dr. [REDACTED] may also participate at trial, including giving testimony. Altogether, it is anticipated that he will spend approximately forty-two (42) hours working in this matter.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion is GRANTED and that Dr. [REDACTED] is hereby appointed as the defense's expert in the area of [REDACTED] pursuant to Tennessee Supreme Court Rule 13, Section 5.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, subject to AOC approval, Dr. [REDACTED] is permitted to bill at a rate of \$150.00 per hour (\$75.00 per hour for travel) for his work in this matter, as well as his reasonable expenses, for a combined amount of up to \$5,250.00.

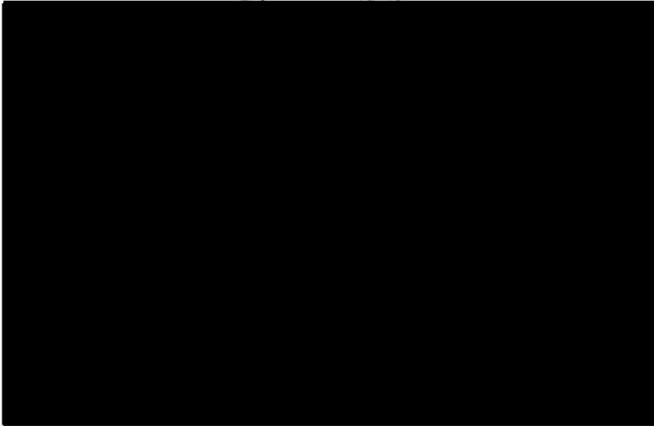
IT IS SO ORDERED on this the [REDACTED] day of [REDACTED].

****Approved****
Initial Incremental Approval
\$150/hr, \$75/hr for travel, up to \$3750.

Laura A. Blount

Laura A. Blount
3/13/24

Approved for Entry:



TO BE FILED UNDER SEAL

IN THE [REDACTED] COURT FOR [REDACTED] COUNTY, TENNESSEE [REDACTED]

STATE OF TENNESSEE

v.

) No(s). [REDACTED]

)

)

)

DEFENSE MOTION TO APPLY *EX PARTE* FOR APPOINTED EXPERT ASSISTANCE

COMES NOW, the above-captioned Defendant, [REDACTED], by and through undersigned counsel, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, § 8 of the Tennessee Constitution; and Tennessee Supreme Court Rule 13, § 5, respectfully moves this Honorable Court to conduct an *ex parte* hearing to determine his or her right to and need for the appointment of an expert consultant in the field of [REDACTED] in light of his indigency in this matter.

In support, the Defendant will show:

1. The Defendant incorporates the following Exhibits into this Motion, which are attached hereto and which shall be designated as "Exh. [exhibit letter], [page number]:"

a. Curriculum Vitae of Dr. [REDACTED]

b. [REDACTED]

c. [REDACTED]

2. The Defendant has been indicted on the charge of [REDACTED] in violation of T.C.A. §§ [REDACTED]. In particular, the State alleges that, on [REDACTED], the Defendant was [REDACTED]

[REDACTED]

[REDACTED]

3. To convict the Defendant of [REDACTED], the State must prove beyond a reasonable doubt that: [REDACTED]

[REDACTED]

As is

relevant to this Motion, the State must [REDACTED]

[REDACTED]

4. The Defendant requires an expert in the field of [REDACTED] to assist in understanding the medical records at issue, particularly the reasonable inferences that might be made from [REDACTED]

[REDACTED]

[REDACTED] Depending upon the expert's findings, the Defendant would further require expert testimony at the trial of this matter.

5. Due process requires that an indigent criminal defendant be afforded the services of appointed expert assistance where a particularized need exists demonstrating that (i) such assistance is necessary to provide the defendant with a fair trial; and (ii) a reasonable likelihood exists that such assistance will materially assist the defendant in preparing for trial. See State v. Barnett, 909 S.W.2d 423, 430 (Tenn. 1995); State v. Scott, 33 S.W.3d 746, 753 (Tenn. 2000); see also Tenn. Sup. Ct. R. 13 § 15(c)(2). A particularized need

exists where the "defendant shows by reference to the particular facts and circumstances that the requested services related 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 defendant's right to a fair trial." Tenn. Sup. Ct. R. 13 § [REDACTED]

6. The defense proposes that this Honorable Court appoint Dr. [REDACTED] as the defense's expert in [REDACTED]. Pursuant to Tennessee Supreme Court Rule 13 § [REDACTED], the defense provides the following information:

a. *Nature of Services.* Dr. [REDACTED] would perform the following services to the defense in this matter:

1. Reviewing the relevant evidence and discovery materials and consulting with the defense regarding the same.

11. Educating the defense on the relevant scientific principles, techniques, and limitations of the testing conducted in this matter to assist in preparing for trial.

m. If necessary, give trial testimony regarding his or her expert opinions and conclusions in this case, including observing the testimony of the State's witnesses and offering rebuttal testimony.

b. *Name, Address, Qualifications, and Licensure Status.* Dr. [REDACTED]'s name, address, qualifications, and licensure status are set forth in the Curriculum Vitae incorporated into this Motion as Exhibit A.

c. *Means, Date, Time, and Location.* While it is impossible to predict at this stage the precise extent of his or her involvement in this matter, Dr. [REDACTED]'s services would likely extend from the date he is approved through the trial of this matter.

He would primarily provide these services from his office in [REDACTED], but he may need to occasionally travel to [REDACTED] County, Tennessee.

While the defense has made efforts to locate an available expert within one-hundred-fifty miles, including online searches, inquiring with other assistant public defenders and posting to the TACDL community message board, this search has been unsuccessful.

d. *Statement of Itemized Costs.* Dr. [REDACTED] will bill at a rate of \$250.00 per hour. It is expected that the following costs will accrue incident to this matter:

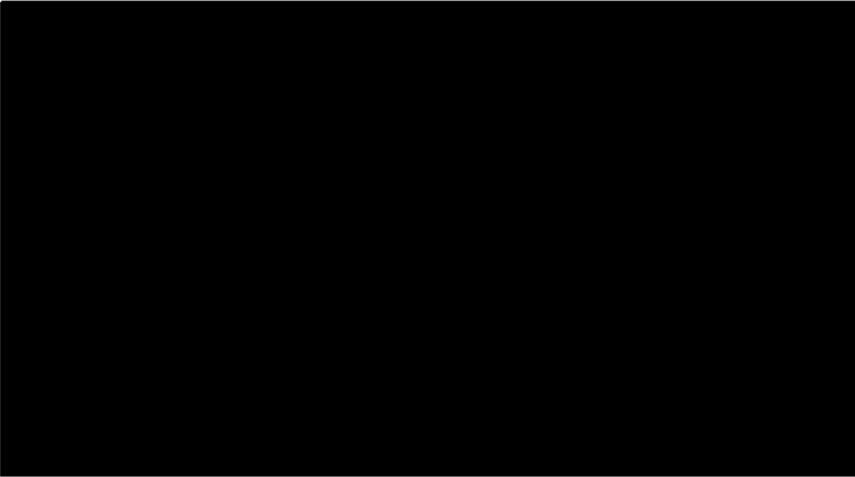
Records Review	Four (4) hours (\$1,000)
Consultation with Counsel	Two (2) hours (\$500)
Trial Preparation and Testimony	Twenty-Four (24) hours ¹ (\$6,000)
Travel (\$75.00 per hour)	Ten (10) hours (\$750)
TOTAL FEES	\$5,250.00

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests this Honorable Court to do as follows:

1. Conduct an *ex parte* hearing to determine whether a particularized need exists in this case for the Defendant's access to an appointed expert in the areas of [REDACTED].
2. Following such hearing, find that such a particularized need exists in this matter and that the Defendant qualifies for appointed expert assistance, and issue an Order appointing Dr. [REDACTED] as the defense expert in Pharmacology/Toxicology and providing for his or her compensation as provided in Tennessee Supreme Court Rule 13 § [REDACTED].

¹ This figure presumes a two-day trial during which Dr. [REDACTED] would be present to observe the Government's case-in-chief.

RESPECTFULLY SUBMITTED,



EXPERT FEES & EXPENSES APPROVAL FORM

(This form is for attorneys to approve the fees of experts in lieu of notating approval on the submitted invoice)

Attorney Name: _____

Expert: _____

Case: _____

County/Court: _____

Case No. _____

Date of Invoice: _____

Total Hours approved: _____

Total Expenses approved: _____

- I have reviewed the invoice for the above referenced claim and I will maintain a copy in my client files.
- I approved the total hours and expenses entered above.

Date

Attorney Signature