Knoxville Bar Association

May 6, 2024

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By Email: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: No. ADM2024-00227

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") carefully considered the proposed amendments to Tennessee Supreme Court Rule 13 at its April 9, 2024 meeting. The Committee presented a report of its review of the Order and the proposed amendments at the April 24, 2024 meeting of the KBA Board of Governors (the "KBA Board").

After consideration, the KBA Board submits the following comments from the Committee:

First, the Committee has a comment on the proposed amendments to Rule 13, Section 1 (d)(2)(C)(iv) and (d)(2)(D)(v), which, in certain juvenile and parental proceedings, require courts to direct the child's parents or custodians to pay into the registry of the clerk of the court any sum that the court determines they are able to pay. The amendments also provide that when funds received by the AOC are greater than the amount claimed by and paid to the appointed GAL, those "excess" funds are to be paid to the GAL. In the Committee's view, it may not be appropriate in every case to pay such "excess" funds to the GAL instead of refunding them to the parent or custodian. It is also not clear how funds deposited with the clerk would get to the AOC. Accordingly, the Committee respectfully suggests

(1) that the language be amended to place within the discretion of the trial court the disposition of any "excess" funds in the possession of the clerk of the court or the Administrative Office of the Courts; and

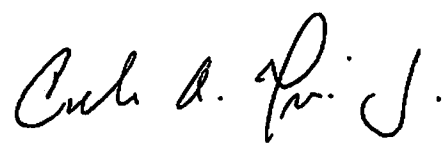
(2) that the language be amended to provide clarity to clerks of the court in how funds paid into the registry of the clerk of court under Section 1 (d)(2)(C)(iii) and (d)(2)(D)(ii) are handled and disbursed.

Second, the Committee discussed the proposed amendments to Section 1 (d)(2)(B), which has to do with appointment of counsel for parents in dependency and neglect and termination proceedings. The existing rule requires appointment of counsel for indigent parties in those proceedings. The proposed amendment, however, appears to limit appointment to indigent parents "who have a constitutional right to counsel and whose parental rights could be in jeopardy." It appears that circumstances could occur under the new rule where an individual in a dependency and neglect proceeding may not be entitled to appointment of counsel unless there is a finding by the trial court that the parent(s) involved have a constitutional right to counsel and that their parental rights could be in jeopardy. This could pose a particular challenge where an individual is not appointed counsel at the outset, but circumstances later change, requiring appointment of counsel in the middle of the proceedings. Because the existing rule seemed adequate to the Committee, the Committee recommends against the proposed change to Rule 13, Section 1 (d)(2)(B).

Third, the Committee discussed proposed Section 5(a)(3), which is an amended version of existing 5(a)(2). The existing rule prohibits authorizing funding for investigative or expert services in non-capital post-conviction proceedings. The amendment authorizes exceptions to that prohibition. The explanatory comment for Section 5, however, still states that "Section 5(a)(2)" (which would now be 5(a)(3)) "unequivocally" provides that funding for investigative or expert services in non-capital cases is "not available." There is a conflict between the comment and the proposed amendment. The Committee respectfully suggests that the comment be amended. Also, for clarity, the Committee suggests that the language of the rule itself be revised along the following lines: "In non-capital post-conviction proceedings, funding for investigative, expert, or other similar services generally shall not be authorized or approved. The exceptions to this provision include the following," etc.

As always, the KBA appreciates the invitation to consider and comment on proposed rule changes.

Sincerely,



Carlos A. Yunsan, President
Knoxville Bar Association

cc: Tasha C. Blakney, KBA Executive Director (via email)
Executive Committee of the Knoxville Bar Association (via email)

Kim Meador - Public Comment No. ADM2024-00227

ADM2024-00227
RECEIVED
MAY - 5 2024
Clerk of the Courts
Rec'd By KM

From: Sean Smith <thelastquery@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/5/2024 1:41 PM
Subject: Public Comment No. ADM2024-00227
Attachments: Reply Respon Opp Motion Access Just 5.4.2024.pdf; Motion-Affidavit For Accessible Justice v.F April 2024.pdf; Exhibits A4 C4 D4_Mot Acc Just.pdf; 2024.05.02_Response to Motion for Accessible Justice_Final.pdf

Hello Administrative Office of the Courts and the Supreme Court of Tennessee,

I am writing to submit public comments on No. ADM2024-00227 "IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13". Comments deadline May 6, 2024.

I'm a disabled pro se litigant with an active case against TennCare (Sean Smith v. Tennessee Department of Finance & Administration, Div. TennCare. Case No. 24-0074-I). I believe the rules for appointment of counsel need to address the right to counsel of disabled adults who sue the state of Tennessee in civil cases, especially when the case involves civil and/or constitutional rights violations by the State.

I believe the current burdens of litigation in TN courts for disabled adults with mental and cognitive disabilities are discriminatory and can violate our 1st, 5th, 14th U.S Const. Rights in some circumstances as well as other statutory rights such as those granted by the Amercians with Disabilities Act and ADA-related CFR and the Social Security Act and SSA related CFR. There seems to be a presumption in the legal community that because no "absolute" right to counsel in civil cases exists there is no conditional right either.

I have submitted a Motion for Accessible Justice in my case. And have mailed on 5.3.2024 for filing a Reply to Respondents' Response in Opposition to Motion for Accessible Justice. I have attached copies of these documents to this email for you to review as part of my public comment.

It is my hope that the Administrative Office of the Courts and Supreme Court of Tennessee will revise Tennessee Supreme Court Rule 13 to make it clearer there is a conditional right to counsel in civil cases for indigent litigants, especially disabled adults who file suit against the state, and similarly review their current ADA Policy.

Sincerely,
Sean Smith

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Sean P. Smith,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	**Case No. 24-0074-I**
	)	
	)	**Chancellor Patricia Moskal**
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

Petitioners' Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?

THE MOTION FOR ACCOMODATIONS IS TO BE HEARD ON FRIDAY, May 10TH, 2024, at 11:00 a.m OR AS SOON THEREAFTER AS THE MOTION MAY BE HEARD via *ZoomGoV* Video Conference. FAILURE TO TIMELY FILE AND PERSONALLY SERVE A RESPONSE TO THE MOTION, IN ACCORDANCE WITH RULE 26 OF THE DAVIDSON COUNTY LOCAL RULES OF PRACTICE, WILL RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.

ARGUMENT AND ANALYSIS

1 - Justice Has Been Disabled for the Disabled by the Able

The Court stated in its March 7th 2024 Order that as a pro se litigant I am "entitled to fair and equal treatment by the Court, and the Court will grant him [Mr. Smith] some leeway in reading his pleading and other papers. See Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) (citations omitted). At the same time, Mr. Smith must follow the same rules that attorneys and other self-represented parties are required [sic] follow, and he may not "shift the burden of the litigation" to Respondents or the Court. Id. at 903-04." The Court reiterated this point in its March 19th 2024 Order, stating "the Court must "be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary." Hessmer v. Hessmer, 138 S>W.3d 901, 903."

Unexamined in Hessmer v. Hessmer and not directly addressed in the Court's March 7th and 19th Orders, is a question of great relevance to my case:

> For disabled adults who must engage in pro se litigation as a last desperate means by which to plead for assistance in order to protect their health, well-being, and fundamental human rights, at what point are the burdens of litigation to be considered discriminatory against their disabilities or in violation of their constitutional rights?

This is a question that seems worthy of careful examination by the Courts. One that I believe I need to extend to the Court at this time. I need the Chancellor and the Attorney General and any parties that might in the future read through this case to be cognizant of this concern. Perhaps not even just for my sake, but for all the disabled adults throughout Tennessee who the legal community currently refuses or neglects to provide adequate legal assistance to.

Disabled adults who in order to attempt to access justice are limited to attempting the seemingly impossible task of performing successful pro se litigation against the Attorney General of Tennessee and TennCare, State agencies that respectively receive $70 million and $15.4 billion dollars in annual funding[1], have an army of lawyers, no shortage of political capital, a long list of corporate allies, receive limited public scrutiny or regulatory oversight, and retain many other resources and forms of support. Tenncare and the Attorney General fight from a position so advantaged, so biased towards their success, that full fledged medical doctors and

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[1]State of Tennessee. The Budget Fiscal Year 2024-2025. Retrieved: https://www.tn.gov/content/dam/tn/finance/budget/documents/2025BudgetDocumentVol1.pdf

attorneys, large medical practices and law firms, nonprofits that title themselves "Disability Rights TN" and "Tennessee Justice Center" deem it too difficult to fight against them for these issues that I have placed before the Court with my case, and here is the Court insisting that I, a disabled adult pro se plaintiff whose request for relief is essentially asking the Court to make my health plans stop abusing me so that I don't suffer further physical, mental, financial, and social injuries, or get killed, and can have the opportunity to be 'able' to fully participate in society, I Must Shoulder More Burdens, because it would be considered an unfair imposition for TennCare, the Attorney General, or the Court to shoulder some of these burdens on my behalf.

I asked the Tennessee Administrative Office of the Courts ADA Coordinator via Email to explain the "Basis for not providing attorneys to disabled adults?" and the explanation provided to me was that, "generally there is no constitutional right to counsel unless fundamental constitutional rights are involved" and that "although a litigant may qualify for an accommodation under the ADA, the ADA itself does not provide an inherent or absolute right to counsel.". [Exhibit A4].

As a disabled adult I am dependent upon State and Federal programs for my income, my healthcare, and many other basic necessities. What I can afford and access is largely and at times entirely dictated by the resources I am granted, be it through direct aid such as SSI and Medicaid, or indirect aid through nonprofit organizations provided grants and state agencies funded to provide services. It has been dictated to disabled adults that we shall not be allowed to obtain the financial resources required to hire attorneys or be able to afford to pay for the specialized healthcare services required to rehabilitate us.[2] If we accrue more than $2000 we incur penalties to our income. If we get a job the income from that job reduces our SSI income $1 for every 2$ we earn over $65. The money earned at a $10 hr job then 'pays' at $5 hr, making one work more than twice as hard for half the pay[3].

More than twice as hard because not only is our income reduced, but our disabilities generally make tasks at jobs more challenging to complete. This type of income adjustment for disabled adults is a way to discriminate against people with disabilities while trying to make it seem nondiscriminatory. Were a place of business, like a grocery store, to pay disabled adults seeking part time positions 50% below the minimum wage while those without disabilities got full

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[2] While SSI is a federal program, States can supplement the SSI payment, and thus a disabled adults net SSI related income is ultimately determined by the State. Tennessee is one of 7 states that do not supplement the SSI payment. https://www.ssa.gov/ssi/text-benefits-ussi.htm

[3] https://www.ssa.gov/ssi/text-work-ussi.htm "EARNED INCOME EXCLUSION We do not count the first $65 of earned income plus one–half of the amount over $65. Therefore, we reduce your SSI benefit only $1 for every $2 you earn over $65."

pay, that would be viewed as outright discriminatory. The net result is that quite often the resources gained are not sufficient to warrant spending that time engaging in gainful employment rather than investing it in *working* on self-care of one's disabilities or seeking rehabilitative care or attending to the many other seemingly insurmountable problems that disabled adults face due to a lack of resources or assistance.

Sometimes the benefit of avoiding the risk of injury that is present from attempting to work outweighs any potential benefits from the slight increase in total income one could obtain from working. Especially when one's health plan is engaged in misconduct which limits or prevents needed care, as after sustaining further injury the health plan can be expected to continue to limit or prevent needed care. As a direct example, my attempts to attend college and work in 2011-2013 resulted in repeated orthopedic injuries and complications [Exhibit B4, 14 Tabor Ortho, Results PT, Oral Surg CT&MRI TMJ.pdf] and then compounding those injuries was a 2014 head injury [Exhibit B4, 5 St. Franicis ER 5.30.2014.pdf] and in 2016 I learned these injuries were directly related, even caused, by my jaw-airway issues [Exhibit B4, 8 Dr. Melody Barron DDS TMD & SRDB evaul.pdf]. Each of those records just referenced were submitted to my health plans with my 2019 Medical Appeal. The impairments from those and many subsequent injuries were additive to the impairments I already had from my existing disabilities. One should keep in mind that the severity of my disability has qualified me to receive SSI since ~2005.

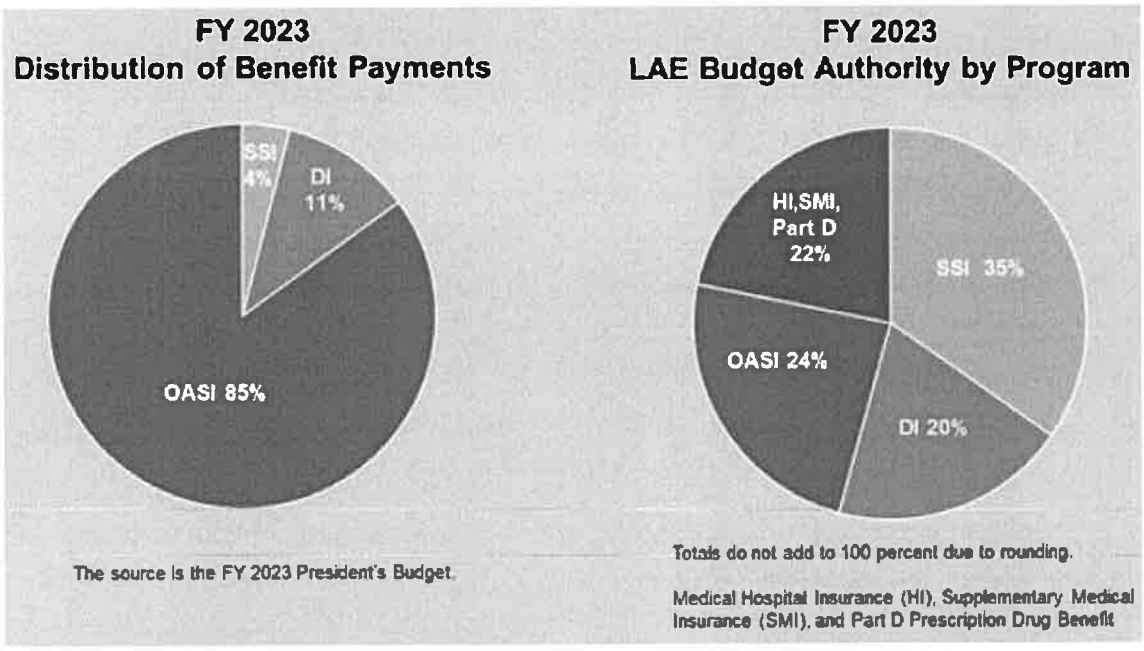
To date the misconduct of private and state operated health plans limits or prevents me from receiving appropriate care for those jaw-airway issues and the lingering effects of those and other injuries. Instead of the risks that some disabled adults incur from attempting to work being recognized and accommodated with something akin to Hazard Pay, our pay is reduced by 50%.

> "SSI benefits are reduced by 50 cents for every $1 of wages in excess of $65 each month and by a full $1 for every $1 of "unearned income" after the first $20 each month".
> "The $20 unearned and $65 earned income disregards have remained fixed since SSI was first created in 1974.199 Had these thresholds risen in line with inflation, they would be $127 and $414, respectively, today.200 And had the income disregards risen in line with average wage growth, as measured by the SSA, they would have been $151 and $490, respectively, as of 2021.201"
> "SSI asset limits have only been raised once since the program's creation in 1972—in 1989—and that did not even make up for inflation at the time. To keep up with inflation today, limits would need to be more than four times as high as they were in 1972."

One of the primary goals of the Americans with Disabilities Act was to better include people with disabilities in the workforce by preventing disability discrimination and requiring reasonable accommodations [42 U.S. Code § 12101]. In contrast are these rules for the SSI program which discourage disabled adults from fully participating in the workforce. Even more curious is that were an employer to implement rules like this in adjusting the pay of people with disabilities it would be regarded as an intolerable instance of disability discrimination. These SSI rules not only compromise the pursuit of The Nations Proper Goals for people with disabilities, but also create costly inefficiencies in the SSA's administration of SSI:

> "SSI is expensive to administer because its complex rules require SSA staff to continually monitor recipients' living arrangements, incomes, savings, support from family and friends, marital status, and more. SSI benefits make up only 5 percent of the payments that SSA makes, but the program requires 35 percent of the agency's budget to administer.[12] In contrast, SSA spends 20 percent of its budget to administer SSDI, even though it has 1.5 million more beneficiaries than SSI."

Benefits And Administrative Budget By Program[4]:



And if those problems weren't bad enough:

[4] Social Security Administration. (March 2022). FY 2023 Congressional Justification. Pg. 7

".. it is expensive to be disabled.19[5] Households with disabled adults need 28 percent more income, on average, to achieve the same standard of living as adults without a disability.20[6] Moreover, the added costs of medicines and medical procedures, accessibility accommodations in homes and transportation, and many other regular expenses are exacerbated by the fact that disabled workers—if they are able to work and are employed—earn just 74 cents for every dollar earned by their nondisabled counterparts;" "The extra cost of living for disabled people is often referred to as the "disability tax.22[7]"[8]

The State of Tennessee could acknowledge that the cost of living for disabled adults is greater than it is for able bodied persons by supplementing SSI payments to adjust for cost of living, but chooses not to.

"In recognizing that there were variations in living costs across the Nation, Congress added section 1618 to the Social Security Act to encourage States to supplement the Federal payment. This ensured that SSI recipients received the full benefit of each cost-of-living adjustment. States may administer their own State supplement programs or have us administer the programs on their behalf." .[9]

The assistance granted to disabled adults by the State of Tennessee and U.S. Government is structured to make it impossible for us to afford attorneys and makes it exceedingly difficult or impossible to perform the tasks that are part of the "burdens of litigation". That the hardships and needs of disabled adults are generally neglected by the State of Tennessee is compounded by its agencies whose conduct creates additive undue hardships, such as physical or psychological injuries, that can further increase the cost of living for a disabled adult. The State

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[5] Sarah Hawthorne, "7 Hidden Costs of Disability," Medium, August 22, 2021, available at https://medium.com/@sarahhawthorne/7-hidden-costs-of-disability-f2756645723f; Zachary Morris, Nanette Goodman, and Stephen McGarity, "Living with a disability is very expensive – even with government assistance," The Conversation, March 23, 2021, available at https://theconversation.com/living-with-a-disability-is-very-expensive-even-with-government-assistance-157283; Sophie Mitra and others, "The hidden extra costs of living with a disability," The Conversation, July 25, 2017, available at https://theconversation.com/the-hidden-extra-costs-of-living-with-a-disability-78001.

[6] Nanette Goodman and others, "The Extra Costs of Living with a Disability in the U.S. — Resetting the Policy Table" (Washington: National Disability Institute, 2020), available at https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf.

[7] Jasmine E. Harris, "Taking Disability Public," *University of Pennsylvania Law Review* 169 (9) (2021): 1681–1749, available at https://scholarship.law.upenn.edu/faculty_scholarship/2743.

[8] Justin Schweitzer, Emily DiMatteo, Nice Buffie, Mia Ives-Rublee. (Dec, 5, 2022). How Dehumanizing Administrative Burdens Harm Disabled People. Retrieved: https://www.americanprogress.org/article/how-dehumanizing-administrative-burdens-harm-disabled-people/

[9] Social Security Administration. (March 2022). FY 2023 Congressional Justification. Pg. 127.

of Tennessee stacks the deck against us, gaining an advantage so unfair and unjust it is comical to think that there might be any way to level the playing field let alone disadvantage the State and its agencies against a disabled adult pro se litigant. It's like trying to referee a fair fight between a professional boxer and a two year old child, and if the child manages to get a hit in award penalties because their strikes land below the belt, and that is against the rules.

The burdens of litigation are more challenging than the employment that a great many 'able' Amercians engage in, as the existence of the profession of the Lawyer and their $350-$750 an hour fees necessitates this to be. Disabled adults can't function well enough to work, but are being required to do tasks that are the purview of lawyers and doctors to try to receive the rehabilitative care they need in order to be able to work. The demands of these legal-medical tasks exceed my ability, exceed the ability of most disabled adults, and in my attempt to perform those tasks I have suffered injuries and as I continue to try to perform them can be expected to continue to suffer such injuries.

This creates a paradox. In order for some Disabled Adults in Tennessee to try to access rehabilitative care they have to engage in a pro se litigation process which discriminates against their disabilities and creates burdens that are injurious because of those disabilities. A disabled adult's ability to have the autonomy to exercise liberty and be independent becomes further compromised by sustaining injuries that cause one's disabilities to become more severe. The State of Tennessee's discriminatory procedures of due process causes the State of Tennessee to deprive disabled adults of their health, wellbeing, and limited resources[10] by the State without due process.

The reason there are Fair Hearings and Petitions for Judicial Review about Fair Hearings related to TennCare's administrative decisions is that the State is not permitted to deprive its citizens of their property without due process [5th & 14th Amend. U.S. Const., Goldberg v. Kelly, 397 U.S. 254 (1970)]. By making it impossible for disabled adults to afford attorneys, and making the burdens of litigation so demanding that they exceed the ability of most disabled adults to safely meet them as pro se litigants, the State of Tennessee defeats the intended protective purpose of Fair Hearings and Petitions for Judicial Review. One of the

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[10] A Disabled adults capacity to work is already compromised, so it seems safe to assert that there is *definitely* no chance of trying to engage in gainful employment while trying to pro se litigate while disabled. Further, the costs of litigation hurt the meager resources disabled adults have, which are already inadequate to allow disabled adults to meet their existing disability needs, and therefore, by further depriving a disabled adult of their existing resources they further deprive them of being able to accommodate their disabilities, which then leads to further inability to conduct themselves in society (which is the exercise of liberty) and meet the burdens of litigation; the burdens of litigation can become a discriminatory deprivation that compounds itself.

primary Causes of Action in my case involves the State of Tennessee Department of Finance and Administration through its division TennCare depriving me of the due process of a fair hearing [Am. Pet. Rev. pg. 12 ¶ 5]. Tenncare, the State of Tennessee, has already acted to circumvent the process of due process. That in Tennessee the burdens of litigation created by the procedures of due process could itself further circumvent the process of due process is, well, it is quite remarkable.

States are specifically prohibited from depriving its citizens of life, liberty, or property without due process [14th Amend U.S. Const.].

My being a Disabled Adult on SSI, having TennCare, means it has been established that I am already burdened beyond my capacity to bear and require assistance from the State in order to meet my most basic needs. Under such circumstances, imposing additional burdens is adding salt to an open wound. There is nothing reasonable or fair about being disabled and suffering repeated injuries from treatable, even curable, health conditions simply because health insurance plans skirt the law because the legal community and the justice system conduct themselves in a manner that makes justice inaccessible to disabled adults with certain disabilities and legal complaints.

As I have struggled to meet the burdens of litigation I have pondered the question of what is an appropriate burden and what is a discriminatory burden; what is justice for disabled adults in Tennessee. On March 15th 2024 I wrote:

> "The Law should protect me and other disabled adults from being physically and psychologically tortured by the abuse and exploitation of health insurance plans, but the people of Tennessee refuse to take the actions required for those laws to be enforced.
>
> I've come to a conclusion that:
>
> Requiring indigent disabled adults to hire a lawyer or find pro bono representation to be able to access justice is like requiring a person in a wheelchair to hire or find a person to carry them in order to access a court house. And if by some miracle they manage to crawl up the stairs on their own, penalize them for showing up late.
>
> The impairments I have due to the health conditions causing my disabilities makes it an impossible task to do the job of a lawyer. My job isn't really to win this lawsuit against TennCare. It's to communicate that I'm a disabled adult, I'm being abused and exploited, I need assistance, I need someone to protect me, and if the Attorney General and TennCare and Deputy Director Stephen Smith decide to use legal process like a

baseball bat to beat me 6ft under the ground, I just need to make sure all of them knew what it is that they were doing, so that when it's done, any sane, moral, prudent person will understand how wrong it was, and law or not, find cause that they should be held accountable."

I read and reread the rules, the orders, the laws, the case law I can find, my notes, my filings, over and over. I keep forgetting things, having to reread things. My physical and mental disabilities, my health conditions unmet due to health plan misconduct, they are known to cause brain injury; dysautonomia; psychiatric conditions; cognitive and emotional disabilities; musculoskeletal related neurological impairments to cognition, mood, digestion, and motor control of my hands and legs; they cause further impairment the more I sit at a computer trying to work towards getting care and justice. I read and I work until I can't function well enough to even understand what I'm reading, then I keep reading and rereading the same paragraph, or the same sentence, and write and rewrite and then read and reread what I wrote, and keep at it until my efforts become so unproductive or harmful that I have to stop. And then when I stop to lick my wounds and try to recover, my mind then no longer occupied with the demands of those tasks, it is in that pause that my mind finds its way to wondering:

What is the point of all of this?

Why do I keep trying to get care?

Why haven't I killed myself?

These questions have been in my mind for over a decade. I used to have answers to these questions. As a child and adolescent I told myself I just needed to hold on while medicine advanced and my doctors figured out how to fix me. In my late twenties when it became clear that my doctors weren't going to figure things out on their own, I answered that I owed it to myself to do everything I could on my own to try to understand what was causing my disability. And when I figured out the causes of my disabilities, then the answer was that I owed it to myself to try to get care for those causes of disability. And then the answer became that I owed it to myself to understand why I was not being allowed to get the care that I needed. And upon figuring out that the reason I could not get needed care was due to health plan misconduct and that people refuse to take the necessary actions to curtail that misconduct, I stopped having an answer.

It is with that process and with those questions that I researched my health conditions, figured out the causes of my disabilities, the treatments required, the doctors who provide such care, and why those doctors were not and would not be expected to become in-network, all while my health plans prevented or limited me and others like me from being able to see the

doctors who possess the specialization required to diagnose and treat the health conditions causing our disabilities. That's how I wrote my medical appeals. That's how I studied the law. That's how things are for me in a society that shifts the burden of holding accountable private and state operated health plans to the disabled adults that they are abusing and exploiting.

My process for working on my 88 page complaint-appeal sent to my health plans in November of 2023, which is central to this case, was to read the entire main body of the text on those 88 pages and additional sections and resources contained in the drafting document. The drafting document at its largest was 196 pages long [Exhibit C4]. The original drafting document dates back to 2020, as evidenced by the Google Documents version history [Exhibit C4]. It took 50.6 hours for me to transcribe the Cigna-Fedex Conference Call referenced in the complaint-appeal according to the work time record at the start of the document [Pet. Jud. Rev. Ex. B Digital References, Cigna-Fedex Conf. Call Transcript]. Corroborating my record of work time is the file properties of the transcripts .odt file show the editing time to have been 45:24:57. Listening to the conference call to create the transcription continually provoked my PTSD, and the time I spent managing my PTSD flares and related suicidal ideation is not included in that work time tally. The excerpted quotations of the scientific publications referenced throughout my 2023 complaint-appeal, particularly pages 51-63, were obtained by reading through each of the 50 referenced articles, which in total have over 580 pages and include references of their own many of which I read through and decided not to include in my complaint-appeal.

I would read my complaint-appeal draft and make changes as I read it, then read it again, and make more changes, do research and rewrite things, include more references and supplementary documentation, reread articles I'd read and referenced to double check information, and do that over and over, month after month. And after having spent an extensive number of hours reading and rereading it, I can't remember a lot of what I wrote, but retain now mostly a generalized remembrance of what things it contains. That's what I have to do to work on things. I try until I become too dysfunctional to try any more, and then try hard to manage my disabilities, and then try again to work on things, and repeat that process over and over. And in so doing I suffer injuries, I get more impaired, I get more disabled, and I try harder, because you all require that of disabled adults in Tennessee; you burden us with that. And for my efforts I am denied with no more justification than a single sentence claiming, "It's too late to appeal your request for OUTPATIENT PHYSICAL THERAPY". You all place my obtaining of my health and my rights at the top of a staircase I can't climb, and from that superior position, then lob rocks at me, and call it fair and equal treatment.

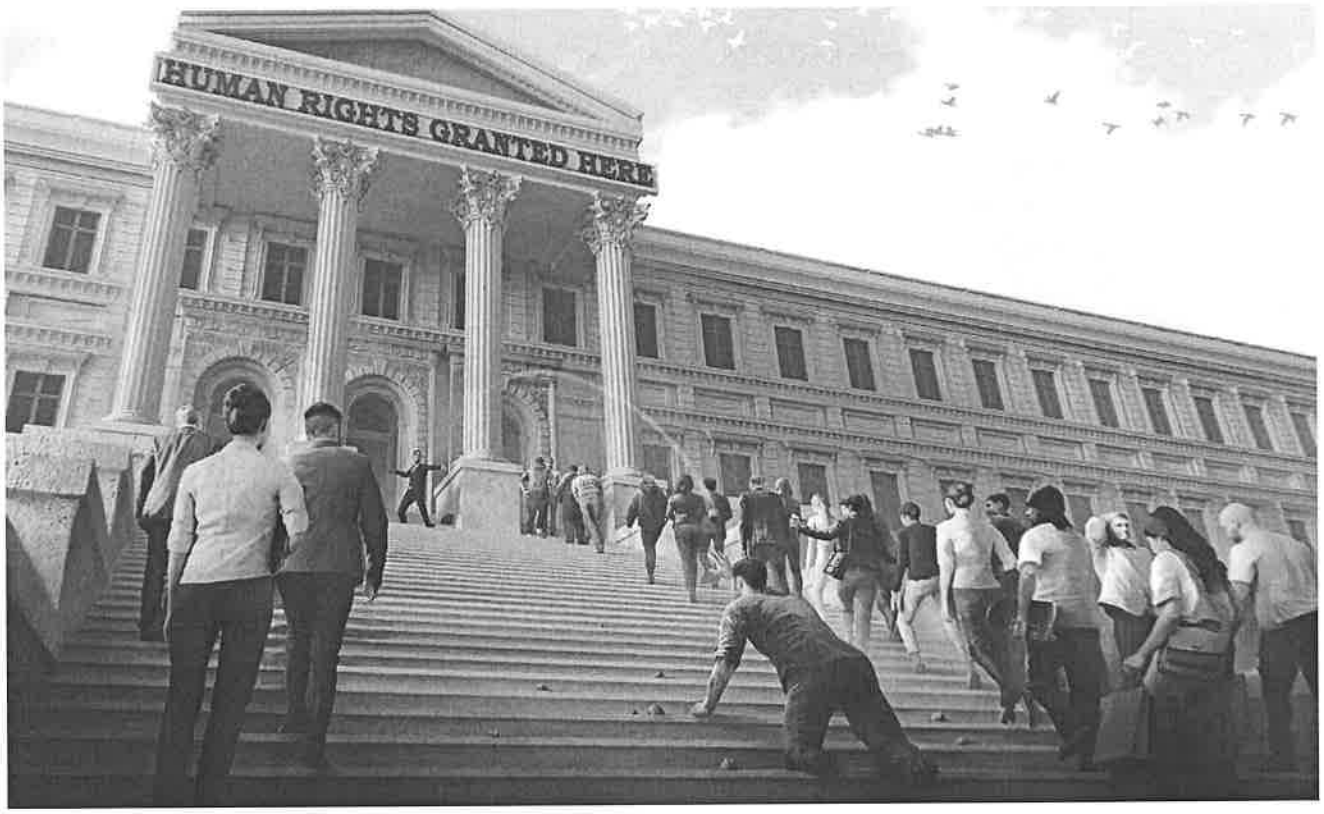

Image Title: Crawling to Justice.

The court easily understands that it would be discriminatory to hold a hearing in which a deaf pro se plaintiff was without a real-time video transcription or sign language interpreter. Or to require a person in a wheelchair to attend a hearing in a building without wheelchair access. I concede that it is not a simple or easy thing to understand how my health conditions impair me and cause my disabilities and therefore it is even more difficult to understand what must be done to avoid discriminating against my disabilities. Compounding that is the fact I have been prevented or limited from working with the healthcare specialists and/or an attorney which could help explain matters on my behalf. Complicating matters further is that as a disabled adult pro se litigant I don't have the education or experience necessary to fully understand what the burdens of litigation are or how to meet them. That my disabilities impair me so much that they compromise my ability to discern and communicate my claims, the abuse I've suffered, and what disability related accommodations I might need in order to be able to meet the burdens of pro se litigation further exacerbates these compounded and complicated matters.

It is difficult to find a justification for it to be the burden of disabled adults to educate a health insurance plans administrators and its doctors or the Court and its staff so that they can comprehend our disabilities well enough to avoid discriminating against us and depriving us of

our fundamental rights. Yet, that burden is imposed upon me by health plan misconduct, by the Respondents, the Courts requirements, and societies inattention and inaction to the plight of disabled adults in their community. This is a full-time job that I don't receive compensation for doing. A job that when I do it I am often subjected to more abuse, discrimination, and injuries that I receive no workers comp for. It is a burden in addition to already overwhelming burdens. I've had to try harder in the last decade than most people have to during their entire lifetime, and despite trying so hard, and gaining the hard-won experience that comes with such persistent diligent effort, I still fail and get injured because I am a disabled adult - Because I Am Not Able.

2 - What Burdens Are Discriminatory Against the Disabled

The question of what burdens are discriminatory against a person with disabilities is a complex one and it warrants consideration at every stage in my case and the cases of any other disabled adult pro se litigants.

I asked myself this question throughout January to March of 2024 as I struggled to learn and meet the demands of the Tennessee Rules for Civil Procedure and Local Rules for service of process, notarizing affidavits, and filing procedures. I ponder this question even more intensely as the Court's April 22nd 2024 Order denied my *Motion for Accommodations* and I find myself unable to understand the Order's reasons to deny. I wrestle with this question as I seek to understand and respond to the *Respondents' Motion to Dismiss* , wondering if my *Motion for Accessible Justice* will even be heard if I managed to get it filed in time, or will I lose my case because my disabilities impaired me so much I couldn't understand how to argue and complete my Motion for Accessible Justice until it was too late?

My Petition for Judicial Review included what I thought to be competent evidence supporting my allegations. My Motions included Exhibits which presented even more documentation that I thought would be competent evidence further supporting the allegations in my Petition and in my 2023 complaint-appeal. The court's ruling seems to suggest to me that it considers what I've presented so far are allegations absent competent evidence.

Am I so cognitively impaired by my disabilities that I can't figure out what is and is not competent evidence? Or did I present competent evidence but my cognitive impairments prevent me from properly communicating that evidence? Is there a Rule about evidence that my mental disabilities are once again preventing me from understanding?

As I write this paragraph on April 22nd I am confused, distraught, and walking around my neighborhood in circles trying unsuccessfully to get my brain to stop thinking about committing suicide. I am reading through the Courts April 22nd Order, reading the case law in it, reading Rules for Evidence, reading through Tenn. R. Civ. P. 65.03 Restraining Order and trying to understand why my Petition, Motion, and Exhibits aren't enough to warrant an injunction against the Respondents ongoing abuse. Why does a disabled adult with severe mental disabilities have to be able enough to understand what is competent evidence and be able enough to competently present that evidence? Why do I have to do that just to stop the abuse that occurs because of the incompetence of the able persons who are failing to prevent the abuse?

I keep wondering how I can stop being abused by my health plans. I don't know. I don't understand. It doesn't make sense. As I try to make sense of it all my suicidal ideation gets stronger because I know if I go kill myself the abuse will definitely stop. My mental disabilities don't stop me from understanding that. In fact my mental disabilities help me understand how helpful suicide really can be to this situation. So much so that it often seems the best solution because it appears to be the only solution the State of Tennessee and the citizens therein will make accessible to me and other disabled adults.

Is my last paragraph competent evidence? Or just allegations of having experienced anguish? Is the potential of self-harm too hypothetical for the court to address? Is my opinion not expert enough? Every other state agency in Tennessee I have complained to about my health plans has said it's not their job to deal with, so why then should it be the courts?[11]

Rules by which an individual's disability can be determined have been set forth within the Americans with Disabilities Act (ADA) [42 U.S.C. 12102] and its related Code of Federal Regulations (CFR) [28 CFR § 35.108]. These define disability as, "A physical or mental impairment that substantially limits one or more of the major life activities of such individual". An impairment is regarded as a disability when it "substantially limits the ability of an individual to perform a major life activity[12] as compared to most people in the general population." and

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[11] Exhibit B from the Petition for Judicial Review and Exhibit A3 from Reply to Respondents Response In Opposition to Plaintiffs Motions for Accommodation has documents which are competent evidence that corroborates the allegation made. I don't understand why disabled adults should be required to be able to do more than I have been able to do to evidence I am being abused and that the people that should take action to stop this abuse are not.

[12] 42 U.S.C. §12102

(2) Major life activities

(A) In general

"whether an impairment substantially limits a major life activity requires an individualized assessment." [28 CFR § 35.108(a), (d)(v)-(vi)]

I have communicated to my health plans and the Court that I have multiple health conditions that cause multiple impairments that substantially limit multiple major life activities in my 2019 Appeal [Am. Pet. Rev. Ex. B. Digital Refs., 2019 Med. App., file: "Sean Smith's 2019 Medical Appeal (redacted for court 2024).pdf", pg. 53-58, see also pg. 12-13, 18-23, 25, 27, 29, 33-36], November 2023 Complaint-Appeal [Am. Pet. Rev. Ex. B pg 2, 8, 12, 15-16, 22-24, 31, 36, 37, 41, 47-49, 50-61, 63, 68-69, 73-75], Email to Deirdra at FedEx HR [Am. Pet. Rev. Ex. B. Digital Refs, file: "Email to Deirdra at Fedex HR Apr-May 2020.pdf" pg. 2-4, 7], Amended Petition for Judicial Review [pg 1-3], Motion for Accommodations [ran out of time], Reply to Respondents Response in Opposition to Petitioners Motion for Accommodation [ran out of time], and in this Motion for Accessible Justice [ran out of time]. Medical records submitted to my health plans alongside my 2019 Appeal provided extensive proof of how long-standing my symptoms of jaw-airway issues were [Exhibit B4]. Three of my declared health conditions (Major Depressive Disorder, Bipolar Disorder, PTSD) are specifically mentioned in the CFR as substantially limiting brain function [28 CFR § 35.108(d)(2)(iii)(K)].

It is worth noting that I developed PTSD because of the abuse perpetrated by my health plans and parties that my health plans and their in-network providers involved in healthcare operations. That same abuse is understood to worsen Bipolar Disorder and Major Depressive Disorder, which further exacerbates the PTSD. I also have my other health conditions, which include but are not limited to, Mast Cell Activation Syndrome, Dysautonomia, Obstructive Sleep Apnea, TMD, MSK Dysfunction, neurological issues, chronic pain, etc, which cause substantially limiting impairments that are additive to those understood to be related to my psychiatric diagnoses, even as many of my psychiatric diagnoses can be understood to be as a result my other health conditions.

My development of PTSD can be understood per the publications I referenced to have occurred not merely because I was abused, but because my existing disabilities disposed me to

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For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
(B) Major bodily functions
For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." (emphasis added to highlight my disabilities) [see also, 28 CFR § 35.108(b)(1)(I)]

developing the PTSD when being abused. Which was communicated in my 2019 medical appeal [Ex. B4 2019 Med. App. pg 17-19, 22, 27-28], and once again communicated in sections of my 2023 complaint-appeal which quoted excerpts from the scientific literature that I referenced in the 2019 appeal [Am. Pet. Rev. Ex. B. pg 54-61, 69] which the Court and Respondents were supplied digital copies of as part of the Petition for Judicial Review's Exhibit B[13].

The work of Dr. Krakow highlights that while sleep breathing disorders can make it more likely one develops PTSD, PTSD can also worsen sleep disordered breathing (SDB). In the references section of both the 2019 and 2023 appeal at "87. Barry J. Krakow, et al. (2015)" is an excerpt from that article by Krakow, which states, "...among more recent reviews, there is a growing indication that individuals with PTSD suffer a disproportionately higher rate of SDB compared to the general population." . The information from articles referenced in the 2019 appeal - these same articles also being extensively quoted with excerpts in the 2023 complaint-appeal - communicate how sleep breathing disorders can cause and worsen mood disorders like Major Depressive Disorder and Bipolar Disorder. On page 50 of the 2023 complaint-appeal is communicated that, "Indeed some authors note, "Once thought to be relatively rare, there is increasing evidence that obstructive sleep apnea (OSA) is both common and associated with significant medical and psychiatric comorbidities." [Christopher A. Baker et al., 2016], with some studies observing rates of OSA prevalence as high as 84% in psychiatric populations [Knechtle et al., 2019]."

The adversary I face in my case isn't limited to the Attorney General acting as the Respondents counsel, or even the process of due process imposed by Tennessee's Judicial Branch which discriminates against disabled adults with mental and cognitive disabilities, but my own mind, my neurological and psychological injuries and impairments, my diseases disordering my mood and deficiting my cognition. My mental disabilities file their own Motions to Dismiss Me from existence. Motions I must argue in a 'Court' in which its rules operate with indifference and absolute tyranny, enacting dictates that are both capricious and arbitrary and seek to serve no party or common good. A place without compromise, accommodation, agendas, reasoned argument, good or bad, just or unjust, only actions and outcomes transpiring in accordance with rules dictated by natural laws. The Cosmos Doesn't Care, It Just Is, And Will Be.

In order to defend one's rights one must be able to perform with minimal impairment multiple major life activities such that one may either acquire the resources to hire legal

[13] A USB with the files was mailed with the Petition for Judicial Review filed on 1.26.2024. An email delivering those same files within a .zip archive was supplied to Respondents counsel on April 6th 2024.

representation or to perform pro se litigation. A process by which one can determine if an individual is substantially limited in performing the major life activities required of pro se litigation against the State is delineated in 28 CFR § 35.108(d)(3)(i)-(ii).

3 - Realizing The Nation's Proper Goals Requires Accessible Justice

My mental and cognitive disabilities impair my ability to do mentally demanding tasks and even some cognitively simple tasks. It takes me longer to perform tasks based upon how severely impairing my disabilities are at a given time. I've been trying to learn to perform pro se litigation. It takes me a long time to try to figure out what to do and longer to try to do it. Sometimes it takes me a long time just to discover I'm not able to do something the court requires me to do and even longer to try to figure out how to correct the mistakes I made while trying to perform those initial tasks. So by the time I learn enough to understand I needed accommodations and what those accommodations needed to be in order for me to be 'able' to do something it's often too late - Is my Motion for Accessible Justice too late? I then have to try to figure out a new set of problems caused by my mistakes and don't know what accommodations I might need to be able to meet the demands of those new problems. While affording me more time to litigate might seem a reasonable accommodation, more time spent litigating increases the time I spend without rehabilitative care and subjected to these abusive and injurious conditions.

The misconduct of TennCare and Unitedhealthcare Community Plan (UHCCP) has played a central role in limiting and preventing me from receiving needed care. One should note that UHCCP and TennCare have been operating as secondary health insurance plans, and one might thereby reason that their role could not have been central. However, were TennCare and it's MCO UHCCP to operate in compliance with the laws, to provide full and fair review of appeals and grievances, upon discovering that my primary private health insurance plan was engaged in misconduct and willful noncompliance, as any prudent person would, I as a disabled adult would designate TennCare and UHCCP as the primary insurance so that I would get full and fair review of my care requests and thereby access the medical assistance necessary to facilitate my rehabilitation. I would be able to use my medicaid health program benefits, my property, to achieve the intended purpose of the medicaid program [42 U.S.C. § 1396–1].

The misconduct of TennCare and UHC:CP has deprived me needed care just-as-much as the misconduct of Cigna and Fedex, and arguably even more so, as designating

Cigna-Fedex as a primary insurance then requires myself and my parents to meet a costly annual deductible which we would not have to pay if UHCCP-TennCare were my primary insurance plan. UHCCP and TennCare limiting and preventing care has caused me to suffer numerous physical, mental, and financial injuries which increased the severity of my already severe disabilities. That causes me greater impairment, and those undue impairments and more severe disability act as an imposed restraint on my ability to function. TennCare imposes this restraint on my function which is limiting or preventing me from being 'able' to meet the burdens of litigation; to act as my own lawyer, to be a witness, to present and communicate evidence. TennCare's imposed restraint is obstructing justice [18 U.S.C. 1503]. "The United States Supreme Court appears to favor a broad reading of the omnibus clause."[14]

The burdens of litigation that the Court demands disabled adult pro se litigants with mental and cognitive disabilities meet becomes even more of a discriminatory requirement given the restraints on function imposed on disabled adult pro se litigants by TennCare's misconduct. The State of Tennessee and the U.S Government limit the resources of disabled adults to prevent us from affording attorneys or needed care. The State of Tennessee creates restraints that further impair disabled adults by engaging in misconduct to prevent us from receiving rehabilitative care. And then the State of Tennessee requires us to meet litigation burdens our disabilities prevent us from meeting.

How the Davidson County Chancery Court handles my case and accommodates my disability needs is a slippery slope to traverse. Especially when allegations and evidence indicate TennCare and other State agencies have acted to defeat or neglected to uphold the administrative processes, rules, and laws intended to protect disabled adults from discrimination, neglect, abuse, and exploitation.

Were the Attorney General to assist Tenncare in a manner which enables them to continue engaging in discriminatory practices which then perpetuate the neglect, abuse, and exploitation of disabled adults, or were the Chancery Court to conduct its operations in a manner which discriminates against my disabilities and further obfuscates my Access To

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14 https://www.justice.gov/archives/jm/criminal-resource-manual-1724-protection-government-processes-omnibus-clause-18-usc-1503
See also:
https://www.justice.gov/archives/jm/criminal-resource-manual-1721-protection-government-processes-obstruction-justice-scope-18-usc

Justice, that would be a problem as such conduct is specifically prohibited by federal laws. It is clearly the intent of Congress that State's not find ways to defeat the protections of the ADA:

28 CFR § 35.130

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing **accomplishment of the objectives of the public entity's program with respect to individuals with disabilities;** or

(iii) **That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.**

(emphasis added)

There is also a disturbing similarity between the burdens of my health plans appeals process and the burdens of litigation being placed upon disabled adults by the Tennessee Courts, as can be observed by my statements at the 2019 TennCare Block Grant hearing:

> "[UHCCP-TennCare] essentially torture people who can barely function by requiring them to navigate one obstacle after another, and when I have asked for assistance with the appeals process I get told that there is no one to assist." [Am. Pet. Rev. Ex. B, pg 33]

Earlier in my case, even though I read through the sections of the Tennessee Rules for Civil Procedure and Local Rules related to initiating a civil suit and service of process multiple times, I failed to understand and completely follow the rules. The arguments set forth by the Respondents in their April 22nd *Motion to Dismiss* reaffirms that my ability to function is too impaired to understand and effectively communicate my situation. That my disabilities are largely why I have had such failures doesn't change that my prior failures cause me to question what other legal matters I'm not understanding. Yet, as I doubt the validity of my perception of what access to justice should be for disabled adults in Tennessee, I remind myself why the Amercians with Disabilities Act was passed in 1990, and that even after passing it the courts failed to interpret it as Congress intended, which is why the 2008 amendments were made, and why ADA related CFR makes repeated mention of "broad" coverage and states "The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA." [28 CFR § 35.101(b)].

The failure of State courts to interpret and apply the ADA as intended are manifested in instances where States, such as Tennessee, resisted compliance, arguing exemption via 11th Amendment immunity, a sovereignty to conduct itself as it pleased, seeking to perpetuate its existing discriminatory practices, reinforcing the fact the State didn't view people with disabilities as being worthy of inclusion in society, worthy of accessing justice, requiring them to argue their

case in federal court all the way to the U.S. Supreme Court, just so that they didn't have to literally crawl on their bellies to get to a court hearing in Tennessee Courts. The 2004 Supreme Court case Tennessee v. Lane and the cases cited in it reminds me that I can't let my doubts yield my perceived rights to State agencies that have such a long track record of holding to discriminatory prejudiced perceived certainties regarding whether disabled adults have a right to Justice and other fundamental rights:

> "Difficult and intractable problems often require powerful remedies, and this Court has never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. One means by which the Court has determined the difference between a statute that constitutes an appropriate remedy and one that attempts to substantively redefine the States' legal obligations is by examining the legislative record containing the reasons for Congress' action." Kimel, 528 U. S., at 88
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> "It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."
>
> "The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response.""
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> "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U. S. C. §12131(2)."
>
> "Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." South Carolina v. Katzenbach, 383 U. S. 301, 308 (1966). See also Florida Prepaid, 527 U. S., at 639–640; Boerne, 521 U. S., at 530."
>
> "This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. Boddie, 401 U. S., at 379"
>
> [Tennessee v. Lane, 541 U.S. 509, 2004]

I want to live in a Society, a State, a Nation where disabled adults can access justice and rehabilitative care. I want fair and equal treatment and the opportunity to fully participate in all aspects of society. At this time I do not expect the Court to fully understand how to provide non-discriminatory access to justice for disabled adults. But I would like the Court to

be made aware that I believe it is obligated to try. At Least As Much As I Am Trying To Shoulder The Burdens of Litigation. And perhaps when we both fail at our respective tasks we can try to be forgiving of each other in order to focus upon succeeding in our shared pursuit of Justice.

> "Even though the courts cannot create claims or defenses for pro se litigants where none exist, *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn.Ct.App. 1994), **they should give effect to the substance**, rather than the form or terminology, of a pro se litigant's papers." Hessmer v. Hessmer, (Tenn. Ct. App. 2003). (emphasis added)

The Courts have been required to be made physically accessible to people whose disability limits their ambulation. The Courts have been required to be made accessible to those whose indigency prevents paying for Court costs. The Court should likewise endeavour to allow justice to be accessible to disabled adults whose disabilities impair, limit, or prevent them from securing legal representation or representing oneself effectively. Such a requirement is in keeping with Congress's intent for persons with disabilities, as declared in 42 U.S. Code § 12101(a), which states:

> "The Congress finds that
>
> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (7) **the Nation's proper goals** regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
>
> (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity **to compete on an equal basis** and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and

nonproductivity."

In order to have human rights one must be able to defend one's rights from violations. To defend one's rights one must utilize the law to take private legal actions. If the accommodations required to allow a disabled adult pro se litigant to defend their rights, to make justice accessible to them, are deemed unreasonable, by proxy the Court is declaring that it is not reasonable for those disabled adults to have civil and constitutional rights. Which would subvert the notion that disabled adults are entitled to and being afforded the due process that can provide equal protection of the law.

42 USC § 12132:

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 USC § 12131:

"(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and"

"(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Many disabled adults who rely upon a wheelchair have as equal an opportunity to climb stairs as a person with functioning legs. In fact, one might even point towards the Capitol Crawl Protest[15], and point out that people in wheelchairs proved that they could crawl up the stairs. It takes them longer, and some could 'hypothetically'[16] get hurt in their

[15] "Shortly before the act [Americans with Disabilities Act] was passed, disability rights activists with physical disabilities coalesced in front of the Capitol Building, shed their crutches, wheelchairs, powerchairs and other assistive devices, and immediately proceeded to crawl and pull their bodies up all 100 of the Capitol's front steps, without warning."
https://en.wikipedia.org/wiki/Americans_with_Disabilities_Act_of_1990 "Capitol Crawl".

[16] Congress passed the ADA due to pervasive instances of disability discrimination dictating a need for prophylactic measures to prevent future hypothetical instances of discrimination and harm through deterrence. And when those deterrent measures prove inadequate, the ADA provides remedies. The ADA

attempt, but they can 'do' it. Yet, the thing to which they are to have equal opportunity to access isn't the climbing of stairs, or the rooms inside the building atop the stairs, it is to access and fully participate in the proceedings in those rooms wherein members of free society congregate to engage in activities such as a court hearing where they and their fellows can defend and thereby obtain their rights through judicial processes providing equal protection of the law [42 U.S.C. §§ 12131(2), 12132]. Likewise, having an equal opportunity to file lawsuits and attend hearings isn't the same as having an equal opportunity to Access Justice.

> "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." [28 CFR § 35.150(a)].

And because the burdens of litigation can make justice inaccessible to a great many disabled adults with disabilities impairing their mental, cognitive, and physical function, essentially excluding this class of individuals from being 'able' to *effectively* pursue private action against parties that violate their rights, the appropriate regulatory action of private legal actions cannot be applied to State agencies. As a result, when TennCare and its MCOs fail to do the job they're funded to do, there are no meaingful consequences to them. This is what makes it possible for TennCare and its Managed Care Organizations to engage in extensive fraud against taxpayers, and directly contribute to that "billions of dollars in unnecessary expenses" that our Congress has so expressly condemned. Until justice is made accessible to disabled adults, the intent of Congress as it relates to persons with disabilities will remain defeated by the misconduct of private and state operated health plans. The Courts will, in effect, fail to achieve what Congress has defined as being The Nations Proper Goals.

4 - Constitutional Violations

A. 1st Amendment of the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people

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is in effect a Restraining Order from Congress upon the States due to the States past history of disability discrimination and abuse. My Motion for Accomodations sought a similar form of Restraining Order against the Respondents, but the Court denied my request as it deemed my situation does not warrant any prophylactic protection from the Respondents activities causing me further injury.

peaceably to assemble, and to petition the Government for a redress of grievances."

The current environment created by the State of Tennessee and U.S. Government prevents disabled adults from obtaining adequate legal representation or engaging in pro se litigation in an effective manner. The functional capacity of many disabled adults is so limited that it is a challenge for us, for me, to even figure out how to submit complaints. To figure out how to submit a complaint one must 1) be 'able' enough to become aware that there is a procedural process to submit a complaint; 2) to be 'able' enough to review that procedural process and understand the actions required to perform it; 3) to be 'able' enough to perform the procedure in its *entirety*. These requirements can be exceptionally challenging and injurious, and at times impossible, for persons with mental, cognitive, and certain physical disabilities which substantially limit their ability to perform the major activities of living required of the actions that are part of the procedural process.

Even when a complaint is submitted the task of keeping on top of things is very demanding. Those demands can easily exceed the capability of disabled adults because their disabilities prohibit them from being able to meet them. The current system of petitioning the State of Tennessee for redress of grievances discriminates against disabled adults with mental, cognitive, and certain physical disabilities. With most disabled adults being unable to engage in effective litigation against State agencies, there are no meaningful consequences to those agencies when they do not attend to appeals, complaints, grievances, and other disputes in good faith with conformity to the law. Thereby disabled adults are deprived from being 'able' to *effectively* petition for an equitable resolution of a dispute with the State of Tennessee. This violation of the First Amendment rights of disabled adults in Tennessee then leads to violations of other civil and constitutional rights.

B. 5th Amendment of the U.S. Constitution:

"nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Medicaid health plan benefits are the property of qualifying disabled adults. When TennCare and its MCOs deprive their disabled adult plan beneficiaries from accessing and benefiting from their benefits, the State and its contractors have effectively seized that property, reappropriating it for their own agendas. TennCare depriving me of full and fair review of my requests for care, my complaints and grievances, depriving me of the due process of a fair hearing, depriving me of being able to access my benefits to receive rehabilitative care, has caused numerous physical and psychological injuries and a multitude of other damages, for which no offer of just compensation has ever been made.

The process of engaging in litigation is itself an exercise of liberty. That the State of Tennessee has created and maintains a judicial environment where disabled adults are being excluded from being able to effectively engage in litigation due to restrictions, rules, and burdens that discriminate against their disabilities violates the Fifth Amendment rights of these disabled adults. Compounding that offense is that TennCare and other parties, that the State of Tennessee and U.S. Government are required to regulate, are preventing disabled adults from meeting their disability needs and as a result the State of Tennessee and U.S. Government are imposing undue impairments upon these disabled adults.

These unmet health needs causing disabled adults to suffer more severe disability related impairments act as physical and mental restraints that further compromise a disabled adults already limited ability to conduct themselves in society. In the State of Tennessee the misconduct of private and state operated health insurance plans, the state's prohibition against disabled adults having enough resources to afford attorneys, the neglect of the legal community to provide pro bono representation for these legal complaints, and the discriminatory nature of the judicial systems pro se litigation process, is depriving disabled adults of their Liberty, Property, access to Justice, the opportunity to achieve Independence and pursue Happiness, and at times even their Life. As previously argued, the discriminatory process of due process in Tennessee is itself circumventing due process, and thereby these deprivations of constitutional rights occur without due process.

C. 14th Amendment of the U.S. Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The privileges and immunities conferred to disabled adults by the Americans with Disabilities Act and other laws serve to protect their fundamental rights, such as exercising liberty, achieving independence, protecting their property, preserving their life, engaging in gainful employment, the pursuit of happiness, etc. When the Tennessee Rules for Civil Procedure and other TN laws that are part of the burdens of litigation are enforced in a manner that abridge those privileges and immunities so conferred by the ADA and other laws enacted to protect disabled adults, then it is in violation of the 14th Amendment of the U.S. Constitution.

The State of Tennessee's abridging of those conferred legal protections creates a process of due process that does not provide due process to disabled adults with mental and cognitive disabilities and certain physical disabilities. The State of Tennessee's current practices

making justice inaccessible to most disabled adults has been preventing disabled adults from having the opportunity to obtain equal protection of the law.

POSSIBLE REMEDIES

1.) A Constitutional Remedy:
The 6th amendment of the Constitution might be interpreted to suggest a remedy to providing due process for disputes between the State and citizens in which a citizen's fundamental rights are at stake. One could thereby infer that it would be a reasonable accommodation for the Court to provide disabled adults whose fundamental rights are being violated by the State a competent attorney whose legal practice includes an area of focus for the issues involved in the complaint. This is arguably the simplest and most complete remedy to level the playing field for indigent disabled adults whose adversary is the State.

2.) Established Practices in Other States:
An alternative remedy to appointing an attorney that has been adopted in some States, and is argued in detail by Chelsea Marx in the article "Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities" [Exhibit D4], is to appoint a "suitable representative", which is an individual who has "the "knowledge of or the ability to attain knowledge of" procedural rules and substantive issues, the "experience and training in advocating for people with disabilities", and the "individual's availability to meet the timelines and duration of the particular adjudicative proceeding.".

A QUANDARY FOR MY CASE AND THE COURT

Given the extent to which I have sought legal counsel and determined that throughout the State of Tennessee there appears to be no attorneys who are willing or able to practice this specific area of law related to the misconduct of private and state operated health plans that neglect, abuse, exploit, and injure disabled adults, it begs the question as to whether or not the court can appoint an attorney who would possess the experience and expertise required to be able to competently litigate my complaint. In my perception it seems to be that the only reason I am having to engage in pro se litigation at all is due to a collective failure on the

part of the legal community within the State of Tennessee.

In example, I contacted the Nashville Bar Association (NBA) on Jan 3-4 2024 to use their attorney referral service. The NBA didn't know of any attorney throughout the entire state of Tennessee who handles cases like this. NBA office manager Vicki Shoulders opted to refund the attorney service referral fee I had paid. I think those events aptly corroborate that there appears to be no attorneys in Tennessee who actively practice this area of law. Further demonstrating this would be that of the many attorneys who declined my case I would ask if they could refer me to an attorney who could help or know of someone who could help. I would often be directed to contact legal aid societies or private attorneys who would eventually direct me to the Tennessee Justice Center (TJC). I was directed to TJC by professionals in related fields, such as social workers, disability rights advocates, disability nonprofit organizations (empower TN, others], PhDs in health policy, and the non-profit organization Disability Rights Tennessee.

At one point I looked through past lawsuits filed against TennCare to try to find private attorneys who might help and tried to contact them. The attorney I was able to get in contact with said that the only reason she was able to litigate the complaint over a decade ago is because she got assistance from Tennessee Justice Center attorneys who walked her through the process. My contact with TJC resulted in being told that they only help people with the application process to get on or stay on TennCare. That once people are on Tenncare and experiencing wrongful service denials or other problems the Tennessee Justice Center does not provide assistance [Exhibit E4, digital files, TJC Call Notes and Recording].

The question I must ask of myself and the court is can I or the court find an attorney who has the education, expertise, and experience needed to be able to improve my access to justice?

I don't know what the right answer is here, other than to conclude that an effective remedy is needed. Finding the right answer requires more than just my mind to analyze this problem and explore possible solutions. Perhaps what my request for relief needs to be is that the court commits to making justice accessible on an ongoing basis by addressing each problem that is anticipated or encountered that limits or prevents my access to justice throughout this case.

REQUESTED RELIEF:

1. For the Court to provide the relief required to make Justice Accessible to Mr. Smith and other disabled adults in Tennessee with mental, cognitive, and physical disabilities compromising their ability to meet the burdens of litigation.
2. DEFEND THE DISABLED

Dated April 24th 2024.

Sincerely,

Sean Smith
6402 Baird lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Affidavit of Motion for **Accessible Justice's Informational Accuracy**

I Sean Smith do hereby affirm that the information I present in my Motion for Justice is to the best of my knowledge and ability true and correct and representative of past events per my memory of past events and/or documentation of those events, and submit my Motion for Accessible Justice as both a Motion and a Testimony, as at this time I am too impaired to gather, examine, analyze, and present all of the evidence I have or know of within the time limits I have to complete and submit this Motion.

Dated April 24th 2024.
Sincerely,
Sean Smith
6402 Baird lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Certificate of Service

I Sean Smith hereby certify that a true and correct copy of *Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?* and the *Affidavit of Motion for Accessible Justice's Informational Accuracy* is being forwarded via email and USPS certified mail to the following:

Respondents Counsel
HAYLIE C. ROBBINS (BPR# 038980)
Assistant Attorney General
Office of the Tennessee Attorney General
Haylie.Robbins@ag.tn.gov

Dated April 24th 2024.
Sincerely,
Sean Smith
6402 Baird Lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Index of Exhibits for Petitioners' Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?

Note: Exhibits A-D, part of Petition for Judicial Review.
Exhibits A2-D2, part of Motion for Accommodations
Exhibits A3, part of Reply to Respondent's Response in Opposition to Motion for Accomodation
Exhibits A4-E4, part of Motion for Accessible Justice

Exhibit A4 - Email Exchange with Tennessee Judicial Branch ADA Coordinator

Exhibit B4 - (Under Seal) 2019 Medical Appeal Medical Records as 49 Digital Files

Exhibit C4 - Screenshots of 2023 Complaint-Appeals Google Docs Revision History

Exhibit D4 - A full copy of: Chelsea Marx. (2018). Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities, 95 Denv. L. Rev. F. Retrieved: https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1035&context=dlrforum

Exhibit E4 - (Under Seal) File names: "Tennessee Justice Center Call Notes.odt" and "Tennessee Justice Center Call Recording_2024-01-02 13.54.50.mp3"

Dated April 24th 2024.

Exhibit A4

Email Exchange with Tennessee Judicial Branch ADA Coordinator

Gmail **Sean Smith <thelastquery@gmail.com>**

Basis for not providing attorneys to disabled adults?

6 messages

Sean Smith <thelastquery@gmail.com> Sun, Mar 31, 2024 at 8:52 PM
To: adacoordinator@tncourts.gov

Hi Tennessee Judicial ADA Coordinator,

I understand it is your general policy that if a disabled adult pro se litigant requests to be provided an attorney as an ADA "reasonable accomodation", that requested accomodation would be denied. I would like to better understand why that is by reading through a detailed and comprehensive argument explaining matters. Could you provide a concise explanation alongside some references to case law specific to that subject that I could read through?

Sincerely,
Sean Smith

---

adacoordinator <adacoordinator@tncourts.gov> Wed, Apr 10, 2024 at 7:37 AM
To: Sean Smith <thelastquery@gmail.com>

Mr. Smith,

Good morning. Thank you for your inquiry regarding the assistance of counsel under the ADA. Generally, the right to appointed counsel arises in criminal proceedings wherein federal and/or state constitutional rights attach. If the proceeding under which you are seeking an ADA accommodation is a criminal proceeding, you may seek appointed counsel under the Tennessee constitution in the trial court. If, however, the proceeding under which your are seeking an ADA accommodation is not a criminal proceeding but rather a civil matter, generally there is no constitutional right to counsel unless fundamental constitutional rights are involved such as, for example, a termination of parental rights matter. In addition, although a litigant may qualify for an accommodation under the ADA, the ADA itself does not provide an inherent or absolute right to counsel. You have requested references to case law in this regard. First, I would invite you to read the ADA statutes themselves, which can be found at 42 U.S.C. 12101 et seq. You may search for the ADA code section here: https://www.law.cornell.edu/*. Secondly, I have attached a few cases, as requested, corroborating the points above.*

Thank you.

Gene F. Guerre
Assistant General Counsel
State Judicial Branch ADA Coordinator
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219
(615) 741-2687
Fax (615) 253-0017
adacoordinator@tncourts.gov

>>> Sean Smith <thelastquery@gmail.com> 3/31/2024 8:52 PM >>>
[Quoted text hidden]

4 attachments

Smith v Dugas (No Right to Counsel under the ADA).pdf
154K

Smith v Robertson (No Inherent or Absolute Right to Counsel under ADA).pdf
201K

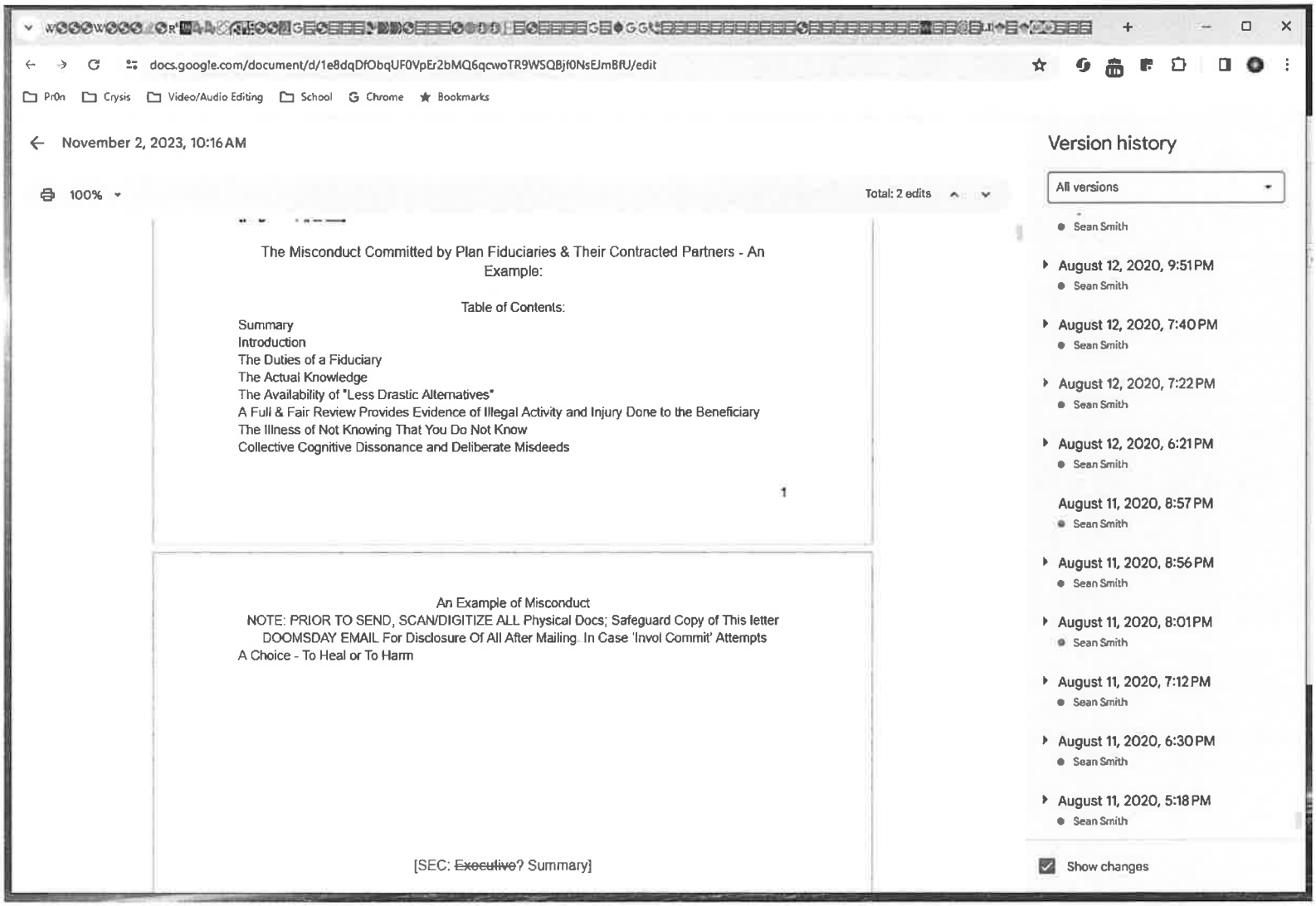
Stone v Town of Westport (No Inherent Right to Appointed Counsel).pdf
112K

White v Franks (No Appointment of Counsel under ADA).pdf
169K

Sean Smith <thelastquery@gmail.com> Wed, Apr 10, 2024 at 7:47 PM

Exhibit C4

Screenshots of 2023 Complaint-Appeals Google Docs Revision History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Pr0n
Crysis
Video/Audio Editing
School
Chrome
Bookmarks
November 2, 2023, 10:16 AM
100%
Total: 2 edits
The Misconduct Committed by Plan Fiduciaries & Their Contracted Partners - An Example:
Table of Contents:
Summary
Introduction
The Duties of a Fiduciary
The Actual Knowledge
The Availability of "Less Drastic Alternatives"
A Full & Fair Review Provides Evidence of Illegal Activity and Injury Done to the Beneficiary
The Illness of Not Knowing That You Do Not Know
Collective Cognitive Dissonance and Deliberate Misdeeds
1
An Example of Misconduct
NOTE: PRIOR TO SEND, SCAN/DIGITIZE ALL Physical Docs; Safeguard Copy of This letter
DOOMSDAY EMAIL For Disclosure Of All After Mailing. In Case 'Invol Commit' Attempts
A Choice - To Heal or To Harm
[SEC: ~~Executive~~? Summary]
Version history
All versions
Sean Smith
August 12, 2020, 9:51 PM
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August 12, 2020, 7:40 PM
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August 12, 2020, 6:21 PM
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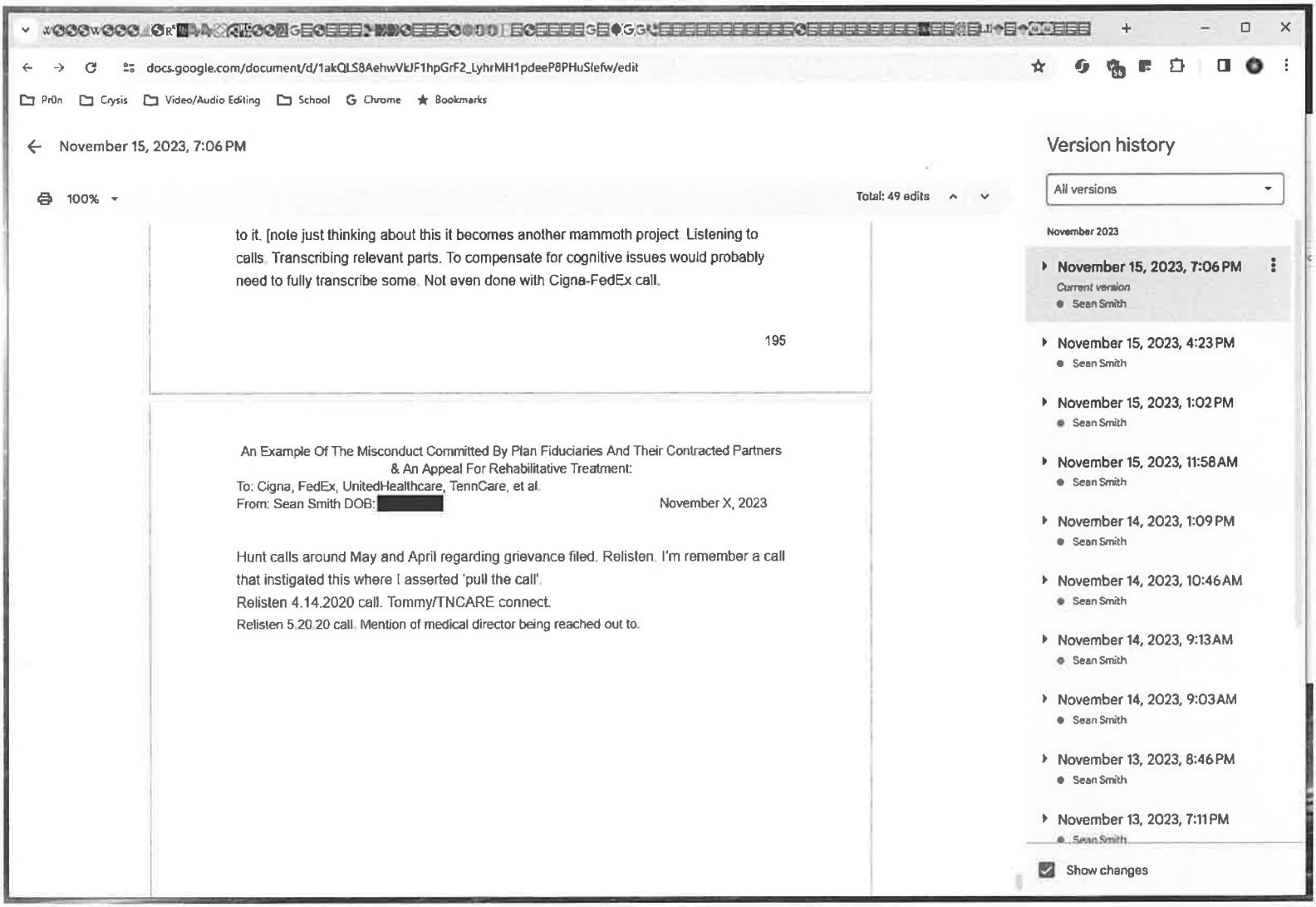
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PrOn
Crysis
Video/Audio Editing
School
Chrome
Bookmarks
November 15, 2023, 7:06 PM
100%
Total: 49 edits
to it. [note just thinking about this it becomes another mammoth project. Listening to calls. Transcribing relevant parts. To compensate for cognitive issues would probably need to fully transcribe some. Not even done with Cigna-FedEx call.
195
An Example Of The Misconduct Committed By Plan Fiduciaries And Their Contracted Partners & An Appeal For Rehabilitative Treatment:
To: Cigna, FedEx, UnitedHealthcare, TennCare, et al.
From: Sean Smith DOB: [redacted] November X, 2023
Hunt calls around May and April regarding grievance filed. Relisten. I'm remember a call that instigated this where I asserted 'pull the call'.
Relisten 4.14.2020 call. Tommy/TNCARE connect.
Relisten 5.20.20 call. Mention of medical director being reached out to.
Version history
All versions
November 2023
November 15, 2023, 7:06 PM
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November 13, 2023, 8:46 PM
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November 13, 2023, 7:11 PM
Sean Smith
Show changes

Exhibit D4

A full copy of: Chelsea Marx. (2018). Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities, 95 Denv. L. Rev. F.

Retrieved: https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1035&context=dlrforum

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Volume 95 Article 26

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Accomodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities

Chelsea Marx

Accomodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities

ACCOMMODATIONS FOR ALL—THE IMPORTANCE OF MEANINGFUL ACCESS TO COURTS FOR PRO SE LITIGANTS WITH MENTAL DISABILITIES

I. INTRODUCTION

The Americans with Disabilities Act (ADA) requires all public entities, including courts, to provide reasonable accommodations to individuals with disabilities to ensure equal access to programs and to prevent discrimination. Unfortunately, there has been little attention paid to reasonable accommodations for mental disabilities under the ADA because "after the ADA passed . . . the statute as applied to physical disabilities received the most attention."[1] However, the percentage of complaints filed under the ADA alleging discrimination based on mental disabilities is steadily increasing.[2] Currently, the National Alliance on Mental Illness estimates that "approximately 1 in 25 adults in the U.S.—9.8 million, or 4.0%–experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities." Thus, these individuals qualify for protection under the ADA.[3] Due to the increasing prevalence of mental disabilities in America, it is imperative for the Colorado court system to consider how to accommodate these individuals like other public entities have, especially when individuals with mental disabilities are representing themselves pro se in civil proceedings.

In Colorado, despite the work of Colorado Legal Services and attorneys taking pro bono cases, the overwhelming majority of individuals in civil adjudicative proceedings represent themselves.[4] Recent statistics show that:

> [i]n Colorado domestic relations cases over the last three years, roughly three-quarters of litigants were unrepresented. In two-thirds of domestic relations cases, there was no lawyer on either side. In county court civil cases, consisting primarily of collections, evic-

1. U.S. COMM'N ON CIVIL RIGHTS, No. 005-907-00594-4, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), www.usccr.gov/pubs/ada/ ch5.htm.

2. *See id.* (discussing that from 1992-1999 charges filed with the EEOC for discrimination based on mental disabilities began to outpace charges filed based on physical disabilities).

3. NAT'L ALL. ON MENTAL ILLNESS, *Mental Health by the Numbers*, https://www.nami.org/learn-more/ mental-health-by-the-numbers (last visited Mar. 22, 2018).

4. William Hood and Dan Cordova, *The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources through Technology*, THE COLO. LAWYER, October 2016 at 55.

> tions, and restraining orders, the pro se rate for responding parties held steady at 98% over the same period of time.[5]

In 2016, Colorado Supreme Court Chief Justice Nancy Rice sought to respond to "the challenges facing unrepresented civil litigants" by connecting these litigants to legal resources through technology.[6] However, this effort fails to fully support those litigants that are amongst the 260,000 Colorado residents estimated to have mental disabilities.[7] In order for the Colorado Supreme Court to fully provide equal access to justice for these individuals, it must re-evaluate the current deficit in court rules addressing disability accommodations.

In 2004, former Chief Justice Mullarkey of the Colorado Supreme Court signed Directive 04-07, *Access to Court Services and Programs for People with Disabilities*, to "ensure equal access and full participation" in the Colorado judicial system for individuals with disabilities.[8] Although the Colorado Judicial Department's resource guide for providing reasonable accommodations to people with disabilities specifically discusses how "providing a coach or support person at the proceeding" may be a necessary accommodation for individuals with cognitive or developmental disabilities,[9] it does not have the force of a formal court rule. The only court rules regarding disability accommodations in Colorado govern court interpreters for individuals with hearing impairments.

This article argues the Colorado Supreme Court should adopt a comprehensive court rule providing individuals with mental disabilities otherwise unrepresented in civil proceedings individualized assistance, by a skilled individual appointed by the court, to ensure meaningful access to the legal process for all Coloradans. Part two addresses the federal law requirements public entities, including courts, must comply with under Title II of the ADA. Part three briefly describes how skilled support persons are widely used by courts to accommodate individuals with physical disabilities. In contrast, part four discusses how other public entities use skilled individuals as reasonable accommodations to support individuals with mental disabilities. Finally, part five proposes that Colorado adopt the "suitable representative" model recently created by the Washington Office of Administrative Hearings.

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5. *Id.*
6. *Id.*
7. Jennifer Brown, *Breakdown: Mental Health in Colorado*, DENVER POST, http://extras.denverpost.com/mentalillness/index.html (last visited Apr. 2, 2018).
8. COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 4 (2004).
9. *Id.* at 9.

II. TITLE II OF THE ADA REQUIRES ALL PUBLIC ENTITIES TO ACCOMMODATE INDIVIDUALS WITH DISABILITIES.

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[10] Courts must "broadly construe" the ADA because it is a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society."[11] Title II of the ADA prohibits public entities from discriminating against a "qualified individual with a disability" by excluding the individual from participation in services, programs, or activities of the public entity or denying the individual the benefits of such services, programs, or activities.[12]

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services for the participation in programs or activities as provided by the public entity."[13] Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[14] A mental impairment may be "any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability."[15]

Under Title II, public entities, including courts, must ensure their services, programs, and activities are "readily accessible and usable" by people with disabilities when viewed in the entirety.[16] A public entity can make programs accessible by modifying policies, practices, or procedures or by providing auxiliary aids and services, also known as accommodations, to the individual with a disability.[17] Moreover, courts have interpreted the access requirement under Title II to require provision of an affirmative accommodation to ensure "meaningful access to a public service."[18] Specifically, a public entity must furnish an accommodation "where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."[19] The public entity shall give "primary consideration" to the accommodation requested by the individual with a

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10. 42 U.S.C. § 12101(b)(1) (2012).
11. Kinney v. Yerusalim, 812 F.Supp. 547, 551 (E.D. Pa. 1993).
12. 42 U.S.C. § 12132 (2012).
13. 42 U.S.C. § 12131(2) (2012).
14. 42 U.S.C. § 12102(1) (2012).
15. 28 C.F.R. § 35.108(b)(1)(ii).
16. 28 C.F.R. § 35.150(a).
17. *See* 28 C.F.R. § 25.130(b)(7)(i); *see also* 28 C.F.R. § 35.104 (providing examples of auxiliary aids and services).
18. Nunes v. Massachusetts Dept. of Correction, 766 F.3d 136, 145 (5th Cir. 2014) (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 273–76 (2d Cir. 2003)).
19. 28 C.F.R. §35.160(b)(1).

disability, however the administrative authority may decide if an "equally effective" alternative accommodation will be made.[20]

A public entity is not required to make modifications that "would fundamentally alter the nature of the service, program, or activity" or impose an undue burden or hardship on the program provider.[21] "The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program."[22] The public entity bears the burden to prove that the accommodation would fundamentally alter or cause an undue burden.[23] Courts have determined that if a public entity provides an accommodation in one context, it is not unreasonable to provide that accommodation in all facets of the program.[24]

III. SKILLED INDIVIDUALS ARE COMMONLY USED TO ACCOMMODATE INDIVIDUALS WITH PHYSICAL DISABILITIES IN STATE COURTS.

Title II regulations provide several examples of skilled individuals supplying services to facilitate the participation of an individual with a disability in a public entity's program, including, but not limited to, interpreters, notetakers, and readers as "auxiliary aids and services" to accommodate individuals with disabilities.[25] Many states include provisions in state court rules about disability accommodations codifying a process to manage accommodation requests generally.[26] However, the majority, including Colorado, only discuss accommodations in the context of providing interpreters, focusing on providing accommodations for individuals with hearing impairments.[27] Like interpreters, notetakers, and readers, Colorado should create an accommodation that employs skilled persons to assist individuals with mental disabilities. Thus, allowing those with mental disabilities to meaningfully participate in civil court proceedings.

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20. 28 C.F.R. § 35.160(b)(2); *see also* COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATION FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 3 (2004), https://www.thearc.org/file/ADAresourceguide.pdf (asserting "the courts are to give primary consideration to the accommodation requested by the person with the disability").

21. 28 C.F.R. § 35.130(b)(7)(i); *see, e.g.*, Galusha v. New York State Dep't of Envtl. Conservation, 27 F. Supp. 2d 117, 117 (N.D.N.Y. 1998).

22. Easley by Easley v. Snider, 36 F.3d 297, 305 (3rd Cir. 1994).

23. 28 C.F.R. Pt. 35, App. A. § 35.164; *see also* Center v. City of West Carrollton, 227 F. Supp. 2d 863, 867 (S.D. Ohio 2002).

24. Soto v. City of Newark, 72 F. Supp. 2d 489, 496 (D.N.J., 1999) (holding that it was a reasonable accommodation for a municipal court to provide sign-language interpreters at weddings when the municipal court provided sign-language interpretation at other functions).

25. 28 C.F.R. § 35.104.

26. *See, e.g.*, CA ST ALL COURTS Rule 1.100; FL ST J ADMIN Rule 2.540; Md Rule 1.332.

27. *See, e.g.*, AK R ADMIN Rule 6.1; AZ ST GILA SUPER CT Rule 4; NJ Directives DIR. 01-17.

IV. UNDER TITLE II, SKILLED INDIVIDUALS ARE A REASONABLE ACCOMMODATION FOR INDIVIDUALS WITH MENTAL DISABILITIES.

a. Other public entities use skilled individuals to accommodate individuals with a mental disability.

Under Title II, public entities use skilled individuals to accommodate individuals with mental disabilities. For example, the Title II Technical Assistance Manual describes how a public entity may have an obligation to provide "individualized assistance" to an individual with a mental disability to participate in programs.[28] In the illustration, the manual uses the example of an application process for county benefits that "is extremely lengthy and complex."[29] The manual asserts that, because of the complexity of the process, individuals with mental disabilities may not be able to complete the application without individualized assistance or other accommodations. Thus, these individuals are "effectively denied benefits to which they are otherwise entitled."[30] Therefore, the county has an "obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits."[31]

Additionally, public post-secondary education institutions are public entities under Title II that have developed several accommodations to support individuals with mental disabilities using skilled individuals. Academic experts urge higher education institutions to "appoint individuals who can assist [students with mental disabilities] as note-takers, reader, scribes, or other essential roles."[32] Additionally, experts from the University of Washington identify several accommodations for students with mental disabilities, including assigning a classmate to be a volunteer assistant, notetakers, and alternate formats for exams and homework.[33]

Employing a skilled individual as an accommodation to support persons with mental disabilities navigate the civil court system is analogous to programs that public universities and county assistance programs are already expected to use as public entities. Although many state judiciaries have yet to adopt similar programs, they still have the legal obligation to ensure individuals with mental disabilities are meaningfully participating in judicial proceedings.

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28. U.S. DEP'T OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL loc. II-3.600 (1993) (ebook).

29. *Id.*

30. *Id.*

31. *Id.*

32. *College Guide for Students with Psychiatric Disabilities: How Schools Accommodate Students with Psychiatric Disabilities*, http://www.bestcolleges.com/resources/ college-planning-with-psychiatric-disabilities/ (last visited Mar. 19, 2018).

33. ALFRED SOUMA, ET AL., ACADEMIC ACCOMMODATIONS FOR STUDENTS WITH PSYCHIATRIC DISABILITIES 3 (2012).

b. A few courts, including federal administrative courts, are beginning to address accommodations for individuals with mental disabilities.

As the demand grows for reasonable accommodations for individuals with mental disabilities in the judicial system, courts must ensure compliance with federal law. A few court systems, including the federal administrative courts, have started to recognize the importance of making accommodations for individuals with mental disabilities. First, in *Franco-Gonzales v. Holder*, a California district court held that mental disabilities may impede an individuals' ability to meaningfully access immigration removal proceedings. Thus, the court concluded, individuals with mental disabilities are entitled to a "qualified representative" as a reasonable accommodation under federal disability law.[34] Here, the court concluded that after a "fact-specific individualized analysis of the disabled individual's circumstances and the accommodations that might allow meaningful access to the program" it was a reasonable accommodation to provide these individuals a qualified representative, an attorney providing services pro bono or at the government's expense.[35]

Similarly, some state court systems recognize the importance of providing accommodations for individuals with mental disabilities. The Washington State Court system has General Rule 33 which provides that reasonable accommodations may include "as to otherwise unrepresented parties to the proceeding, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability."[36] Washington's General Rule 33 also requires a court to "make its decision on an individual-and-case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation."[37]

Additionally, some states and advocacy organizations have recognized the importance of non-attorney support persons to assist individuals with disabilities in court proceedings. The Judicial Council of Georgia identifies support service providers, individuals who assist persons who are deaf-blind or those who have intellectual, or other cognitive disabilities with court appearances.[38] The Judicial Council of Georgia's ADA Handbook provides that "[i]n addition to helping reduce the anxiety of court proceedings for a person with cognitive or intellectual disabilities, a support person may also assist the person by explaining court proceedings in simple terms, explaining paperwork or follow-up obliga-

34. 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010).
35. *Id.* at 1054–58.
36. WASH. GR 33.
37. *Id.*
38. JUDICIAL COUNCIL OF GA., ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES: A GUIDE FOR GEORGIA COURTS (2017).

tions, or identifying signs of confusion or misunderstanding."[39] The Council's recommendations are based in part on a report by The Arc, the largest national advocacy organization for individuals with cognitive and intellectual disabilities, that discusses different ways that states can support these individuals in judicial proceedings.[40]

Just as these other courts, Colorado should adopt a court rule that specifically sets forth a process to accommodate individuals with mental disabilities in the civil court system. Without proper guidance on accommodations, individuals with mental disabilities will likely be unable to navigate the complex civil litigation process and meaningfully access their rights in Colorado courts. Colorado must act to ensure equal access for all individuals with disabilities, physical and mental, to Colorado courts.

V. THE "SUITABLE REPRESENTATIVE"—A PROPOSED MODEL

Earlier this year, the Washington State Office of Administrative Hearings amended its "Accommodation" rule in the administrative code to conform with Washington State Court General Rule 33.[41] The administrative code does not identify "representation by counsel" as an accommodation for otherwise unrepresented individuals with disabilities in administrative hearings.[42] Rather, the code defines a "suitable representative" as an individual who is qualified under the code "to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the adjudicative proceeding."[43]

A suitable representative may be appointed if, after considering several factors pertaining to the individual's capacity for understanding procedural rights and ability to engage in the proceedings, an ADA coordinator determines that a party is "unable to meaningfully participate in the adjudicative proceeding as a result of the disability."[44] If, after considering these factors, the ADA coordinator determines that the party is unable to meaningfully participate in the adjudicative proceeding, the coordinator will determine if a suitable representative is the "most appropriate accommodation."[45] If so, the ADA coordinator "will identify an

39. *Id.*

40. THE ARC OF THE U.S., THE ARC'S JUSTICE ADVOCACY GUIDE: AN ADVOCATE'S GUIDE ON ASSISTING VICTIMS AND SUSPECTS WITH INTELLECTUAL DISABILITIES 11–12 (2006) (noting Vermont's "Communication Specialist" program "that is similar to an ASL interpreter for someone who is deaf which allows the person with a disability to communicate effectively with attorney, judge, court staff and others in the judicial system").

41. *See* WASH. ADMIN. CODE § 10-24-010 (2018).

42. *See id.*

43. WASH. ADMIN. CODE § 10-24-010(2)(b) (2018).

44. WASH. ADMIN. CODE § 10-24-010(7) (2018).

45. WASH. ADMIN. CODE § 10-24-010(8) (2018).

individual to assist the party at no cost to the party" as a suitable representative.[46]

A suitable representative is not an attorney, rather it is an individual the ADA coordinator appoints that receives "uniform qualification training, or demonstrate[s] equivalent experience or training, as established by the chief administrative law judge."[47] The individual is identified after consideration of the party's preferences, the "knowledge of or the ability to attain knowledge of" procedural rules and substantive issues, the "experience and training in advocating for people with disabilities", and the "individual's availability to meet the timelines and duration of the particular adjudicative proceeding."[48] No individual that is employed by the office of administrative hearings or is prohibited by law from representing the party is eligible to be appointed as a suitable representative.[49] Additionally, the party must accept the appointment in writing and be given the opportunity to contact the ADA coordinator if he or she disagrees with the appointment.[50]

Colorado should adopt an accommodation process for individuals with mental disabilities akin to Washington's suitable representative because it affords these individuals meaningful access to the Colorado justice system. The suitable representative model is analogous to interpreters and readers already required by the vast majority of court rules for individuals with physical disabilities. Moreover, while some state and federal courts require the appointment of legal representation for certain individuals with mental disabilities, the suitable representative program employs a skilled individual to accommodate the party without having to provide costly legal representation. Finally, the suitable representative model will likely improve judicial efficiency by helping an individual without other representation navigate a process that might otherwise be daunting and exclusionary because of their disability.

*Chelsea Marx**

46. WASH. ADMIN. CODE. § 10-24-010(10) (2018).
47. WASH. ADMIN. CODE. § 10-24-010(20) (2018).
48. WASH. ADMIN. CODE. § 10-24-010(11) (2018).
49. *Id.*
50. *Id.*

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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE, PART I

SEAN SMITH,	)	
	)	
Petitioner,	)	
	)	**Case No. 24-0074-I**
v.	)	
	)	**Chancellor Patricia Head Moskal**
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR ACCESSIBLE JUSTICE

Respondents, the Tennessee Department of Finance & Administration, Division of TennCare ("TennCare") and Stephen Smith, Director of TennCare ("Director") (jointly "Respondents"), by and through counsel, herein respond in opposition to Petitioner's *Motion for Accessible Justice* ("Motion"). Petitioner requests "for the Court to provide the relief required and make Justice Accessible." Not only is the requested relief extraordinarily vague, but to the extent Petitioner seeks the appointment of counsel, the right to an attorney is not an enumerated right to private citizens for civil cases, and is not required by the Americans with Disability Act ("ADA"). Tennessee Court Systems, *Judicial ADA Policy* – "What kinds of assistance cannot be provided?", www.tncourt.gov (last updated 2024), https://www.tncourts.gov/administration/human-resources/ada-policy. Nor is such relief otherwise warranted. Therefore, Petitioner's Motion should be denied.

BACKGROUND

Petitioner filed his *Complaint and Petition for Judicial Review* on January 27, 2024, and an *Amended Complaint and Petition for Judicial Review* on April 7, 2024. Respondents filed a Motion to Dismiss on April 23, 2024, that is set to be heard on May 17, 2024. On April 24, 2024, upon being served with Respondents' Motion to Dismiss, Petitioner filed a *Motion for Accessible Justice* requesting that "the Court to provide the relief required to make Justice Accessible to Mr. Smith" and for this Court to "DEFEND THE DISABLED." In his Motion, Petitioner outlines his process to litigate this case and the effort it takes him to do so. He also describes the various unsuccessful ways he has attempted to find an attorney who will represent him in this litigation. While Respondents sympathize with Petitioner, we respond in opposition due to the lack of relief requested in his Motion.

ARGUMENT

I. Petitioner is Not Entitled to the Appointment of Counsel.

Although Petitioner's motion is somewhat opaque, Respondents understand the Motion as requesting the Cout to appoint counsel for Petitioner. *See* Motion at 25 ("One could thereby infer that it would be a reasonable accommodation for the Court to provide disabled adults whose fundamental rights are being violated by the State a competent attorney."). Specifically, Petitioner seems to request appointment of counsel as an ADA accommodation. *Id.* at 3 (indicating that Petitioner requested the Administrative Office of the Courts ADA Coordinator to appoint counsel).

Appointment of counsel as an ADA accommodation in this case is nor required or warranted. The Judicial ADA Policy for the Tennessee Courts makes clear that "the appointment of an attorney to represent a party to a civil case *cannot be required.*" (Motion, Ex. A4). This policy is well grounded in Tennessee law. "[T]here is no absolute right to counsel in a civil case."

Bell v. Todd, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005). "Unlike indigent defendants in criminal cases, indigent civil litigants possess neither the constitutional nor the statutory right to appointed counsel." *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003). Rather, appointment of counsel in a civil case is "justified only by exceptional circumstances." *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). No such circumstances are presented here. Indeed, Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party, and the Court's ADA assistance cannot "change the basic nature of the judicial system." Tennessee Court Systems, *Judicial ADA Policy* – "What kinds of assistance cannot be provided?" www.tncourt.gov (last updated 2024), https://www.tncourts.gov/administration/human-resources/ada-policy.

Petitioner does not establish a basis for appointing counsel under either the Tennessee or Federal Constitutions or the ADA, and his Motion must be denied.

II. Petitioner Does Not State with Particularity the Relief He is Requesting.

To the extent Petitioner seeks relief other than appointment of counsel, such relief is not adequately defined such as to give Respondents fair opportunity to respond. Petitioner moves the Court to "make Justice Accessible to Mr. Smith and other disabled adults in Tennessee" and to "DEFEND THE DISABLED." Motion, p. 27. Such relief is, on its face too vague to identify the requested relief. Pursuant to the Davidson County Chancery Local Rules, "motions shall clearly state with particularity the grounds therefore and shall set forth the relief or order sought as required by Tenn. R. Civ. P. 7.02." L.R. 26.04(a). The Tennessee Rules of Civil Procedure also require that a motion "shall set forth the relief or order sought." Tenn. R. Civ. P. R. 7.02(1). "Although [Tennessee courts] construe pleadings and motions liberally, parties must still abide by the particularity requirement of Tenn. R. Civ. P. 7.02(1)." *Just. v. Nelson,* No.

E201802020COAR3CV, 2019 WL 6716300 at *5 (Tenn. Ct. App. Dec. 10, 2019). Accordingly, Petitioner, even though pro se, should be required to

CONCLUSION

For the foregoing reasons, Petitioner's *Motion for Accessible Justice* must be denied.

Respectfully Submitted,

JONATHAN SKRMETTI
ATTORNEY GENERAL & REPORTER

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this motion, memorandum in support, and all attached exhibits have been served via email and electronic filing on May 2, 2024, upon the following recipients:

COUNSEL OF RECORD	PARTY REPRESENTED
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HAYLIE ROBBINS
Assistant Attorney General

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Sean P. Smith,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	**Case No. 24-0074-I**
	)	
	)	**Chancellor Patricia Moskal**
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

PETITIONERS' REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR ACCESSIBLE JUSTICE

My Motion for Accessible Justice was filed as a sworn Affidavit and my arguments and statements were made in good faith for the purposes declared. Which in brief summary would be for justice to be equally accessible to disabled adults in Tennessee. Respondents' Response in Opposition to Motion for Accessible Justice makes no such sworn statement or equivalent affirmation. Their arguments may be driven by motives that are not in alignment with equitable justice or the nation's proper goals for individuals with disabilities. I believe it is worth noting that if my statements and claims are more than just "true and correct" "to the best of my knowledge and ability" and are objectively true and correct, which I continue to believe they will prove to be if properly tested, then Respondents counsel as Attorney General will have - or has? - an ethical dilemma.

Like TennCare's administrators an AG also makes an oath to fulfill their duties faithfully with fidelity and in support of the State and Federal Constitutions. TennCare's actions as I have described them have worked against our Constitutions. Knowingly helping TennCare avoid the

remedial reformative process of legal consequences for their offenses so that they may persist in their offending actions would also act against our Constitutions. At what point in these proceedings will the AGs duty to defend TennCare be superseded by their duty to investigate and prosecute TennCare?

One might try to play the game of "allegations" "are not, of course, evidence of the facts averred" [Hillhaven Corp. v. State ex Rel. Manor Care, 565 S.W.2d 212 (Tenn. 1978)] but this offers little shelter. It is far from supporting our Constitutions to make it the job of indigent disabled adults with substantially limited brain function to pro se litigate such a complex legal matter in order to aver the allegations. And by proxy opposing that I and those like me be appointed counsel seems in service of an agenda not in alignment with proper governmental purpose. That much like with my complaints and appeals the Respondents seek to dismiss and deny without considering their oath and obligations. Which is unacceptable conduct for those acting in stewardship of our State of Tennessee and United States of America. The common good that our Constitutions are sentinels of is owed greater devotion.

ARGUMENT AND ANALYSIS

1. A Full and Fair Review of Case Law Supports Petitioner's Right to Appointed Counsel

In *Respondents' Response in Opposition to Petitioner's Motion for Accessible Justice* they cite the Tennessee Judicial Branches ADA policy which states that "the appointment of an attorney to represent a party to a civil case cannot be required." Respondents claim the policy "is well grounded in Tennessee law." [pg. 1 ¶ 1]. Respondents' cite Bell v. Todd, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005) which says "it is now well-settled that there is no absolute right to counsel in a civil trial. See Knight v. Knight, 11 S.W.3d at 900; Memphis Bd. of Realtors v. Cohen, 786 S.W.2d 951, 953 (Tenn.Ct.App. 1989)."

Bell v. Todd cites *Knight v. Knight*, 11 S.W.3d at 900 which states:
"There is no absolute right to counsel in a civil trial." reasoning "The Sixth Amendment right to counsel is limited by its terms to criminal prosecutions." and cites, "*Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn.App.1988); *In re Rockwell*, 673 S.W.2d 512, 515 (Tenn.App. 1983)."

And in *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn.App.1988):
"The thirteenth issue apparently complains that the trial judge did not appoint counsel for Husband in the trial court. There is no absolute right to counsel in a civil trial. See In re Rockwell, 673 S.W.2d 512 (Tenn. App. 1983). This issue is without merit."

In re Rockwell, 673 S.W.2d 512 (Tenn. App. 1983):
"The Sixth Amendment right to counsel is limited by its terms to criminal prosecutions. There is no absolute right to counsel in a civil trial. Barish v. Metropolitan Government, Etc., 627 S.W.2d 953 (Tenn. App. 1981)."

In Barish v. Metropolitan Government, Etc., 627 S.W.2d 953 (Tenn. App. 1981):
"There is no absolute right to counsel in a civil trial. *See* U.S.Const. amend. VI; Tenn.Const. Art. I, § 9. *Cf. Lassiter v. Department of Social Services of Durham County, North Carolina,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Turner v. Steward,* 497 F. Supp. 557 (E.D.Ky. 1980); *State v. Tyson,* 603 S.W.2d 748 (Tenn.Cr. App. 1980).".

And on and on it goes from 2005 to 1981 each case citing another case and providing little information as to the basis for the claim that there is no absolute right to counsel beyond a brief mention of the Sixth Amendment of the US Constitution. Nowhere in these cases is examined the issues I have presented to the court for consideration in my Motion for Accessible Justice, where I asserted that I and disabled adults like me have a *conditional* right to legal assistance provided by an attorney and/or qualified representative based upon the severity of our need (some persons with disabilities will be disabled enough to need some help, but not so disabled they need an attorney) in order to Access Justice. I asserted that current policy and procedure in the Tennessee Courts to refuse appointment of counsel as an ADA accommodation leads to violations of my/our fundamental rights conferred by the 1st, 5th, and 14th Amendments to the U.S. Constitution.

I should have included in my Motion for Accessible Justice the TN Constitution art. 1 sec. 8 due to its specific wording of "or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land." and do here now include it in argument. For I have certainly been destroyed in my fundamental rights by the misconduct of TennCare's Plan administrators who swore an oath to fulfill their official duties "faithfully" and

with "fidelity" in "support" of the Constitution of Tennessee and the United States [Am. Pet. Jud. Rev. Ex. C].

In my Motion I explained a statutory and constitutional basis by which disabled adults have a conditional right to counsel. I did not assert an absolute right to counsel based upon the 6th Amendment to the U.S. Constitution. Respondents' did not examine my claim, and this becomes further apparent when we carefully examine the cited case law.

Respondents' cite Hessmer v. Miranda, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003) to assert my indigency does not confer either a "constitutional nor the statutory right to appointed Counsel." I did not examine or argue whether indigency itself confers such a right. I argued that the State of Tennessee limits the resources of disabled adults, my resources, and forces indigency upon me. My indigency is imposed by the State and acts as a financial restraint, in addition to the physical and mental restraints it also imposes [Mot. Acc. Just. pg. 17 ¶ 1-2] . I am indigent because the state deprives me of my right to rehabilitative treatment and prevents me from being able to engage in gainful employment and then further restricts what resources I can acquire or retain and then makes justice Inaccessible; the State violates my statutory and constitutional rights. I am disabled by "treatable, even curable, health conditions simply because health insurance plans skirt the law because the legal community and the justice system conduct themselves in a manner that makes justice inaccessible to disabled adults with certain disabilities and legal complaints." [Id. pg. 8 ¶ 2].

Bell v. Todd cites *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003) which reads: "Indigent civil litigants, unlike indigent criminal defendants, possess neither a constitutional nor statutory right to court-appointed assistance. *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002);"

Hessmer v. Miranda cites *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002):
"Indigent civil litigants possess neither a constitutional nor a statutory right to appointed counsel. See Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997). Nevertheless, Congress has granted district courts statutory authority to "request" appointed counsel for indigent civil litigants. See 28 U.S.C. § 1915(e)(1) (providing that "[t]he court may request an attorney to represent any person unable to afford counsel"). This Court has interpreted § 1915 as affording district courts "broad discretion" to determine whether appointment of counsel in a civil case would be appropriate. See Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). The Tabron court

found that the decision to appoint counsel may be made at any point in the litigation, and may be made by a district court sua sponte. Id. at 156."

"In Tabron, we developed a list of criteria to aid the district courts in weighing the appointment of counsel for indigent civil litigants [FN9, *Infra* pg. 5 ¶ 3]. As a threshold matter, a district court must assess whether the claimant's case has some arguable merit in fact and law. Tabron, 6 F.3d at 155; see also Parham, 126 F.3d at 457. If a claimant overcomes this threshold hurdle, we identified a number of factors that a court should consider when assessing a claimant's request for counsel. These include:

1. the plaintiff's ability to present his or her own case;
2. the difficulty of the particular legal issues;
3. the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;
4. the plaintiff's capacity to retain counsel on his or her own behalf;
5. the extent to which a case is likely to turn on credibility determinations, and;
6. whether the case will require testimony from expert witnesses.

Tabron, 6 F.3d at 155-57.

We have noted that "this list of factors is not exhaustive, but should serve as a guidepost for the district courts." Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 155). In addition, we have cautioned that courts should exercise care in appointing counsel because volunteer lawyer time is a precious commodity and should not be wasted on frivolous cases. Id. at 458."

Footnote 9 from above;

"**This court has rejected the rule of our sister circuits that have held that appointment of counsel under § 1915(e)(1) is justified only under "exceptional circumstances."** See, e.g., Lavado v. Keohane, 992 F.2d 601, 605-06 (6th Cir. 1993) ("Appointment of counsel in a civil case . . . is a privilege that is justified only by exceptional circumstances."); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) ("[T]his court has limited the exercise of [the District Court's discretionary power under the statute] to exceptional circumstances."). We explained in Tabron that "[n]othing in [the] clear language" of the statute ("the court may request an attorney to represent any person unable to afford counsel"), "[nor] in the legislative history . . . [,] suggests that appointment is permissible only in some limited set of circumstances." Tabron, 6 F.3d at 155." (emphasis added)

[I have wondered throughout this review why pick Lavado v. Keohane's "exceptional circumstances" over the Tabron standard. Maybe it's as simple as the people who detest poor people like disabled adults choose Lavado v. Keohane, and the people who want to pursue the Nation's Proper Goals pick Tabron? Yes, that's an oversimplified inflammatory quip (even if it could sometimes be true), but I think even so it draws closer to the matter at hand. There needs to be a well-reasoned reason to pick one over the other to avoid that selection being prejudiced and discriminatory, and so far the above is the closest I've found to a well-reasoned reason. Constraints on time limit how thoroughly I can examine both sides of this particular issue. Which is unfortunate as John Stewart Mill argued in *On Liberty*, "He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion... Nor is it enough that he should hear the opinions of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. He must be able to hear them from persons who actually believe them...he must know them in their most plausible and persuasive form." (emphasis added)
"Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think..."
And particularly fitting to my situation with TennCare and the inaccessibility of justice:
"The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."]

"As a threshold matter, we must assess whether Montgomery's case, in which he claims that the defendants violated his civil rights under 42 U.S.C § 1983 by depriving him of prescribed medical treatment, has "some arguable merit in fact and law." Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 155); see also Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986)"

"We agree and find that Montgomery has satisfied the first prong of Estelle by demonstrating a serious medical need. See Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (instructing that the seriousness of a medical need "may . . . be determined by reference to the effect of denying the particular treatment")."[1]

[1] "I strongly urge you to cover the cost of this therapy. Failure to do so would place the patient's health in jeopardy." [Pet. Jud. Rev. Exhibit B pg. 68 ¶ 5, Mot. Acc. Just. Exhibit B4 file:"Dr. Rice Vivos Dx Tx.pdf"]

"we find that Montgomery has adequately demonstrated the subjective component of the Estelle standard. See Durmer v. O'Carroll, M.D., 991 F.2d 64, 68 (3d Cir. 1993) (noting that deliberate indifference may exist in a variety of different circumstances, including where "prison authorities prevent an inmate from receiving recommended treatment," or "where knowledge of the need for medical care[is accompanied by the] intentional refusal to provide that care")."

[In my own case the effect of denying medical care leaves me disabled by treatable, even curable illness, has caused injury and puts me at risk of further injury, which increases the severity of my disability, all of which works to deprive me of my fundamental rights. Likewise, the denial of my care shows deliberate indifference and irrationality by the health plan (aka arbitrary and capricious agency decisions and actions). My 2019 complaint-appeal explained in great detail how the research literature shows that people like me have increasingly high medical utilization the longer that we go without appropriate care for our jaws-airways. Meaning that it costs less to treat us appropriately than it does to deny care.[2] (Pet. Jud. Rev. Ex. B digital files, file:"Sean Smith's 2019 Medical Appeal (redacted for court 2024).pdf" pg. 30 ¶ 1, pg. 12-13.) However, it can be argued that rather being solely an act of irrationality it is also one of malfeasance intended to exploit disabled adults and defraud taxpayers by leveraging the capitated payment model that is a hallmark of Medicaid MCO health plans by retaining as many plan beneficiaries as possible while paying the least amount of money they can for needed care.]

"we agree with Montgomery that the District Court abused its discretion in failing to appoint counsel, we will vacate the District Court's judgment and remand the case with instructions to appoint counsel to assist Montgomery in the preparation and presentation of his case.

We review a district court's decision to deny counsel to an indigent civil litigant for abuse of discretion. *Hamilton v. Leavy,* 117 F.3d 742 (3d Cir. 1997). We have determined that a district

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[2]Review complaint-appeal references for publications validating statements. Pg. 12 "What treatment was supplied had limited to no efficacy in symptom management and
offered practically no substance in regard to an etiological explanation that moved towards achieving a resolution of primary complaints; I observe this trend to be a common story amongst patients with Temporomandibular Disorders (TMDs) and/or disordered breathing [6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36]."
Pg. 30 "Absent treatment patients are often
observed to do poorly with increased healthcare costs that place substantial burdens upon families, employers, third-party payers, and our society [18, 52, 139, 140, 141]"

court abuses its discretion if its decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Newton v. Merrill Lynch,* 259 F.3d 154, 165-66 (2001) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 783 (3d Cir. 1995))."

Montgomery v. Pinchak cites Hamilton v. Leavy whose summary on casetext.com is a quote from Burk v. Runk, 1:19-CV-01358 (M.D. Pa. Dec. 28, 2021), footnote 81. I find it interesting to compare it to my situation despite the differences between my case and it. Especially given what I argued in my Amended Petition for Judicial Review and my Motion for Accommodations, now argue in my Motion for Accessible Justice and have been drafting in my forthcoming Response to Respondents Motion to Dismiss Am. Comp. Pet. Jud. Rev.:
"See Hamilton v. Leavy, 117 F.3d 742, 746-47 (3d Cir. 1997) (finding that prison official could be held liable for transferring plaintiff to a prison where he was attacked because official knew of excessive risk to plaintiff's safety and failed to act); Young v. Quinlan, 960 F.2d 351, 36263 (3d Cir. 1992) (holding that prison officials, who ignored inmate's repeated notifications of physical assaults and requests for placement in protective custody, could be found deliberately indifferent).".

I'm not a prisoner with a warden, but TennCare acts as a trustee of my property-benefits, and acts as a type of caregiver for my health and safety. I believe my dispute being 'under' the jurisdiction of this Chancery Court means something here too, though I'm not sure what, even though it's clear to me that the Court in adjudicating my case will act as a sort of caregiver for Justice, of the civil and fundamental rights of myself and other disabled adults and all the other 'inmates of society', such as the Respondents.

An analysis and comparison of *Hamilton v. Leavy,* 117 F.3d 742 (3d Cir. 1997) to my case yields interesting insights and questions:

Case:
"Hamilton has a long history of being assaulted throughout the Delaware prison system."

Comparative Analysis:
I have a long history of getting injured due to my health plans limiting and preventing me from getting rehabilitative care with jaw-airway specialists.

Case:
"After reviewing Hamilton's history of being assaulted in prison, the MDT unanimously recommended that Hamilton be placed in protective custody. But despite their own recommendation, the MDT took no immediate action to protect Hamilton."
"The MDT's report and recommendation were forwarded to the CICC, chaired by Lewis. The CICC thereafter made a unanimous determination to take "no action.""

Comparative Analysis:
Some of my doctors have enough education to understand I need jaws-airway care, and some understand enough to recommend I receive such care but can take no immediate action themselves to provide it. Their recommendations were forwarded to UHCCP-TennCare who took "no action" to assure my health and safety to the extent as is required by their duties and obligations.

Case:
"Consequently, Hamilton remained in the general population. Less than two months following the CICC's "no action" determination, on August 5, 1992, Hamilton was assaulted by another prisoner." "As a result of the assault, Hamilton required surgery to repair two jaw fractures and currently has two metal plates in both sides of his jaw.".

Comparative Analysis:
This is where our cases diverge. Unlike Hamilton I have not been able to get treatment for the injuries related to my jaw-airway issues and live with my injuries and the preexisting danger to my health and safety. Sarcastic Supposition: to get jaw-airway care I should commit a crime, go to prison, and get assaulted. Analysis of Sarcastic Supposition: If Prison Officials do their job, they will prevent the assault and my plan will fail and I won't get assaulted and receive jaw-airway care. Conclusion: Law-breaking UHCCP-TennCare prevents jaw-airway care for law-abiding disabled adults, law-abiding Prison Officials prevent jaw-airway care for law-breaking disabled adults. *Brain Explodes*

Case:
"Hamilton thereafter filed suit in district court, claiming that prison officials violated state prison regulations and showed a deliberate indifference to his safety"

"The district court granted summary judgment in favor of the MDT defendants on the ground that they recommended that Hamilton be placed in protective custody, and were without authority to effectuate that recommendation."

Comparative Analysis:
I submitted complaints and appeals and doctors recommendations to UHCCP-TennCare, and UHCCP-TennCare responded by showing deliberate indifference to my health, safety, disability needs, and their statutory obligations (I cited them in my complaint-appea)l. It's UHCCP-TennCare who prevents both me and my doctors from doing what is needed. Even those doctors who did not do all that they should to help me, these doctors conducted themselves in that manner because the "deliberate indifference" of UHCCP-TennCare conditioned them to believe that no matter how hard they tried UHCCP-TennCare wouldn't let them help people like me. UHCCP-TennCares response to my complaint-appeals proved them correct.

Case:
"While "[i]t is not . . . every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for a victim's safety," "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" Farmer, 114 S. Ct. at 1977 (quoting Rhodes v. Chapman, 452 U.S. 337, 345 (1981))."

Comparative Analysis:
Health plans are not going to be perfect places either. Some people will not get the care they need at the time that they most need it. Their needs might exceed what is medically possible or financially responsible. Or the complexity of their case as yet requires further diagnostics and analysis before It becomes clear what's causing the health conditions causing one's disabilities and how to treat them rehabilitatively. However, the Respondents engage in misconduct to make succeeding in the diagnostic and treatment identification process as impossible as possible. And if by chance one does succeed UHCCP-TennCare then endeavors to limit and prevent access to rehabilitative treatment. There comes a time when a health plans conduct becomes misconduct and is a "cruel and unusual" "unnecessary and wanton infliction of pain." We are well past that time with respect to my case.

Case:
"("[O]ur cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."). Specifically, the inmate must show that the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference." Id."

Comparative Analysis:
Given the extent of my communications to UHCCP-TennCare via my 2019 and 2023 complaint-appeals and supporting medical records, I believe the Respondents' are certainly aware of my situation. My diagnoses, the causes of the health conditions causing my disabilities, my need for rehabilitative care, and how I have not been allowed to access the care I need. How because of that I have sustained serious harm and I'm at risk of sustaining further serious harm. I also believed I had made the Court aware of these matters, but the Courts April 22nd denial of my Motion for Accomodations indicates that they believe my risk of injury is too 'hypothetical' and the evidence I have presented to not be 'competent'.

Case:
"Hamilton also alleges that the district court erred by denying his request for the appointment of counsel." (749)
"the district court considered the factors we announced in Tabron v. Grace, 6 F.3d 147, 155-56 (3d Cir. 1993), for determining whether the appointment of counsel is warranted."
"In Tabron we held that when deciding whether to appoint counsel for indigent litigants, district courts should consider the merits of the plaintiff's claim, the plaintiff's ability to present his or her case, the difficulty of the legal issues, and the degree to which the case will require extensive factual investigation or turn on credibility determinations. Id. at 156"
"After weighing the various Tabron factors, the district court concluded that Hamilton could not demonstrate "special circumstances indicat[ing] the likelihood of substantial prejudice to him resulting . . . from his probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984).

We are unable to agree with this conclusion for two reasons: first, the district court erred in concluding that Hamilton did not have a colorable claim; second, the record indicates that

Hamilton may be ill-equipped to represent himself or to litigate this claim inasmuch **as there is unrebutted medical evidence that he suffers from a paranoid delusional disorder**. The district court's failure to consider the weight of this fact demonstrates that more serious consideration should have been given to Hamilton's request for the appointment of counsel. We will therefore reverse on this issue and remand to the district court with instructions to appoint counsel for Hamilton. See Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991) (appointment of counsel appropriate when plaintiff presented colorable claim of deliberate indifference to serious medical needs resulting in permanent deformities)." (emphasis added)

Comparative Analysis:
Mental and cognitive disabilities which substantially limit brain function have been recognized as requiring the appointment of counsel in certain civil cases independent of the ADAs protections. The court's indifference to my likelihood of incapacitating injury or death seems like a bit of a problem given the ADA related CFR [28 CFR § 35.130] and that my case is against TennCare for their "deliberate indifference" of my "serious medical needs resulting in" them abusing, exploiting, and injuring me repeatedly over a number of years causing me to become more severely disabled and simultaneously deprived of my fundamental rights.

Respondents' claim that, "appointment of counsel in a civil case is "justified only by exceptional circumstances." Lavado v. Keohane, 992 F.2d 601, 606 (6th Cir. 1993). No such circumstances are presented here. Indeed, Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party" [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 1]. Respondents' claim that no such exceptional circumstances are present, but Respondents do not specify why they believe this to be the case nor how they arrived at that determination. Nor do respondents argue why the exceptional circumstances standard should be used when other courts emphatically and explicitly reject it [*Supra* pg. 5 ¶ 3]. Which seems to me to make Respondents' claim quite specious. Let us nevertheless examine "exceptional circumstances" in the spirit of performing a full and fair review.

Bell v. Todd cites *Hessmer v. Miranda* cites *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993) which states:
"In determining whether "exceptional circumstances" exist, courts have examined "the type of case and the abilities of the plaintiff to represent himself." *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987); *see also Poindexter v. FBI,* 737 F.2d 1173, 1185 (D.C. Cir. 1984). This generally

involves a determination of the "complexity of the factual and legal issues involved." *Cookish v. Cunningham,* 787 F.2d 1, 3 (1st Cir. 1986)."

Lavado v. Keohane cites *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987):
"Appointment of counsel is authorized in § 1983 actions only in "exceptional circumstances." *Id.* at 412.[*Robbins v. Maggio,* 750 F.2d 405, 413 (5th Cir. 1985).]"

Archie v. Christian cites *Robbins v. Maggio,* 750 F.2d 405, 413 (5th Cir. 1985):
"In *Caston,* this Court expressed the view that a layman unschooled in the law in the area of civil rights who had been inappropriately denied assistance of appointed counsel had little hope of successfully prosecuting his case to final resolution on the merits. *Id.* at 1308. This statement is no less true after *Coopers Lybrand.* Indeed, there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims."

Lavado v. Keohane cites *Cookish v. Cunningham,* 787 F.2d 1, 3 (1st Cir. 1986):
"Whether exceptional circumstances exist requires an evaluation of the type and complexity of each case, and the abilities of the individual bringing it. *Branch v. Cole,* 686 F.2d 264, 266 (5th Cir. 1982)."
"Some factors which courts have found to bear on the question of exceptional circumstances in a particular case include the indigent's ability to conduct whatever factual investigation is necessary to support his or her claim, *Peterson v. Nadler,* 452 F.2d 754, 758 (8th Cir. 1971); the complexity of the factual and legal issues involved, *Childs v. Duckworth, supra,* at 922; and the capability of the indigent litigant to present the case. *Maclin v. Freake, supra,* at 888."

Cookish v. Cunningham cites *Childs v. Duckworth,* at 922:
"However, the prisoner has no constitutional right to such an appointment unless the denial of proper representation would result in fundamental unfairness impinging upon the prisoner's due process rights[3] or, as we have stated recently in *Merritt v. Faulkner,* 697 F.2d 761, 764 (7th Cir.

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[3]Mot. Acc. Just. pg. 7-8
"The State of Tennessee's discriminatory procedures of due process causes the State of Tennessee to deprive disabled adults of their health, wellbeing, and limited resources by the State without due process"
"That in Tennessee the burdens of litigation created by the procedures of due process could itself further circumvent the process of due process is, well, it is quite remarkable."

1983), "the circumstances of a particular case may make the presence of counsel necessary." *See also LaClair v. United States,* 374 F.2d 486 (7th Cir. 1967)".

"It is the recognized duty of the trial court to insure that the claims of a *pro se* client are given a "fair and meaningful consideration," *Madyun v. Thompson,* 657 F.2d 868 (7th Cir. 1981), particularly when his First Amendment rights are concerned[4], and also to give liberal construction to a *pro se* plaintiff's pleadings. *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). In *Maclin v. Freake,* 650 F.2d 885 (7th Cir. 1981), we have set forth a variety of factors which should be weighed in determining whether counsel for a *pro se* litigant should be appointed. The threshold question is whether there are merits to the indigent litigant's claim." (emphasis added)

"Once this threshold is passed, the other factors to be considered are whether: the litigant has the ability to investigate the factual issues in dispute; evidence introduced will be in the form of conflicting testimony, thus requiring the need for cross-examination by an attorney; the litigant is capable of presenting his own case; and the legal and factual issues are complex."

Childs v. Duckworth cites Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981):

"The decision must rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel." (emphasis added)

"First, the district court should consider the merits of the indigent litigant's claim."

"Once the merits of the claim are considered and the district court determines the claim is colorable, appointment of counsel may or may not be called for, depending upon a variety of other factors. One such factor is the nature of the factual issues raised in the claim. Where the indigent is in no position to investigate crucial facts, counsel should often be appointed."

"Counsel may also be warranted where the only evidence presented to the factfinder consists of conflicting testimony. In such cases, it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination."

"Another factor to be considered is the capability of the indigent litigant to present the case. In *Drone v. Nutto,* 565 F.2d 543 (8th Cir. 1977), the district court was ordered to reconsider

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[4] Mot. Acc. Just. pg. 22-23 "With most disabled adults being unable to engage in effective litigation against State agencies, there are no meaningful consequences to those agencies when they do not attend to appeals, complaints, grievances, and other disputes in good faith with conformity to the law. Thereby disabled adults are deprived from being 'able' to effectively petition for an equitable resolution of a dispute with the State of Tennessee. This violation of the First Amendment rights of disabled adults in Tennessee then leads to violations of other civil and constitutional rights."

appointing counsel for the indigent plaintiff because the record indicated **the plaintiff suffered from mental disease and therefore could not conduct the case unaided.**" (emphasis added)

"More generally, the Fourth Circuit has stated that "[i]f it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him." *Gordon v. Leeke,* 574 F.2d 1147, 1153 (4th Cir.), *cert. denied sub nom. Leeke v. Gordon,* 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978)."

"On the other hand, where it appears the indigent litigant is competent to pursue the claim, courts have denied requests for appointment of counsel. A refusal to appoint was upheld in *Hudak v. Curators of the University of Missouri,* 586 F.2d 105 (8th Cir. 1978), *cert. denied,* 440 U.S. 985, 99 S.Ct. 1799, 60 L.Ed.2d 247 (1979), where the indigent was a former law professor whom the court deemed competent to handle her case unaided."

"The district court should also take into consideration the complexity of the legal issues raised by the complaint."

"We think it follows that where the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis." (emphasis added)

"The factors we have discussed thus far are those most often cited by other courts presented with requests for counsel. They are, in addition, the factors most relevant to the case before us now. They are by no means an exclusive checklist, however. In some other case other elements will no doubt be found significant — even, perhaps, controlling."

"Maclin has presented a colorable claim for relief. He is a paraplegic and, according to the limited record presented here, received no physical therapy for his condition from the time he entered prison"

"Confined to a wheelchair and in constant pain, he can hardly be thought capable of conducting an adequate examination of his own medical records, let alone of developing evidence of the medical treatment he ought to have received. Should his case go to trial, we think he will need an attorney to elicit relevant, comprehensible testimony that will elucidate for the factfinder the treatment he received and the adequacy of that treatment."

"Finally, this is not a case in which the indigent plaintiff has demonstrated a workable knowledge of the legal process, *cf. Davis v. United States, supra,* 214 F.2d 594 (7th Cir. 1954)."

"Under all the circumstances presented here, we conclude the district court should have granted Maclin's request for appointed counsel. We reverse the grant of summary judgment to the

defendant and remand for appointment of counsel and for further proceedings. Circuit Rule 18 shall apply."

Childs v. Duckworth cites *Merritt v. Faulkner,* 697 F.2d 761, 764 (7th Cir. 1983):
"Indigent civil litigants have no constitutional or statutory right to be represented by a lawyer. Nevertheless, particularly when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility. *See Bounds v. Smith,* 430 U.S. 817, 821-24, 97 S.Ct. 1491, 1494-1496, 52 L.Ed.2d 72 (1977); *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972). This principle of meaningful access is reflected in many decisions by the United States Supreme Court and by this court. Congress, in 28 U.S.C. § 1915 (1976), has indicated that the federal courts must be a judicial forum truly available to the rich and poor alike."
"In some civil cases meaningful access requires representation by a lawyer. In *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932), Justice Sutherland observed that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [sic] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more is it of the ignorant and illiterate, or those of feeble intellect."

"Even when there is no absolute right to counsel, *see, e.g., Scott v. Illinois,* 440 U.S. 367, 369, 99 S.Ct. 1158, 1159, 59 L.Ed.2d 383 (1979) (no right to counsel when potential prison sentence is not actually imposed), the Court has made it clear that the circumstances of a particular case may make the presence of counsel necessary."
"Quite often the factual and legal issues in a civil case are more complex than in a criminal case. *See* Note, *The Indigent's Right to Counsel in Civil Cases,* 76 Yale L.J. 545,

548 (1967). This often will be true in cases presenting constitutional questions. Indeed, surviving a critical motion to dismiss under Fed.R.Civ.P. 12(b)(6) may well depend upon the ability to perform legal research and present sophisticated legal arguments in such doctrinally complex areas as prisoner medical rights or free speech. These are skills which a layman often may not have and in which a lawyer receives professional training. [FN3]

[Footnote 3] The problem is compounded by the inequality which results when the defendant, most often the state, is represented by counsel and the indigent civil litigant is not. An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources. This assumption is destroyed when only one side is represented. *See Bounds v. Smith,* 430 U.S. 817, 826, 97 S.Ct. 1491, 1497, 52 L.Ed.2d 72 (1977)." (emphasis added)

The above cases focus on prisoners, and often cite 28 U.S.C. § 1915 Proceeding in forma pauperis. Maclin v. Freake takes particular note of § 1915 even quoting the entire subsections of (a) and (d). Upon reviewing § 1915 I found subsection (e), which states "(e)(1) The court may request an attorney to represent any person unable to afford counsel.". While other subsections specify "prisoner" this section uses the term "person" suggesting that 28 U.S.C. § 1915(e) applies to people like me. It remains unclear how proceeding in forma pauperis might apply to my situation let alone how to do it. The wording of § 1915(e) suggests it is at the Courts discretion and can be granted with or without request. Google searches seem to equate the Pauper's Oath affidavit for filing as being the same as the In Forma Pauperis affidavit. I filed my case with a Pauper's Oath via the Uniform Civil Affidavit of Indigency.

Tennessee Supreme Court Rule 13 on appointment of counsel to indigent persons has a similarly open wording which seems to apply to persons like me, but is also unclear how exactly it does relative to the criteria set forth in the case law cited above.

"(a)(1) The purposes of this rule are:

(A) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;"

"(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule."

There's a striking similarity between my case and Maclin v. Freake in which the court ruled "the district court should have granted Maclin's request for appointed counsel". That

Maclin was denied appropriate physical therapy is, well, it seems quite fitting that his case be cited here in my case. And like Maclin I have severe disability that doesn't get better on its own, a need for intensive medical assistance, help seeking and receiving that medical assistance, have and continue to be subject to state actions depriving my fundamental rights, and have a lack of familiarity with the legal process.

I didn't understand what a Petition for Judicial Review was in December of 2023, a month before filing my Petition for Judicial Review. I didn't know what a Motion was or what it did or how to do it. When I filed my Petition I didn't understand what I actually needed to put in it beyond briefly explaining my issues with TennCare and what I needed from the court. I looked at other filings via the Chancery Information Access to try to understand things better, but when I encountered phrases like "Causes of Action" I didn't understand what that meant and all it did was cause me confusion. A confusion that grew as It became apparent that even though I read and reread the Tenn. R. Civ. P. and Local Rules sections on service of process multiple times I had misunderstood how to do something as basic as service of legal process. I didn't even know I had to notarize an affidavit. I've known that the Rehabilitation Act of 1974 somehow needs to be included in my case, but don't understand how to include it appropriately or even if I did if it would matter [29 U.S.C. § 794]. I don't understand the differences between the various courts or if there is a court my case would be most appropriate to present to. All I had was TennCare sending me a denial letter telling me the next hoop I was supposed to jump through was to file a petition for judicial review. And after I have, they file a motion to dismiss it claiming I didn't exhaust all administrative remedies.

The Maclin v. Freake judgment occurred in 1981 against the backdrop of the Rehabilitation Act of 1974. The Americans With Disabilities Act was passed in 1990, and the Americans with Disabilities Act Amendments in 2008. A disabled adult's right to counsel, the protections and accommodations which should be afforded, should be stronger now than they were in 1981.

In denying my Motion for Accomodations the Court noted that "The allegations contained in Mr. Smith's Amended Complaint and Petition and his motions are not competent "evidence" in support of his claims. See Hillhaven Corp. v. State ex rel. Manor Care, Inc., 565 S.W.2d 210, 212 (Tenn. 1978)." [4.22.2024 Order Denying Mot. Accom. pg. 3 ¶ 2]. In my Motion for Accessible Justice I express my dismay and confusion at the ruling in the Court's order saying, "My Petition for Judicial Review included what I thought to be competent evidence". "Am I so cognitively impaired by my disabilities that I can't figure out what is and is not competent evidence? Or did I present competent evidence but my cognitive impairments prevent me from

properly communicating that evidence? Is there a Rule about evidence that my mental disabilities are once again preventing me from understanding?" [Mot. Acc. Just. pg. 12 ¶ 4-5].

The inability to present competent evidence is one of many factors in my case "that have been recognized as highly relevant to a request for counsel" [Maclin v. Freake 650 F.2d 885 (7th Cir. 1981)]. Or maybe my impairments are even keeping me from understanding this matter properly too.

Respondents' have called into question my case, even to the point of questioning whether or not I have a case [Resp. Memo Supp. Mot. Dismiss Am. Pet. Rev. pg 1]. Which indeed begs the question of my "capability" [Maclin v. Freake] to present my case, as well as highlights that the complexity of the legal issues in my case are so complex that even the Respondents' struggle to understand them despite how much I'm trying to describe my situation and my claim. Yet, Respondents' also claim I have not amply demonstrated that I am substantially impaired relative to other pro se litigants. I don't understand how one could hold such a belief given the extent of the information I disclosed about how "I have multiple health conditions that cause multiple impairments that substantially limit multiple major life activities" [Mot. Acc. Just. pg 14 ¶ 1]. My explanations focused upon my mental and cognitive impairments and disabilities even pointing out that, "Three of my declared health conditions (Major Depressive Disorder, Bipolar Disorder, PTSD) are specifically mentioned in the CFR as substantially limiting brain function [28 CFR § 35.108(d)(2)(iii)(K)]." [Id.]

It would seem appropriate to extend Justice Sutherland's 1932 statement with an amendment based upon current laws and understanding, that "If that be true of men of intelligence, how much more is it of the ignorant and illiterate, and those of feeble intellect" or those with substantially limited brain function and multiple health conditions that cause multiple impairments that substantially limit multiple major life activities. One should consider that in the 1930s "those of feeble intellect" were often people with mental disabilities. Justice Sutherland's statements can be understood to encompass people like me who have "substantially limited brain function".

It was stated in Maclin v. Freake [*Supra* pg. 14 ¶ 2] that, "Where the indigent is in no position to investigate crucial facts, counsel should often be appointed." To be in a position to investigate one has to be able to perform the tasks of investigation. These tasks generally require subject matter knowledge, sufficient cognitive ability, financial capability, legal expertise, and physical function. An investigator needs to have these abilities and be able to employ them on a consistent basis. I have a limited ability to perform the tasks necessary to litigate my case. I

do not have consistent function. I become increasingly impaired and less functional the longer I try to function despite my disabilities.

An analogy that I've used for years to help my doctors understand my disability situation is that I have to build a sandcastle in the middle of a storm with rain and surf washing it away over and over while everybody else gets to build on a sunny beach, take photos, and compete in sand castle contests. A person being intelligent doesn't make them able. Intelligence can be compromised by impairment. Like how a doctor or lawyer who practices while inebriated is a problem, so too it is a problem for an intelligent disabled adult suffering from substantially limited brain function to engage in pro se litigation.

I think Respondents' statement that "Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party" is a clear instance of disability discrimination. Or perhaps respondents are attempting to argue that substantially limited brain function is a common affliction or that litigation is not a mentally demanding "major life activity" for which someone with substantially limited brain function would be disadvantaged relative to most people who possess no such mental or cognitive disabilities. Respondents do not offer much to support their assertion beyond presenting general rules, policy, and some case studies which do not address whether or not applying such rules and policies would be discriminatory against my disabilities and violate the Motions cited statutes and my fundamental rights granted by the 1st, 5th, and 14th Amendments of the U.S. Constitution. I believe that respondents' denying the impact my disabilities have on my ability to perform a task as mentally demanding as litigation in such a clearly discriminatory manner compromises what little merit their arguments might have been able to have.

My motion for accessible justice has an entire section titled "Constitutional Violations" that define the Constitutional violations that occur by not appointing me an attorney [Mot. Acc. Just. pg 22-24]. Respondents provide no direct, let alone detailed, counter to my arguments and instead make a blanket claim that "Petitioner does not establish a basis for appointing counsel under either the Tennessee or Federal Constitutions or the ADA, and his Motion must be denied." [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 2].

Central to my case is that the Respondents' refuse to provide full and fair review of my 2019 and 2023 complaint-appeals. And here too Respondents seem to refuse to provide a full and fair review of my Motion for Accessible Justice. Providing full and fair review of the very case law they cite in opposition then leads to nearly the same conclusions I arrived at in my Motion for Accessible Justice. Were I truly capable of presenting my case I would have been able to find, review, and cite such case law in support of my Motion earlier. But I did not, which

further demonstrates my general lack of ability to handle this case which clearly involves layers of complexity related to civil and constitutional rights.

My Motion for Accessible Justice isn't even the central issue of my case; it is peripheral to it. If this matter proves so challenging without counsel, then the central matters of my case will be even more so. Respondents' arguments continue to demonstrate the necessity that the Court provide relief to me, for the Respondents refuse to provide the full and fair review that is required for an equitable and just resolution of my dispute which might then allow us to achieve the common good of Defending The Disabled such that we might then pursue and achieve The Nation's Proper Goals for individuals with disabilities [42 U.S.C. § 12101].

When one examines the case law presented by the ADA Coordinator[5] and the case law directly presented by the Respondents', one will note that the question of whether or not disabilities which substantially limit brain function warrant appointment of counsel is not directly evaluated. While there is no absolute right to an attorney in civil cases, there is a conditional right to an attorney in civil cases. A conditional right which I argue disabled adults like me meet in general even without the ADA's protections, but when considering the ADA that right to counsel is further solidified. And when from that solidified position we then contemplate my situation as a whole it becomes clear that there is a strong basis to assert I must be appointed counsel. How 42 U.S.C. §§ 1396-1, 1396a(a)(19), and the other various statutory and constitutional provisions that I discuss in my Motion for Accessible Justice relate to my case and how the State depriving me of counsel would further exacerbate the State's prior violations of my rights and trigger specific ADA related prohibitions on such conduct [28 CFR § 35.130].

I'm a disabled adult. A vulnerable person. I've committed no crime, done no wrong, and warrant no prejudice. I am not accused of causing "Mr. Bell's decapitated, dismembered, and burned body" as in Bell v. Todd. My indigency and my inabilities are not related to being incarcerated or committing a crime. I am wrongfully imprisoned by my disabilities due to the misconduct perpetrated by the State of Tennessee's Department of Finance and Administration Division of TennCare. Rather than being an accused or convicted wrongdoer confined by the consequences of their actions, I'm a seeker of the common good attempting to Defend The Disabled, myself and others, from a great wrong being done by the Respondents and their accomplices. My situation is quite exceptional by many measures.

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[5] [*White v. Franks,* No. 2001-CA-001018-MR, 2003 WL 22520440, at *4 (Ky.Ct.App. Nov. 7, 2003)]
[*Stone v. Town of Westport*, 3:04cv18 (JBA) (D. Conn. 2/23/07), 2007 WL 9754412 *1]
[Smith v. Robertson, 341 So. 3d 608 (La.App. 1 Cir. 3/3/22)]]
[Smith v. Dugas, 2019-0852 (La. App. 1 Cir. 2/26/20), 2020 WL 913673 *2]

It is Discriminatory and Prejudiced to so casually dismiss my arguments based upon past rulings about right to counsel in civil cases where the only factor evaluated was the Sixth Amendment U.S. Const., as the Respondents' did, while ignoring something as basic, as fundamental, as the fact that my disabilities substantially limit brain function and create mental and cognitive impairments that substantially limit my capacity to perform major activities of living relative to most people. I am *severely* disadvantaged by my mental and cognitive disabilities.

Even if by chance the courts pro se parties are predominantly people like me, and so I am not any more disadvantaged than they are, that doesn't stop the policies and rules from being discriminatory against each and every one of us as my Motion for Accessible Justice describes.

2. Requested Relief was Clearly Communicated

Respondents' claim that beyond my request for the court to appoint me counsel the relief I request is "is not adequately defined such as to give Respondents fair opportunity to respond." and is "on its face too vague to identify the requested relief" [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 2]. It is not for me to define to the court what it can or cannot do to make justice accessible. That is an administrative matter for the court to determine. I can only define what my disabilities are and how the court is made inaccessible to me because of them and the statutory and constitutional basis that the court should make reasonable accommodations and make suggestions as to what those reasonable accommodations should in my view be. What relief is necessary to make justice accessible is a matter that must be determined at the Court's discretion, as the Court's determination and implementation of policy will affect if it might be open to a repeat of suits like Tennessee v. Lane [Mot. Acc. Just. pg.18-19 ¶ 4].

As I stated in my Motion, "It is difficult to find a justification for it to be the burden of disabled adults to educate a health insurance plans administrators and its doctors or the Court and its staff so that they can comprehend our disabilities well enough to avoid discriminating against us and depriving us of our fundamental rights." [Id. pg. 11 ¶ 2] The job of making justice accessible is one for the Court to perform. As an adversely affected party I will assist the court as much as I can so that Justice is Accessible to myself and others. But "as a disabled adult pro se litigant I don't have the education or experience necessary to fully understand what the burdens of litigation are or how to meet them." and thus cannot determine with specificity and particularly the entirety of the relief the court will need to provide in order to make Justice Accessible to myself and other disabled adults.

It is the Court's duty to provide Accessible Justice and it is not the Respondents' place to question how and by what means the Court determines to do so. It is entirely outside of the Respondents jurisdiction to object to the Court making Justice equally Accessible to Disabled Adult Pro Se litigants. That the Respondents' dare to assert they have such a right is a decision "In excess of the statutory authority of the agency" and an "unwarranted exercise of discretion". And while I'm not sure how or if the UAPA applies here directly, I think you know what I'm saying and can see how the Respondent's pattern of behavior gives further merit to my claims. With my requested relief as it is I am entrusting my welfare to the court even as the respondents lob yet another rock at me as I attempt to crawl towards justice.

Image Title: Crawling to Justice.

Dated May 4th 2024.

Sincerely,
Sean Smith
6402 Baird Lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Certificate of Service

I Sean Smith hereby certify that a true and correct copy of *Petitioners' Reply to Respondents Response In Opposition to Petitioner's Motion for Accessible Justice* is being forwarded via email to the following:

Respondents Counsel
HAYLIE C. ROBBINS (BPR# 038980)
Assistant Attorney General
Office of the Tennessee Attorney General
Haylie.Robbins@ag.tn.gov

Dated May 4th 2024.
Sincerely,
Sean Smith
6402 Baird Lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	)	
	)	No. ADM2024-00227
REVISIONS TO TENNESSEE	)	
SUPREME COURT RULE 13	)	

COMMENTS ON PROPOSED REVISIONS TO TENNESSEE SUPREME COURT RULE 13

Comes now, Claiborne H. Ferguson, President of the Tennessee Association of Criminal Defense Lawyers and files this, the Association's comments on the proposed changes to Rule 13.[1]

Currently the State Legislators have passed HB0430/SB0624 – AN ACT to amend Tennessee Code Annotated, Title 37; Title 39 and Title 40, relative to acts committed by juveniles. This is the so called "Blended Sentencing Act" that allows for juveniles to receive sentences that exceed their 19 birthdays. The legislative description of the bill is:

> Juvenile Offenders - As introduced, allows a juvenile court to impose a blended sentence on a child 16 years of age or older for a juvenile offense that would be a Class A, B, or C felony if committed by an adult; defines blended sentencing as a combination of any disposition otherwise provided for juveniles and a period of adult probation to be served after the child turns 18

[1] TACDL has co-signed onto two other Comments and will not repeat the issues contained in those Comments but stands by and joins in with those Comments.

years of age and which ends on or before the child's twenty-fifth birthday. - Amends TCA Title 37; Title 39 and Title 40.

The proposed Rule 13 amendments do not address the indigent pay for this new "level" of charge. This isn't a juvenile delinquency case nor a circuit/criminal court case but some combination of both that will automatically requires lengthy, complex representation, spanning over two courts, requiring a jury trial every time, and involving a delayed, later occurring, hearing once the child reaches the age of 19 that determines if the Juvenile Court will maintain custody of the "youthful offender" for another six years. Obviously, under current Rule 13 rules, cases in juvenile court can be subject to interim billing while criminal cases are not. There are no provisions for billing currently in Rule 13 for this new hybrid case. Clearly the compensation for juvenile cases is inadequate for this level of work and complexity.

This new level of case should be considered, for compensation, as a trial court level case and compensated at the same rate or greater. This case will require more work and skill than the normal A/B felony that starts in general sessions and proceeds to circuit court. In that context, the attorney would receive a standard fee up to $4,500.00 ($1,500.00 for general sessions and $3,000.00 for circuit court), and a maximum fee, if extended and complex, of up to $7,500.00 ($1,500.00[2] for general sessions and $6,000.00 for circuit court).

It is TACDLs request that the Court take this time to make appropriate provisions for the indigent funding of this new level of representation. At a minimum, we believe the funding level

[2] Counsel would note that there seems to be a typographical or drafting error on the proposed Rule 13 forwards to the state bar. At Section 2(e)(4)(C), the Maximum Compensation is for a $1,250.00 compensated case. There is no similar section for cases compensated at $1,500.00. It is believed that that should be a maximum od $3,000.00 for cases with an otherwise $1,500.00 limit. Nowhere in Rule 13 does it state a Complex and Extended rate for the $1,500.00 cases. If it was the Court's intent to not provide a complex and extended fee for general session work, the Association suggests that there be a complex and extended fee for the juvenile transfer portion of the Blended Sentence case as a transfer hearing is in effect a trial on the merits.

should be on parity with Rule 13, Sections 2(d)(4)(A)[3] (preliminary hearings) and (d)(5)(B) (Murder, A/B felony), that is, a maximum compensation of four thousand five hundred dollars ($4,500.00), unless designated complex or extended and then, seven thousand five hundred dollars ($7,5000.00). As discussed in footnote 2, supra, the transfer hearing should have a complex and extended rate and, if so, the maximum complex and extended fee would actually be $9,000.00 (unless it is a first degree murder and the maximum rate would potentially be above that at the directors discretion).

The final question to be answered would be when would the billing be due. For example, in the normal adult felony case, the case is billed twice, once after the preliminary hearing and once after the trial. But in the blended sentencing context, there are a number of places where billing might become "due." Would the attorney bill the AOC after the transfer hearing, then after the trial, then after adjudication in juvenile court, and then again after the detention hearing once the child reaches 19 years of age? TACDL suggests the case be subdivided into two billing segments, the first ends after the transfer hearing, the second after adjudication. Currently, there isn't enough information to know how the hearing at age 19 will proceed and it should, we suggest, be billed separately as a new juvenile case, years later after the trial has been completed.

As a final suggestion, Section 5(a)(1)(D) should be amended to expressly include Blended Sentencing in as a "juvenile transfer proceeding" as the assistance of experts and investigators will be critical in representing these children that are facing adult sentencing.

[3] Or Section 2(d)(4)(B) (juvenile charged with non-capital offense).

Thank you for the opportunity to review and comment of these proposed changes, and we at TACDL are always available to consult on any issue the Court may need us on.

Date: 6 May 2024

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TENNESSEE
BAR ASSOCIATION

May 6, 2024

The Honorable James Hivner
RE: Tennessee Supreme Court Rule 13
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Via email: appellatecourtclerk@tncourts.gov

Re: **IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13 - No. ADM2024-00227**
Comment of the Tennessee Bar Association

Dear Mr. Hivner:

The Tennessee Supreme Court issued an Order on March 7, 2024, soliciting comments concerning its published proposed revision to Tennessee Supreme Court Rule 13. The Tennessee Bar Association ("TBA") respectfully offers the following comments for the Court's consideration.

Background

Tennessee Supreme Court Rule 13 addresses the Appointment, Qualifications, and Compensation of Counsel for Indigent Defendants. In the March 7 Order, it is noted that the proposed revisions do not include any adjustments to the compensation rates and/or caps for indigent representation. Given the recent funding increases approved for indigent representation, it is anticipated that the Court will have additional proposed revisions to Rule 13, some of which may clarify or address the concerns raised here.

These comments from TBA relate to proposed changes in sections 1, 2 and 7 of Rule 13. Specifically, the provisions that address the financial obligations that may be assessed with guardian ad litem ("GAL") appointments, the filing and review process for determining when cases are complex or extended and situations when alternative agreements may be used to help provide representation for indigent individuals.

Section 1 - Right to Counsel and Procedure for Appointment of Counsel

This section provides guidance on the types of cases and proceedings that are eligible for appointed counsel and procedures for appointments and compensation.

Proposed additions to the rule create a financial responsibility for "parents, legal custodians, or guardians" who are deemed "financially able to defray a portion or all of the cost of the guardian ad litem..." This requirement applies to cases with reports of abuse or neglect, investigation reports and in proceedings to

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terminate parental rights *(Section 1 provisions (d)(2)(C) & (D)).* The explanatory comments note that "the finding of indigency must be evidenced by a court order" and emphasizes that courts have a "statutory duty to consider whether the indigent party can afford to defray a portion or all of the costs of representation."

The intended purpose seems to be that parties who have the means and are responsible for minor children also be held financially responsible for GAL fees incurred due to those parties' neglect or abuse. However, the proposed provisions risk unintended consequences for the GAL, potential temporary custodians and most significantly, the children involved.

First, this provision shifts the burden to the appointed GAL to collect (some or all) fees via court order. Attorneys appointed as GALs are already contending with inadequate compensation and heavy caseloads. This provision adds an unwarranted encumbrance to the appointed GAL role, increasing the complication, delay, and uncertainty of compensation by requiring they take action against the parents or guardians in order to be paid.

TBA is also concerned that the new provisions may discourage relatives or other potential caretakers from stepping forward to take temporary legal custody of a child otherwise at risk of being in foster care. The potential for courts to impose fees for appointed GALs against these temporary custodians will make placing children more difficult because relatives or other possible caregivers may fear some unknown financial burden to pay guardian ad litem fees. The alternative is that children facing difficult and urgent situations have fewer resources for care, and the state then bears the financial responsibility anyway though the placement of those children in foster care.

One suggestion to address this particular concern is to include an exception making it clear that the potential for financial responsibility does not apply to a person who takes custody because of the D&N filing and is not a party who was legally responsible for the child at the time the child became dependent and neglected.

Individuals receiving counsel under Rule 13 are indigent and these new provisions create additional burdens on children and families seeking stability, including those working toward reunification via a Permanency Plan. The rationale for the new provisions is not clear in the proposed rule changes and may result in unintended burdens on all parties in the action.

Section 2 - Compensation of Counsel in Non-Capital Cases

This section provides guidance on compensation rates and maximums, as well as procedures for cases designated as complex or extended.

The proposed addition of procedure for review of complex or extended orders that are not initially approved includes a deadline for response that may be difficult to comply with. Specifically, the proposed section includes a requirement that counsel submit a request for review within 10 business days or it will be deemed waived. The proposed language does not include any exceptions or allow discretion by the Court to consider the request.

Section 7 - Contracts for Indigent Representation

This section provides authorization for the Administrative Office of the Courts to enter into alternative agreements to provide representation to indigent persons in some situations.

Specifically, this section authorizes "agreements with attorneys, law firms or associations of attorneys to provide legal services for a fee to indigent persons" in specified situations. The agreements may specify number and type of cases, but the fixed fee may not exceed the established rates.

The current rule authorizes these arrangements in certain cases involving (1) emergency involuntary judicial hospitalization actions; (2) child support enforcement proceedings; and (3) allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights. The proposed change eliminates authorization for all types of cases except for those that involve emergency involuntary judicial hospitalization actions.

Given the current challenges facing our indigent representation system, and a need to explore options to improve the administration of justice, it seems inconsistent with that goal to narrow the areas where alternative agreements for representation may be utilized. The rationale for eliminating types of cases in Section 7 is unclear and the proposal does not include an explanatory comment for this change. Going forward, it seems prudent to encourage alternatives to address the current challenges.

Conclusion

The TBA commends the Court's ongoing efforts toward attaining additional compensation for appointed counsel, including through current and anticipated revisions to Rule 13. Addressing the current crisis in indigent representation remains a top priority for TBA, and we look forward to continuing to work alongside the Tennessee Supreme Court, the Administrative Office of the Courts, and policymakers on this crucial issue.

The Tennessee Bar Association thanks the Court for the opportunity to provide these comments for consideration.

Sincerely,

Sheree Wright
Executive Director

cc: TBA Executive Committee
John Farringer - TBA Board of Governors & Access to Justice Committee
Lisa Gill - Chair, TBA Family Law Section
Joy Longnecker - Chair, TBA Criminal Law Section
Linda Seely - Chair, TBA Access to Justice Committee

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13

NO. ADM2024-00227

COMMENTS ON PROPOSED REVISIONS TO TENNESSEE SUPREME COURT RULE 13

On March 7, 2024, this Court published proposed revisions to Tennessee Supreme Court Rule 13 and invited public comment from all interested parties. The undersigned submit the following comments in response.

Proposed changes to Section 5(a): Experts, investigators, and other support services

We support the proposed changes to Section 5(a)(1) if the Court and the AOC interpret them as protecting and enlarging the availability of "experts, investigators, and other support services" (hereinafter "support services") to indigent defendants. In recent years, the AOC has interpreted the first sentence of Section 5(a)(1) to deny indigent defendants funding for support services deemed constitutionally necessary by the judges presiding over those cases when those cases are in General Sessions Court, are bound over and not yet indicted, or are in the Motion for New Trial stage. *See generally In Re: Petition to Modify Tennessee Supreme Court Rule 13, Section 5(a)(1) and 5(d)(1)*, No. ADM2021-00237 (filed on March 2, 2021). These funding denials violate indigent defendants' constitutional right to due process and fundamental fairness, and contradict the original expressed intent of the Rule and the Court's clear holdings. *Id.*

In *State v. Barnett*, 909 S.W.2d 423, 426 (1995), the Court held that "due process of law principles required the appointment of expert assistance in a non-capital case when the defendant is able to show that such assistance is necessary to conduct a constitutionally adequate defense." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Based on that holding, the Court adopted Rule 13 with the express intent "to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties *in criminal cases*, parental rights termination proceedings, dependency and neglect proceedings, *delinquency proceedings*, and *capital post-conviction proceedings*." Rule 13, § 1(a)(1)(E) (emphasis added). Five years later, the Court reaffirmed that principle more broadly when it held that its reliance on "the due process principle of fundamental fairness" in *Barnett* "was a clear signal that types of assistance other than psychiatric assistance should be provided upon a showing of necessity." *Scott*, 33 S.W.3d at 753.

The proposed changes to Section 5(a)(1) present an opportunity for the Court to course correct and eliminate the constitutional violations currently happening under Rule 13's administration. The changes make necessary support services available to all indigent defendants (not just those who are entitled to appointed counsel), and define the time frame when those services are available as "the guilt and sentencing phases of a criminal trial." The undersigned support this new, broad language because it includes all criminal case proceedings between arrest and final disposition and eliminates the prior ambiguity surrounding the Rule's use of the phrase "in the trial."

The new proposed rule also retains eligibility in Section 5(a)(1)(B) for necessary support services in "the direct appeal of all criminal cases in which the defendant is entitled to appointed counsel." Although that language should ensure indigent defendants access to necessary support services for motions for a new trial (because in a direct appeal, that is the only forum where those services could be used), that is not always the case. In at least one recent case, the AOC has denied pre-approval for necessary support services for a motion for new trial hearing based on its interpretation that Rule 13 does not authorize it. To eliminate this potential ambiguity, the undersigned recommend that the Court adopt proposed Section (a)(1)(B) with the following modification: "The direct appeal of all criminal cases in which the defendant is entitled to appointed counsel, including motions for new trial."

The undersigned also support the new proposed Section 5(a)(3), which adds eligibility for funding for expert services for youth facing "serious criminal allegations"[1] in certain types of delinquency cases, and for certain non-capital post-conviction proceedings (those involving necessary mental health evaluations, or required DNA or fingerprint analysis). These additions remedy existing gaps in Rule 13 that prevent indigent defendants who qualify for these necessary services from exercising the same fundamental rights as non-indigent defendants.

<u>Proposed Changes to Section 5(d)(1): Rate-setting for support services and "due consideration for state revenues"</u>

[1] This phrase is not defined by the proposed rule changes and should be. We propose the following definition: "any offense for which a youth is subject to transfer or sentencing as an adult."

The proposed changes to Section 5(d)(1) seem to eliminate the inflexible and unreasonably low maximum hourly rate caps for experts and investigators, which was one of the Indigent Representation Task Force's recommendations in 2017. If that is the intent of the proposed changes, we strongly support the proposed amendment. Additional changes to this section would ensure that the AOC interprets and applies Rule 13 in that manner. We recommend removing all references to any "maximum" hourly rate from the rule and explanatory comment, and adding the following sentence at the end of Section 5(d)(1): "Upon a reasonable showing that no expert is available to perform the necessary services at or below the standard approved rate, requests for experts to be compensated at a higher rate of pay may be approved."

We do not support the proposed "additional review" requirement for "[s]ubsequent requests for additional funding for the same investigator or expert...," because we do not understand what this review would entail, or why it is necessary. Needing and requesting additional funding for investigators or experts is common practice, and we see no reason for those requests to undergo an extra layer of scrutiny.

Finally, we strongly oppose the proposed change in Section 5(d)(1) that would require the director and the chief justice to "[give] due consideration to state revenues" when establishing rates paid to investigators and experts providing services to indigent parties.[2] For years now, the Court has kept maximum hourly pay

[2] The Court proposes adding this "due consideration to state revenues" language to other sections of Rule 13, including review of extended or complex orders under proposed Section 2(e)(3). For the reasons explained herein, we strongly oppose its addition to any part of Rule 13.

rates for investigators and experts (and lawyers) far below market value, making it difficult or impossible for indigent criminal defendants to find experts willing to work on their cases. This has the effect of depriving indigent criminal defendants of resources that are necessary to conduct a constitutionally adequate defense and violates their due process rights.

Standard approved rates for expert and investigative services should be based on market value, and what it actually costs to obtain the necessary services from a qualified professional.[3] They should not be set with any "consideration of state revenues" because that is tantamount to saying it is okay for the State to underfund (or not fund) constitutionally required indigent defense services. What if the legislature slashed the indigent defense budget in half next year? Or made even deeper cuts than that? Would the Court triage the constitutional rights of indigent defendants, making "administrative decisions" without judicial review about which poor peoples' needs were the greatest, or who was most deserving?

The Court should not enshrine in its Rules the suggestion that the Constitution allows the Tennessee legislature to underfund constitutionally required indigent defense services. The General Assembly may not appropriate sufficient state revenues to meet the demand for necessary services. The Court has no control over the legislature's actions, but it has absolute control over its own Rules and determinations of what the Constitution requires. When the Constitution requires

[3] *See* Indigent Representation Task Force, *Liberty and Justice for All: Providing Right to Counsel Services in Tennessee,* at p. 53 (April 2017) (finding that expert and investigator rate caps were lower than the prevailing market rate, and recommending the Court adjust them to market rates).

services be provided, the Court's Rules should not diminish or undermine that obligation.

Last year, the Tennessee Supreme Court held that a petitioner in a capital post-conviction proceeding did not have a constitutionally protected right in indigent defense funds, and therefore, the AOC's denial of his expert funding based on an "administrative funding decision" caused by "limited" resources did not violate due process. *See Dotson v. State*, 673 S.W.3d 204, 217 (Tenn. 2023). In reaching that conclusion, the Court disturbingly wrote that "[it], through the AOC Director, has to efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitions in capital post-conviction cases." *Id.* at 215. The Court went on to say:

> Throughout any fiscal year, the AOC Director receives prior authorization orders for funds from trial courts across the state. If funding for expert assistance was unlimited, then all Rule 13 requests could conceivably be granted. But that is not realistic. Funds are limited, and there has to be a mechanism for regulating the flow of funds. That is the role of the AOC Director and the Chief Justice in Rule 13.

Id.

The Court's decision and reasoning in *Dotson* creates a dangerous precedent that threatens to eviscerate its previous holdings in *Barnett* and *Scott*. Those cases unequivocally stand for the proposition that due process requires the State to provide indigent criminal defendants with the expert or investigative services that a judge has found are ***constitutionally*** necessary to his or her adequate defense. In *Dotson*, the Court justified the bureaucratic denial of expert services for ***a man the State is***

trying to kill--even after the trial court concluded those services were necessary to his constitutionally adequate defense--by finding that he did not have a due process right to indigent defense funding. For indigent criminal defendants in the pre-trial, trial, or post-trial direct appeal process, there are no exceptions or loopholes to their constitutional due process rights. In those contexts, things like "consideration of state revenues" and a "limited pool of funds" do not apply, and are not a basis for denying necessary support services.

The Tennessee Supreme Court's role and sworn duty is to uphold and protect the constitutional rights of all people, and to serve as an independent check against the other branches of government when their actions threaten to violate those rights. The Court's adoption of a proposed change to Section 5(d)(1) to require "due consideration for state revenues" would be an abdication of its constitutional duty to serve as a co-equal, third branch of government, and it may improperly incentivize the General Assembly to unconstitutionally deprive indigent defendants of resources "necessary to conduct a constitutionally adequate defense."

<u>Miscellaneous proposed changes</u>

Proposed Section 1(a)(3) would allow the AOC Director to designate one or more unidentified people to make significant decisions about approval or denial of funding orders and fee claim payments. We do not support this change because it would further obfuscate the AOC's already opaque Rule 13 decision-making processes.

Proposed Section 2(e)(3), which replaces former Section 2(e)(2), requires all complex or extended orders (rather than payments) to be reviewed and approved by the AOC Director. It also provides review by the Chief Justice of any order the director does not approve – and describes the Chief Justice's review as "solely limited to the factual allegations contained in the motion and/or order." We oppose this change for several reasons. First, it fails to define the scope of the Director's administrative review, and it fails to describe the purpose and applicable standard for the Chief Justice's review. Second, it perpetuates Rule 13's unfair and secretive "administrative" review process, whereby the AOC and Chief Justice can deny, without explanation, resources that a trial judge has approved in a court order, leaving an indigent defendant with no avenue for a meaningful, on-the-record appeal of that decision. And finally, it places power with the Chief Justice acting alone to conduct a substantive review of a trial court's order, which would violate Article II, sections 1 and 2 and Article VI, sections 1, 2, and 3 of the Tennessee Constitution. *See Dotson*, 673 S.W.3d at 215-17.

The proposed change to **Section 4(a)(3)(D)** would increase the maximum reimbursable daily parking fee from ten dollars ($10) to twenty dollars ($20). Increasing the cap on this expense is long overdue, and we support the Court adopting this change at a minimum. We also know that the actual cost of parking in Nashville for a long day in court already exceeds $20. Lawyers handling an appointed case should be fully reimbursed for their actual expenses, and certainly should never have to pay money out of pocket when providing that service. We suggest that the Court

simply remove the cap on actual parking expense reimbursement, and revise Section 4(a)(3)(D) to state: "Parking at actual costs if supported by a receipt."

Other Comments

While we support many of the proposed amendments to the Rule, and oppose or suggest modifications to several others, these changes will not address the significant and long-standing constitutional problems with Tennessee's appointed counsel system, or eliminate the serious constitutional deficiencies in how Tennessee provides right-to-counsel services. Seven years ago, the Court's Indigent Representation Task Force published a lengthy report cataloging these issues, and recommended the urgent establishment of an independent commission to administer all programs and services related to legal representation of adults and children eligible for court-appointed counsel. This is the same recommendation this Court has heard for decades from previous commissions, consultants and advocates, and the Court has yet to act on it.

The role Tennessee courts and judges have in administering and controlling all aspects of indigent representation services creates a fundamental conflict of interest that infringes upon the constitutional necessity that defense counsel be independent. The only way to remedy the systemic deficiencies in Rule 13 is to create an independent agency to administer all indigent party services. For that reason, we continue to support more comprehensive reform and ask the Court to take immediate steps to act upon that recommendation from its Indigent Representation Task Force.

Dated: May 7, 2024.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13

No. ADM2024-00227

COMMENT

Submitted by Emily Brenyas, BPR#32006, and Charli Wyatt, BPR#034819

We are opposed to the change in (a)(3)(d)(2)(B), specifically the deletion of "that could result in" and the insertion of "who have a constitutional right to counsel and whose parental rights could be in jeopardy from a"

This change would result in a section that reads in relevant part:

> (2) Covered Proceedings: In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C), (D), and (F) below, requests appointment of counsel....(B) Cases under Tenn. Code Ann. Titles 36 and 37 of the involving allegations against parents who have a constitutional right to counsel and whose parental rights could be in jeopardy from a finding a child is dependent or neglected or in terminating parental rights...

Tennessee case law has repeatedly confirmed that there is no absolute federal or state constitutional right to counsel for parents in termination and dependency and neglect cases in Tennessee. There is a **statutory** right. The key cases here are Lassiter v. Department of Social Svcs., 452 U.S. 18 (1981), and In re Carrington H., 483 S.W.3d 507, which summarizes Lassiter's holding and Tennessee's response thereto in this key passage:

> Ultimately, however, the [United States Supreme] Court concluded that the combined weight of the parent's interests, the government's interests, and the risk of erroneous deprivation was insufficient to "lead to the conclusion that the Due Process Clause requires the appointment of counsel [as a matter of course] when a State seeks to terminate an indigent's parental status." Rather, the Lassiter Court held that the question of whether Due Process requires the appointment of counsel in parental termination proceedings must be answered on a case-by-case basis. Appointed counsel is constitutionally required in parental termination cases only where the trial court's assessment of such factors as the complexity of the proceeding and the capacity of the uncounseled parent indicates an appointment is

> necessary. Id. at 27-32; see also State ex rel. T.H. by H.H. v. Min, 802 S.W.2d 625, 626 (Tenn. Ct. App. 1990) (explaining that a parent has no absolute constitutional right to appointment of counsel in termination proceedings under the state or federal constitutions and discussing the factors that should be considered to determine if appointment of counsel is warranted in a particular case).
>
> The Lassiter Court recognized that its holding represented a "minimally tolerable" constitutional standard and that "wise public policy" may counsel in favor of a more protective standard. The Supreme Court has not revisited the question of appointed counsel in parental termination proceedings in the more than thirty years since Lassiter was decided. This may be because almost all States now provide appointed counsel in every parental termination case, either by statute, constitutional provision, or court rule, and do not condition the appointment of counsel on the outcome of the case-by-case balancing test adopted in Lassiter.
>
> Tennessee joined this majority in 2009. Rather than incur the time and expense of litigating the right to appointed counsel in each case under the Lassiter balancing test, Tennessee statutorily provides the right to appointed counsel for indigent parents in every parental termination proceeding. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) (2014);18 Tenn. Sup. Ct. R. 13, § 1 (c), (d)(2)(B);19 Tenn. R. Juv. P. 39(e)(2).20
>
> [some internal citations omitted]

Our concern is that if this change is approved, and this mention of a "constitutional" right is added, it will create confusion about exactly when a parent is entitled to appointed counsel, and that this confusion will result in the effective deprivation of that right, possibly on a massive scale. We are especially concerned about the effect this change will have on how well *juvenile courts* observe a parent's statutory right to counsel at the dependency and neglect stage of proceedings, as juvenile court actions on D&N matters rarely ever receive proper appellate review and correction.

Even at the termination stage, this change could be read as relieving the trial court of its statutory obligation to appoint counsel, and even to relieve the trial court of its obligation to *advise* a parent of the statutory right to counsel until it has conducted a Lassiter test and determines that the parent passes. Since there is currently no procedural due process directive placing the burden on the courts to conduct a Lassiter test, some courts could decide that there is no need to do so *unless the parent first requests it.* Precious few are the parents who know to request counsel – the idea that parents could possibly know to request a Lassiter test as a prerequisite to counsel *without having counsel* is absurd.

Even if a court takes a more parent-friendly reading, and begins conducting Lassiter tests as a matter of course, the practical effect could be a flood of case law challenging denials of counsel when the parent doesn't pass the Lassiter test in the eyes of the trial court.

Part of the justification for the Lassiter test is that termination cases do not always include complicated legal analysis, and many parents could adequately represent themselves. However, the Lassiter test itself is not simple to apply. Parents would be forced to represent themselves in arguing for representation, assuming they are afforded an opportunity to request counsel. This could lead to the absurd result of needing counsel to successfully receive counsel.

Lassiter addresses only terminations, not dependency and neglect matters. We are not aware of any indications in case law describing a constitutional right, conditional or otherwise, to counsel at the dependency and neglect stage. Thus, if this provision were altered as proposed, a court could determine that a parent in a typical D&N case would not be able to assert a right to counsel or to be advised of right to counsel because that parent cannot assert a *constitutional* right thereto, regardless of the statutory right.

The pressure on juvenile courts to properly observe a parent's statutory right to counsel in D&N proceedings is already incredibly low, and, anecdotally, provision of counsel to indigent parents in dependency and neglect cases is far from uniform across the state. Some juvenile courts continue to deny counsel to parents who are entitled to it for a number of reasons, such as the false assumption that the right to counsel only applies if the Department of Children's Services is the petitioner. There is little meaningful review of juvenile court decisions on Title 37 cases at the appellate level, and when deprivation of counsel at D&N proceedings is addressed on review – almost exclusively through appeal of *termination proceedings* – Tennessee appellate courts have repeatedly held that any deprivation of a parent's statutory due process rights in dependency and neglect proceedings – including deprivation of the right to counsel – is cured if due process is properly observed at the termination stage. Thus, there is virtually no effective recourse for denial of counsel in a D&N matter, especially in juvenile court.

The current wording of this section accurately states the statutory right to counsel in termination and dependency and neglect matters as it now exists. We have quoted this provision to judges who had misconceptions about when appointment of counsel is required under the law and know other attorneys who do the difficult work of representing these parents who have had to do the same. This provision has been instrumental in educating courts. To change it in this manner risks dealing a serious blow to the entire statutory scheme ensuring parents' right to counsel and to our ability as advocates to fight for it.

We are not confident that the phrase "and in all other proceedings where required by law" will be sufficient to save this provision from being used to deny due process, since the phrase that follows it, if amended as proposed, directly addresses termination and dependency and neglect proceedings and therefore these proceedings would not fall under the "other proceedings" the phrase protects.

Respectfully submitted,

Emily Brenyas, BPR#32006

Charli Wyatt, BPR#034819

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISION TO TENNESSEE SUPREME COURT RULE 13

No. ADM2024 - 00227

COMMENT REGARDING PROPOSED CHANGES TO SECTION 5 OF THE TENNESSEE SUPREME COURT RULE 13

The proposed changes remove the ability of indigent clients represented by the Office of the Post-Conviction Defender (OPCD) to seek investigative and expert funding through Tennessee Supreme Court Rule 13. For capital post-conviction petitioners represented by private appointed counsel, the proposed changes do not resolve the existing lack of transparency in how the Administrative Office of the Courts (AOC) and the Chief Justice provide approval to release the funds necessary to support a claim of a constitutional violation. The Rule allows capital post-conviction petitioners to be denied funding necessary to obtain and present evidence of constitutional errors based solely on financial reasons, irrespective of their constitutional rights.

The proposed rule states that "where the Office of the Post-Conviction Defender represents a petitioner, funding for investigative services and expert services and tests shall not be paid pursuant to this rule." Proposed Tenn. Sup. Ct. R. 13, § 5(d)(4). According to the Explanatory Comment, this change was triggered by the General Assembly's appropriation of funds "for experts and investigators" to the Office of the Post-Conviction Defender effective July 1, 2024. Proposed Explanatory Comment § 5(d)(4). The proposed change is based on inaccurate

information as it relates to investigative services and fails to consider the potential loss or insufficiency of the expert funding provided to the OPCD by the legislature.

Although the OPCD obtained recurring annual funding for expert services in its Fiscal Year 2024 budget, this did not include money for investigators. The OPCD has investigators on staff, who handle almost all the investigative work on behalf of clients. It is rare that the OPCD asks for additional funding for investigative services through Rule 13. It has done so at times of staffing shortages or when a substantial amount of investigation needed to be completed in another state, and retaining a local investigator was necessary to accomplish the work in a timely manner. Given that the OPCD's budget does not include funding for such additional investigative services, the OPCD is no different from any other public defender office with investigators on staff. Yet, under the proposed changes, those offices retain the ability to apply for funding for additional investigative services through Rule 13 when needed, whereas the OPCD does not. The OPCD respectfully requests that the amended Rule 13 allow for the retention of investigative services through the AOC for those rare cases where they are necessary.

In addition, although the OPCD's budget now includes dedicated expert money, the amount may prove to be insufficient at some point in the future. If a situation arises where litigation necessitates retention of a majority of experts in a case within the same fiscal year (rather than the costs being spread through multiple fiscal years as they typically are), or if the office's caseload increases, driving up the demand for experts overall, the funds currently allocated in the

budget may not be enough.[1] Similarly, the legislature may one day decide to remove the expert funding from OPCD's budget altogether, in which case the majority of death-sentenced individuals would be unable to procure expert services.

Although the OPCD is committed to continually advocating for the necessary expert funding and managing the funds it does have in a fiscally responsible manner, a situation may arise where additional funding is necessary for a capital petitioner to support a claim of a constitutional violation. The inability to request funding through Rule 13 under such circumstances could lead to a failure of a meritorious constitutional claim due to want of proof. Such a miscarriage of justice could be prevented if the OPCD's clients were allowed to seek funds through Rule 13 when there are no other funding alternatives available, and the facts of the case warrant that the funding be granted.

In addition to excluding the OPCD's clients, the proposed rule does not resolve the lack of transparency in the AOC's and Chief Justice's determination of whether expert funding should be made available to an indigent petitioner. The proposed changes to the Rule provide for the following review of a trial court's authorization of expert services by the Director of the AOC and the Chief Justice:

> **Prior Approval by the Director Required**: Once the [expert] services are authorized by the court in which the case is pending, the order and any attachments must be submitted in writing for the director for prior approval. **Review Process if Request is Denied by the Director**: If the director denies prior approval of the request and the requesting attorney requests in writing within 10 days of the date of the notice of denial for review of the

[1] In the recent weeks the Tennessee House and Senate passed a bill expanding the death penalty to non-homicide cases. https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1663. The legislation, if signed by Governor Lee, will take effect July 1, 2024, and will eventually lead to an increase in the capital post-conviction caseload and higher expert costs.

> request by the chief justice, the claim will be transmitted to the chief justice for disposition and prior approval. The determination of the chief justice is final.

Proposed Tenn. Sup. Ct. R. 13, § 5(e)(4) and (5). On its face, the Rule provides no guidance regarding how the Director (or another employee) [2] of the AOC decides whether to provide prior approval of the requested expert services. The same is true for the Chief Justice's review upon the denial by the AOC.

In *Dotson v. State*, 673 S.W.3d 204 (Tenn. 2023), this Court addressed the Director of the AOC/Chief Justice's denial of expert services. There, this Court ruled that the AOC Director's and Chief Justice's review of a funding authorization does not constitute a substantive review. *Id.* at 215. Rather, this Court found that the "denial of prior approval by the AOC Director and the Chief Justice can be based on a prior authorization order that is non-compliant with Rule 13 or an administrative funding decision." *Id.* The Court noted that it must "efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases." *Id.* Because of the "finite pool of funds," some requests for expert services, even though they have been found to be necessary to protect a constitutional right, must be denied. *Id.*

Initially, other than addressing technical errors in funding authorization orders, it is difficult to discern how a determination of compliance with Rule 13 does not constitute a substantive review. If the court order on its face contains all the necessary findings, any other review necessarily involves applying the Rule to the

[2] The proposed Rule states that any reference in its provisions to the Administrative Director of the Courts ("director") encompasses his or her designee(s)." Proposed Tenn. Sup. Ct. R. 13, §1(a)(3).

facts of the case. This constitutes the same substantive review that appellate courts conduct in cases where the lower court, and not the AOC or the Chief Justice, denies funding. *See, e.g., Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013) (reviewing the trial court's denial of expert funding under Rule 13 under an abuse of discretion standard).

Furthermore, most budget-based denials entail at least some substantive assessment of approved expert services. It appears there are two possible scenarios under which the Director/Chief Justice could deny court-authorized expert services for budgetary reasons. First, the Director/Chief Justice could deny services because there is no money left to pay for the requested assistance. While this type of denial would obviously constitute a non-substantive reason for denying the expert services, that information should be provided to the indigent post-conviction petitioner. If there was no money left, defense counsel could wait until the State's coffers are replenished and make the request again. In doing so, the post-conviction petitioner could potentially obtain the requested services later, and thereby resolve the constitutional problems with the denial of an expert necessary to vindicate a constitutional right.

A second, and more likely, form of budgetary denial arises when there is money available, but the Director or the Chief Justice determines that the money would be better spent elsewhere.[3] This determination necessarily involves the

[3] *See Dotson*, 673 S.W.3d at 215 ("A prior authorization order from a post-conviction court is no guarantee or promise of payment. Otherwise, the AOC Director would simply verify compliance with Rule 13 an pay out the authorized funds chronologically until the funds are depleted.")

Director or Chief Justice weighing the need for the requested services against requests from other cases. However, neither the existing rule nor the proposed changes set forth any sort of objective criteria under which that decision is made. Nor does the rule or the proposed changes provide for an explanation of budget-based denials of this kind. Without objective criteria to guide the decision-making process, the rule and the proposed changes invite inconsistency in how budget-based decisions are made. And by failing to require that budget-based denials be explained to the indigent individual requesting the services, there is a lack of transparency in how the process works.

Consistency and transparency are necessary to ensure fair and objective application of the Rule. The current Rule and proposed changes empower an unelected government administrator (the Director or another AOC employee) and a single judge serving in a non-judicial capacity (the Chief Justice) to make decisions regarding services that a trial court has deemed necessary to ensure that constitutional rights are not violated. If that is the course this Court wishes to chart, this Court should implement guardrails to ensure the process is fair and transparent, in keeping with constitutional considerations of open courts, checks and balances, and due process.

In addition, both *Dotson* and the proposed Rule leave open the possibility that a capital petitioner will be denied funding, and thus be rendered unable to present evidence of a constitutional violation, solely for budgetary reasons. Fiscal constraints should not excuse the denial of constitutionally necessary expert

services. Failure to implement a mechanism that prevents such a result creates a risk of executing a person that would have otherwise been entitled to relief. Based on statutes and case law, Tennessee has elected to channel Sixth Amendment claims of ineffective assistance of counsel to post-conviction proceedings. Trial counsel ineffectiveness claims "frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued." *Shinn v. Ramirez*, 596 U.S. 366, 402 (2022) (Sotomayor, dissenting). For such claims to prevail, a defendant must necessarily present evidence outside the direct appellate record, i.e., the evidence that the allegedly ineffective counsel failed to present. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (finding the "defendant must show that the deficient performance prejudiced the defense").

This Court has found constitutional violations in the post-conviction setting based on expert witnesses' testimony on several occasions. *See Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (trial counsel found ineffective in failing to produce an expert witness to testify that petitioner had been diagnosed with post-traumatic stress disorder arising out of his harrowing Vietnam military service experience and his wife's infidelity while he served there); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011) (death sentence reversed based on expert testimony during post-conviction hearing that petitioner was intellectually disabled); *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (death sentence reversed on other grounds and case remanded for further hearings regarding intellectual disability based on expert testimony that

petitioner was intellectually disabled); *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) (trial counsel found ineffective based on expert testimony presented in post-conviction hearing). Had budgetary concerns precluded those petitioners from retaining and presenting expert witnesses during post-conviction, they would not have obtained relief—even though the State's budget has nothing to do with the strength of their constitutional claims. They might have even been executed.

If this Court does not implement safeguards to ensure that all indigent petitioners are provided with constitutionally necessary support services, Tennessee will cede control over its capital sentences to the federal courts handling federal habeas corpus petitions. Generally, federal habeas courts are limited to the record developed in state post-conviction proceedings. *See, e.g.*, *Shinn*, 596 U.S. at 478. However, federal courts may excuse defaulted claims in habeas actions under certain circumstances. To show cause for excusing a defaulted claim, the defendant must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The State's budgetary denial of necessary experts is "external to the defense" and can serve to deny the opportunity to pursue a meritorious claim. This will open the door for federal courts to disturb state adjudications in habeas corpus proceedings.

Because the legislature passed the Tennessee Post-Conviction Procedure Act, in part, to give Tennessee courts the first pass at correcting constitutional infirmities in criminal convictions, this Court should promote that goal by ensuring

that claims of ineffective assistance of counsel and other constitutional violations, including those requiring experts, get a fair determination in Tennessee courts. *See House v. State*, 911 S.W.2d 705, 709 (1995) (Post-Conviction Procedure Act was Tennessee's response to the United States Supreme Court call in *Case v. Nebraska*, 381 U.S. 336 (1965) for enactment of statutory state post-conviction procedures that allow defendants to litigate claims of constitutional violations). In no case is this responsibility greater than in one where a person receives the punishment of death, and the failure to address constitutional infirmity may result in the execution of a person who should have never been convicted or sentenced to death in the first place.

Given the above, the undersigned recommend that this Court amend Rule 13 to inform the petitioner in writing of the reason why the AOC or the Chief Justice is denying previously approved expert or investigative witness services. We recommend that this Court provide a mechanism to ensure that budgetary limitations do not serve to deny the constitutional rights of an indigent petitioner in need of expert assistance—i.e., a rule that enables the indigent party denied resources on budgetary grounds to seek and obtain a continuance until the court-approved funding can be provided. We further recommends that, for capital cases involving Sixth Amendment ineffectiveness allegations, any budgetary determination explicitly consider that such claims can only be pursued through post-conviction proceedings and that the denial of expert witness supporting an ineffectiveness claim serves as a denial of the claim itself, even if it would otherwise

prevail. Finally, we ask that OPCD's clients retain the ability to petition through Rule 13 for funding for additional investigative resources just like any other public defender office in the state, and for expert funding if in the future the OPCD's budget no longer has sufficient funds to pay for the necessary expert services.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13

NO. ADM2024-00227

COMMENTS ON PROPOSED REVISIONS TO TENNESSEE SUPREME COURT RULE 13

On March 7, 2024, this Court published proposed revisions to Tennessee Supreme Court Rule 13 and invited public comment from all interested parties. The undersigned submit the following comments in response.

Proposed changes to Section 5(a): Experts, investigators, and other support services

We support the proposed changes to Section 5(a)(1) if the Court and the AOC interpret them as protecting and enlarging the availability of "experts, investigators, and other support services" (hereinafter "support services") to indigent defendants. In recent years, the AOC has interpreted the first sentence of Section 5(a)(1) to deny indigent defendants funding for support services deemed constitutionally necessary by the judges presiding over those cases when those cases are in General Sessions Court, are bound over and not yet indicted, or are in the Motion for New Trial stage. *See generally In Re: Petition to Modify Tennessee Supreme Court Rule 13, Section 5(a)(1) and 5(d)(1)*, No. ADM2021-00237 (filed on March 2, 2021). These funding denials violate indigent defendants' constitutional right to due process and fundamental fairness, and contradict the original expressed intent of the Rule and the Court's clear holdings. *Id.*

In *State v. Barnett*, 909 S.W.2d 423, 426 (1995), the Court held that "due process of law principles required the appointment of expert assistance in a non-capital case when the defendant is able to show that such assistance is necessary to conduct a constitutionally adequate defense." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Based on that holding, the Court adopted Rule 13 with the express intent "to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties *in criminal cases*, parental rights termination proceedings, dependency and neglect proceedings, *delinquency proceedings*, and *capital post-conviction proceedings*." Rule 13, § 1(a)(1)(E) (emphasis added). Five years later, the Court reaffirmed that principle more broadly when it held that its reliance on "the due process principle of fundamental fairness" in *Barnett* "was a clear signal that types of assistance other than psychiatric assistance should be provided upon a showing of necessity." *Scott*, 33 S.W.3d at 753.

The proposed changes to Section 5(a)(1) present an opportunity for the Court to course correct and eliminate the constitutional violations currently happening under Rule 13's administration. The changes make necessary support services available to all indigent defendants (not just those who are entitled to appointed counsel), and define the time frame when those services are available as "the guilt and sentencing phases of a criminal trial." The undersigned support this new, broad language because it includes all criminal case proceedings between arrest and final disposition and eliminates the prior ambiguity surrounding the Rule's use of the phrase "in the trial."

The new proposed rule also retains eligibility in Section 5(a)(1)(B) for necessary support services in "the direct appeal of all criminal cases in which the defendant is entitled to appointed counsel." Although that language should ensure indigent defendants access to necessary support services for motions for a new trial (because in a direct appeal, that is the only forum where those services could be used), that is not always the case. In at least one recent case, the AOC has denied pre-approval for necessary support services for a motion for new trial hearing based on its interpretation that Rule 13 does not authorize it. To eliminate this potential ambiguity, the undersigned recommend that the Court adopt proposed Section (a)(1)(B) with the following modification: "The direct appeal of all criminal cases in which the defendant is entitled to appointed counsel, including motions for new trial."

The undersigned also support the new proposed Section 5(a)(3), which adds eligibility for funding for expert services for youth facing "serious criminal allegations"[1] in certain types of delinquency cases, and for certain non-capital post-conviction proceedings (those involving necessary mental health evaluations, or required DNA or fingerprint analysis). These additions remedy existing gaps in Rule 13 that prevent indigent defendants who qualify for these necessary services from exercising the same fundamental rights as non-indigent defendants.

<u>Proposed Changes to Section 5(d)(1): Rate-setting for support services and "due consideration for state revenues"</u>

[1] This phrase is not defined by the proposed rule changes and should be. We propose the following definition: "any offense for which a youth is subject to transfer or sentencing as an adult."

The proposed changes to Section 5(d)(1) seem to eliminate the inflexible and unreasonably low maximum hourly rate caps for experts and investigators, which was one of the Indigent Representation Task Force's recommendations in 2017. If that is the intent of the proposed changes, we strongly support the proposed amendment. Additional changes to this section would ensure that the AOC interprets and applies Rule 13 in that manner. We recommend removing all references to any "maximum" hourly rate from the rule and explanatory comment, and adding the following sentence at the end of Section 5(d)(1): "Upon a reasonable showing that no expert is available to perform the necessary services at or below the standard approved rate, requests for experts to be compensated at a higher rate of pay may be approved."

We do not support the proposed "additional review" requirement for "[s]ubsequent requests for additional funding for the same investigator or expert...," because we do not understand what this review would entail, or why it is necessary. Needing and requesting additional funding for investigators or experts is common practice, and we see no reason for those requests to undergo an extra layer of scrutiny.

Finally, we strongly oppose the proposed change in Section 5(d)(1) that would require the director and the chief justice to "[give] due consideration to state revenues" when establishing rates paid to investigators and experts providing services to indigent parties.[2] For years now, the Court has kept maximum hourly pay

[2] The Court proposes adding this "due consideration to state revenues" language to other sections of Rule 13, including review of extended or complex orders under proposed Section 2(e)(3). For the reasons explained herein, we strongly oppose its addition to any part of Rule 13.

rates for investigators and experts (and lawyers) far below market value, making it difficult or impossible for indigent criminal defendants to find experts willing to work on their cases. This has the effect of depriving indigent criminal defendants of resources that are necessary to conduct a constitutionally adequate defense and violates their due process rights.

Standard approved rates for expert and investigative services should be based on market value, and what it actually costs to obtain the necessary services from a qualified professional.[3] They should not be set with any "consideration of state revenues" because that is tantamount to saying it is okay for the State to underfund (or not fund) constitutionally required indigent defense services. What if the legislature slashed the indigent defense budget in half next year? Or made even deeper cuts than that? Would the Court triage the constitutional rights of indigent defendants, making "administrative decisions" without judicial review about which poor peoples' needs were the greatest, or who was most deserving?

The Court should not enshrine in its Rules the suggestion that the Constitution allows the Tennessee legislature to underfund constitutionally required indigent defense services. The General Assembly may not appropriate sufficient state revenues to meet the demand for necessary services. The Court has no control over the legislature's actions, but it has absolute control over its own Rules and determinations of what the Constitution requires. When the Constitution requires

[3] *See* Indigent Representation Task Force, *Liberty and Justice for All: Providing Right to Counsel Services in Tennessee,* at p. 53 (April 2017) (finding that expert and investigator rate caps were lower than the prevailing market rate, and recommending the Court adjust them to market rates).

services be provided, the Court's Rules should not diminish or undermine that obligation.

Last year, the Tennessee Supreme Court held that a petitioner in a capital post-conviction proceeding did not have a constitutionally protected right in indigent defense funds, and therefore, the AOC's denial of his expert funding based on an "administrative funding decision" caused by "limited" resources did not violate due process. *See Dotson v. State*, 673 S.W.3d 204, 217 (Tenn. 2023). In reaching that conclusion, the Court disturbingly wrote that "[it], through the AOC Director, has to efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitions in capital post-conviction cases." *Id.* at 215. The Court went on to say:

> Throughout any fiscal year, the AOC Director receives prior authorization orders for funds from trial courts across the state. If funding for expert assistance was unlimited, then all Rule 13 requests could conceivably be granted. But that is not realistic. Funds are limited, and there has to be a mechanism for regulating the flow of funds. That is the role of the AOC Director and the Chief Justice in Rule 13.

Id.

The Court's decision and reasoning in *Dotson* creates a dangerous precedent that threatens to eviscerate its previous holdings in *Barnett* and *Scott*. Those cases unequivocally stand for the proposition that due process requires the State to provide indigent criminal defendants with the expert or investigative services that a judge has found are ***constitutionally*** necessary to his or her adequate defense. In *Dotson*, the Court justified the bureaucratic denial of expert services for ***a man the State is***

trying to kill--even after the trial court concluded those services were necessary to his constitutionally adequate defense--by finding that he did not have a due process right to indigent defense funding. For indigent criminal defendants in the pre-trial, trial, or post-trial direct appeal process, there are no exceptions or loopholes to their constitutional due process rights. In those contexts, things like "consideration of state revenues" and a "limited pool of funds" do not apply, and are not a basis for denying necessary support services.

The Tennessee Supreme Court's role and sworn duty is to uphold and protect the constitutional rights of all people, and to serve as an independent check against the other branches of government when their actions threaten to violate those rights. The Court's adoption of a proposed change to Section 5(d)(1) to require "due consideration for state revenues" would be an abdication of its constitutional duty to serve as a co-equal, third branch of government, and it may improperly incentivize the General Assembly to unconstitutionally deprive indigent defendants of resources "necessary to conduct a constitutionally adequate defense."

<u>Miscellaneous proposed changes</u>

Proposed Section 1(a)(3) would allow the AOC Director to designate one or more unidentified people to make significant decisions about approval or denial of funding orders and fee claim payments. We do not support this change because it would further obfuscate the AOC's already opaque Rule 13 decision-making processes.

Proposed Section 2(e)(3), which replaces former Section 2(e)(2), requires all complex or extended orders (rather than payments) to be reviewed and approved by the AOC Director. It also provides review by the Chief Justice of any order the director does not approve – and describes the Chief Justice's review as "solely limited to the factual allegations contained in the motion and/or order." We oppose this change for several reasons. First, it fails to define the scope of the Director's administrative review, and it fails to describe the purpose and applicable standard for the Chief Justice's review. Second, it perpetuates Rule 13's unfair and secretive "administrative" review process, whereby the AOC and Chief Justice can deny, without explanation, resources that a trial judge has approved in a court order, leaving an indigent defendant with no avenue for a meaningful, on-the-record appeal of that decision. And finally, it places power with the Chief Justice acting alone to conduct a substantive review of a trial court's order, which would violate Article II, sections 1 and 2 and Article VI, sections 1, 2, and 3 of the Tennessee Constitution. *See Dotson*, 673 S.W.3d at 215-17.

The proposed change to **Section 4(a)(3)(D)** would increase the maximum reimbursable daily parking fee from ten dollars ($10) to twenty dollars ($20). Increasing the cap on this expense is long overdue, and we support the Court adopting this change at a minimum. We also know that the actual cost of parking in Nashville for a long day in court already exceeds $20. Lawyers handling an appointed case should be fully reimbursed for their actual expenses, and certainly should never have to pay money out of pocket when providing that service. We suggest that the Court

simply remove the cap on actual parking expense reimbursement, and revise Section 4(a)(3)(D) to state: "Parking at actual costs if supported by a receipt."

Other Comments

While we support many of the proposed amendments to the Rule, and oppose or suggest modifications to several others, these changes will not address the significant and long-standing constitutional problems with Tennessee's appointed counsel system, or eliminate the serious constitutional deficiencies in how Tennessee provides right-to-counsel services. Seven years ago, the Court's Indigent Representation Task Force published a lengthy report cataloging these issues, and recommended the urgent establishment of an independent commission to administer all programs and services related to legal representation of adults and children eligible for court-appointed counsel. This is the same recommendation this Court has heard for decades from previous commissions, consultants and advocates, and the Court has yet to act on it.

The role Tennessee courts and judges have in administering and controlling all aspects of indigent representation services creates a fundamental conflict of interest that infringes upon the constitutional necessity that defense counsel be independent. The only way to remedy the systemic deficiencies in Rule 13 is to create an independent agency to administer all indigent party services. For that reason, we continue to support more comprehensive reform and ask the Court to take immediate steps to act upon that recommendation from its Indigent Representation Task Force.

Dated: May 7, 2024.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13

No. ADM2024-00227

COMMENT

Submitted by Emily Brenyas, BPR#32006, and Charli Wyatt, BPR#034819

We are opposed to the change in (a)(3)(d)(2)(B), specifically the deletion of "that could result in" and the insertion of "who have a constitutional right to counsel and whose parental rights could be in jeopardy from a"

This change would result in a section that reads in relevant part:

> (2) Covered Proceedings: In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C), (D), and (F) below, requests appointment of counsel....(B) Cases under Tenn. Code Ann. Titles 36 and 37 of the involving allegations against parents who have a constitutional right to counsel and whose parental rights could be in jeopardy from a finding a child is dependent or neglected or in terminating parental rights...

Tennessee case law has repeatedly confirmed that there is no absolute federal or state constitutional right to counsel for parents in termination and dependency and neglect cases in Tennessee. There is a **statutory** right. The key cases here are Lassiter v. Department of Social Svcs., 452 U.S. 18 (1981), and In re Carrington H., 483 S.W.3d 507, which summarizes Lassiter's holding and Tennessee's response thereto in this key passage:

> Ultimately, however, the [United States Supreme] Court concluded that the combined weight of the parent's interests, the government's interests, and the risk of erroneous deprivation was insufficient to "lead to the conclusion that the Due Process Clause requires the appointment of counsel [as a matter of course] when a State seeks to terminate an indigent's parental status." Rather, the Lassiter Court held that the question of whether Due Process requires the appointment of counsel in parental termination proceedings must be answered on a case-by-case basis. Appointed counsel is constitutionally required in parental termination cases only where the trial court's assessment of such factors as the complexity of the proceeding and the capacity of the uncounseled parent indicates an appointment is

> necessary. Id. at 27-32; see also State ex rel. T.H. by H.H. v. Min, 802 S.W.2d 625, 626 (Tenn. Ct. App. 1990) (explaining that a parent has no absolute constitutional right to appointment of counsel in termination proceedings under the state or federal constitutions and discussing the factors that should be considered to determine if appointment of counsel is warranted in a particular case).
>
> The Lassiter Court recognized that its holding represented a "minimally tolerable" constitutional standard and that "wise public policy" may counsel in favor of a more protective standard. The Supreme Court has not revisited the question of appointed counsel in parental termination proceedings in the more than thirty years since Lassiter was decided. This may be because almost all States now provide appointed counsel in every parental termination case, either by statute, constitutional provision, or court rule, and do not condition the appointment of counsel on the outcome of the case-by-case balancing test adopted in Lassiter.
>
> Tennessee joined this majority in 2009. Rather than incur the time and expense of litigating the right to appointed counsel in each case under the Lassiter balancing test, Tennessee statutorily provides the right to appointed counsel for indigent parents in every parental termination proceeding. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) (2014);18 Tenn. Sup. Ct. R. 13, § 1 (c), (d)(2)(B);19 Tenn. R. Juv. P. 39(e)(2).20
>
> [some internal citations omitted]

Our concern is that if this change is approved, and this mention of a "constitutional" right is added, it will create confusion about exactly when a parent is entitled to appointed counsel, and that this confusion will result in the effective deprivation of that right, possibly on a massive scale. We are especially concerned about the effect this change will have on how well *juvenile courts* observe a parent's statutory right to counsel at the dependency and neglect stage of proceedings, as juvenile court actions on D&N matters rarely ever receive proper appellate review and correction.

Even at the termination stage, this change could be read as relieving the trial court of its statutory obligation to appoint counsel, and even to relieve the trial court of its obligation to *advise* a parent of the statutory right to counsel until it has conducted a Lassiter test and determines that the parent passes. Since there is currently no procedural due process directive placing the burden on the courts to conduct a Lassiter test, some courts could decide that there is no need to do so *unless the parent first requests it.* Precious few are the parents who know to request counsel – the idea that parents could possibly know to request a Lassiter test as a prerequisite to counsel *without having counsel* is absurd.

Even if a court takes a more parent-friendly reading, and begins conducting Lassiter tests as a matter of course, the practical effect could be a flood of case law challenging denials of counsel when the parent doesn't pass the Lassiter test in the eyes of the trial court.

Part of the justification for the Lassiter test is that termination cases do not always include complicated legal analysis, and many parents could adequately represent themselves. However, the Lassiter test itself is not simple to apply. Parents would be forced to represent themselves in arguing for representation, assuming they are afforded an opportunity to request counsel. This could lead to the absurd result of needing counsel to successfully receive counsel.

Lassiter addresses only terminations, not dependency and neglect matters. We are not aware of any indications in case law describing a constitutional right, conditional or otherwise, to counsel at the dependency and neglect stage. Thus, if this provision were altered as proposed, a court could determine that a parent in a typical D&N case would not be able to assert a right to counsel or to be advised of right to counsel because that parent cannot assert a *constitutional* right thereto, regardless of the statutory right.

The pressure on juvenile courts to properly observe a parent's statutory right to counsel in D&N proceedings is already incredibly low, and, anecdotally, provision of counsel to indigent parents in dependency and neglect cases is far from uniform across the state. Some juvenile courts continue to deny counsel to parents who are entitled to it for a number of reasons, such as the false assumption that the right to counsel only applies if the Department of Children's Services is the petitioner. There is little meaningful review of juvenile court decisions on Title 37 cases at the appellate level, and when deprivation of counsel at D&N proceedings is addressed on review – almost exclusively through appeal of *termination proceedings* – Tennessee appellate courts have repeatedly held that any deprivation of a parent's statutory due process rights in dependency and neglect proceedings – including deprivation of the right to counsel – is cured if due process is properly observed at the termination stage. Thus, there is virtually no effective recourse for denial of counsel in a D&N matter, especially in juvenile court.

The current wording of this section accurately states the statutory right to counsel in termination and dependency and neglect matters as it now exists. We have quoted this provision to judges who had misconceptions about when appointment of counsel is required under the law and know other attorneys who do the difficult work of representing these parents who have had to do the same. This provision has been instrumental in educating courts. To change it in this manner risks dealing a serious blow to the entire statutory scheme ensuring parents' right to counsel and to our ability as advocates to fight for it.

We are not confident that the phrase "and in all other proceedings where required by law" will be sufficient to save this provision from being used to deny due process, since the phrase that follows it, if amended as proposed, directly addresses termination and dependency and neglect proceedings and therefore these proceedings would not fall under the "other proceedings" the phrase protects.

Respectfully submitted,

Emily Brenyas, BPR#32006

Charli Wyatt, BPR#034819

Knoxville Bar Association

May 6, 2024

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By Email: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: No. ADM2024-00227

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") carefully considered the proposed amendments to Tennessee Supreme Court Rule 13 at its April 9, 2024 meeting. The Committee presented a report of its review of the Order and the proposed amendments at the April 24, 2024 meeting of the KBA Board of Governors (the "KBA Board").

After consideration, the KBA Board submits the following comments from the Committee:

First, the Committee has a comment on the proposed amendments to Rule 13, Section 1 (d)(2)(C)(iv) and (d)(2)(D)(v), which, in certain juvenile and parental proceedings, require courts to direct the child's parents or custodians to pay into the registry of the clerk of the court any sum that the court determines they are able to pay. The amendments also provide that when funds received by the AOC are greater than the amount claimed by and paid to the appointed GAL, those "excess" funds are to be paid to the GAL. In the Committee's view, it may not be appropriate in every case to pay such "excess" funds to the GAL instead of refunding them to the parent or custodian. It is also not clear how funds deposited with the clerk would get to the AOC. Accordingly, the Committee respectfully suggests

(1) that the language be amended to place within the discretion of the trial court the disposition of any "excess" funds in the possession of the clerk of the court or the Administrative Office of the Courts; and

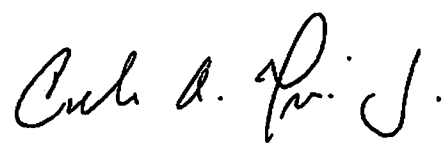
(2) that the language be amended to provide clarity to clerks of the court in how funds paid into the registry of the clerk of court under Section 1 (d)(2)(C)(iii) and (d)(2)(D)(ii) are handled and disbursed.

Second, the Committee discussed the proposed amendments to Section 1 (d)(2)(B), which has to do with appointment of counsel for parents in dependency and neglect and termination proceedings. The existing rule requires appointment of counsel for indigent parties in those proceedings. The proposed amendment, however, appears to limit appointment to indigent parents "who have a constitutional right to counsel and whose parental rights could be in jeopardy." It appears that circumstances could occur under the new rule where an individual in a dependency and neglect proceeding may not be entitled to appointment of counsel unless there is a finding by the trial court that the parent(s) involved have a constitutional right to counsel and that their parental rights could be in jeopardy. This could pose a particular challenge where an individual is not appointed counsel at the outset, but circumstances later change, requiring appointment of counsel in the middle of the proceedings. Because the existing rule seemed adequate to the Committee, the Committee recommends against the proposed change to Rule 13, Section 1 (d)(2)(B).

Third, the Committee discussed proposed Section 5(a)(3), which is an amended version of existing 5(a)(2). The existing rule prohibits authorizing funding for investigative or expert services in non-capital post-conviction proceedings. The amendment authorizes exceptions to that prohibition. The explanatory comment for Section 5, however, still states that "Section 5(a)(2)" (which would now be 5(a)(3)) "unequivocally" provides that funding for investigative or expert services in non-capital cases is "not available." There is a conflict between the comment and the proposed amendment. The Committee respectfully suggests that the comment be amended. Also, for clarity, the Committee suggests that the language of the rule itself be revised along the following lines: "In non-capital post-conviction proceedings, funding for investigative, expert, or other similar services generally shall not be authorized or approved. The exceptions to this provision include the following," etc.

As always, the KBA appreciates the invitation to consider and comment on proposed rule changes.

Sincerely,



Carlos A. Yunsan, President
Knoxville Bar Association

cc: Tasha C. Blakney, KBA Executive Director (via email)
Executive Committee of the Knoxville Bar Association (via email)

Kim Meador - Public Comment No. ADM2024-00227

ADM2024-00227
RECEIVED
MAY - 5 2024
Clerk of the Courts
Rec'd By KM

From: Sean Smith <thelastquery@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/5/2024 1:41 PM
Subject: Public Comment No. ADM2024-00227
Attachments: Reply Respon Opp Motion Access Just 5.4.2024.pdf; Motion-Affidavit For Accessible Justice v.F April 2024.pdf; Exhibits A4 C4 D4_Mot Acc Just.pdf; 2024.05.02_Response to Motion for Accessible Justice_Final.pdf

Hello Administrative Office of the Courts and the Supreme Court of Tennessee,

I am writing to submit public comments on No. ADM2024-00227 "IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13". Comments deadline May 6, 2024.

I'm a disabled pro se litigant with an active case against TennCare (Sean Smith v. Tennessee Department of Finance & Administration, Div. TennCare. Case No. 24-0074-I). I believe the rules for appointment of counsel need to address the right to counsel of disabled adults who sue the state of Tennessee in civil cases, especially when the case involves civil and/or constitutional rights violations by the State.

I believe the current burdens of litigation in TN courts for disabled adults with mental and cognitive disabilities are discriminatory and can violate our 1st, 5th, 14th U.S Const. Rights in some circumstances as well as other statutory rights such as those granted by the Amercians with Disabilities Act and ADA-related CFR and the Social Security Act and SSA related CFR. There seems to be a presumption in the legal community that because no "absolute" right to counsel in civil cases exists there is no conditional right either.

I have submitted a Motion for Accessible Justice in my case. And have mailed on 5.3.2024 for filing a Reply to Respondents' Response in Opposition to Motion for Accessible Justice. I have attached copies of these documents to this email for you to review as part of my public comment.

It is my hope that the Administrative Office of the Courts and Supreme Court of Tennessee will revise Tennessee Supreme Court Rule 13 to make it clearer there is a conditional right to counsel in civil cases for indigent litigants, especially disabled adults who file suit against the state, and similarly review their current ADA Policy.

Sincerely,
Sean Smith

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	)	
	)	No. ADM2024-00227
REVISIONS TO TENNESSEE	)	
SUPREME COURT RULE 13	)	

COMMENTS ON PROPOSED REVISIONS TO TENNESSEE SUPREME COURT RULE 13

Comes now, Claiborne H. Ferguson, President of the Tennessee Association of Criminal Defense Lawyers and files this, the Association's comments on the proposed changes to Rule 13.[1]

Currently the State Legislators have passed HB0430/SB0624 – AN ACT to amend Tennessee Code Annotated, Title 37; Title 39 and Title 40, relative to acts committed by juveniles. This is the so called "Blended Sentencing Act" that allows for juveniles to receive sentences that exceed their 19 birthdays. The legislative description of the bill is:

> Juvenile Offenders - As introduced, allows a juvenile court to impose a blended sentence on a child 16 years of age or older for a juvenile offense that would be a Class A, B, or C felony if committed by an adult; defines blended sentencing as a combination of any disposition otherwise provided for juveniles and a period of adult probation to be served after the child turns 18

[1] TACDL has co-signed onto two other Comments and will not repeat the issues contained in those Comments but stands by and joins in with those Comments.

years of age and which ends on or before the child's twenty-fifth birthday. - Amends TCA Title 37; Title 39 and Title 40.

The proposed Rule 13 amendments do not address the indigent pay for this new "level" of charge. This isn't a juvenile delinquency case nor a circuit/criminal court case but some combination of both that will automatically requires lengthy, complex representation, spanning over two courts, requiring a jury trial every time, and involving a delayed, later occurring, hearing once the child reaches the age of 19 that determines if the Juvenile Court will maintain custody of the "youthful offender" for another six years. Obviously, under current Rule 13 rules, cases in juvenile court can be subject to interim billing while criminal cases are not. There are no provisions for billing currently in Rule 13 for this new hybrid case. Clearly the compensation for juvenile cases is inadequate for this level of work and complexity.

This new level of case should be considered, for compensation, as a trial court level case and compensated at the same rate or greater. This case will require more work and skill than the normal A/B felony that starts in general sessions and proceeds to circuit court. In that context, the attorney would receive a standard fee up to $4,500.00 ($1,500.00 for general sessions and $3,000.00 for circuit court), and a maximum fee, if extended and complex, of up to $7,500.00 ($1,500.00[2] for general sessions and $6,000.00 for circuit court).

It is TACDLs request that the Court take this time to make appropriate provisions for the indigent funding of this new level of representation. At a minimum, we believe the funding level

[2] Counsel would note that there seems to be a typographical or drafting error on the proposed Rule 13 forwards to the state bar. At Section 2(e)(4)(C), the Maximum Compensation is for a $1,250.00 compensated case. There is no similar section for cases compensated at $1,500.00. It is believed that that should be a maximum od $3,000.00 for cases with an otherwise $1,500.00 limit. Nowhere in Rule 13 does it state a Complex and Extended rate for the $1,500.00 cases. If it was the Court's intent to not provide a complex and extended fee for general session work, the Association suggests that there be a complex and extended fee for the juvenile transfer portion of the Blended Sentence case as a transfer hearing is in effect a trial on the merits.

should be on parity with Rule 13, Sections 2(d)(4)(A)[3] (preliminary hearings) and (d)(5)(B) (Murder, A/B felony), that is, a maximum compensation of four thousand five hundred dollars ($4,500.00), unless designated complex or extended and then, seven thousand five hundred dollars ($7,5000.00). As discussed in footnote 2, supra, the transfer hearing should have a complex and extended rate and, if so, the maximum complex and extended fee would actually be $9,000.00 (unless it is a first degree murder and the maximum rate would potentially be above that at the directors discretion).

The final question to be answered would be when would the billing be due. For example, in the normal adult felony case, the case is billed twice, once after the preliminary hearing and once after the trial. But in the blended sentencing context, there are a number of places where billing might become "due." Would the attorney bill the AOC after the transfer hearing, then after the trial, then after adjudication in juvenile court, and then again after the detention hearing once the child reaches 19 years of age? TACDL suggests the case be subdivided into two billing segments, the first ends after the transfer hearing, the second after adjudication. Currently, there isn't enough information to know how the hearing at age 19 will proceed and it should, we suggest, be billed separately as a new juvenile case, years later after the trial has been completed.

As a final suggestion, Section 5(a)(1)(D) should be amended to expressly include Blended Sentencing in as a "juvenile transfer proceeding" as the assistance of experts and investigators will be critical in representing these children that are facing adult sentencing.

[3] Or Section 2(d)(4)(B) (juvenile charged with non-capital offense).

Thank you for the opportunity to review and comment of these proposed changes, and we at TACDL are always available to consult on any issue the Court may need us on.

Date: 6 May 2024

RESPECTFULLY SUBMITTED,

The
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/s/Claiborne H. Ferguson
CLAIBORNE H. FERGUSON (BPR 20457)
President of the Tennessee Association of Criminal Defense Lawyers, 2023-2024

TENNESSEE
BAR ASSOCIATION

May 6, 2024

The Honorable James Hivner
RE: Tennessee Supreme Court Rule 13
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
Via email: appellatecourtclerk@tncourts.gov

Re: **IN RE: REVISIONS TO TENNESSEE SUPREME COURT RULE 13 - No. ADM2024-00227**
Comment of the Tennessee Bar Association

Dear Mr. Hivner:

The Tennessee Supreme Court issued an Order on March 7, 2024, soliciting comments concerning its published proposed revision to Tennessee Supreme Court Rule 13. The Tennessee Bar Association ("TBA") respectfully offers the following comments for the Court's consideration.

Background

Tennessee Supreme Court Rule 13 addresses the Appointment, Qualifications, and Compensation of Counsel for Indigent Defendants. In the March 7 Order, it is noted that the proposed revisions do not include any adjustments to the compensation rates and/or caps for indigent representation. Given the recent funding increases approved for indigent representation, it is anticipated that the Court will have additional proposed revisions to Rule 13, some of which may clarify or address the concerns raised here.

These comments from TBA relate to proposed changes in sections 1, 2 and 7 of Rule 13. Specifically, the provisions that address the financial obligations that may be assessed with guardian ad litem ("GAL") appointments, the filing and review process for determining when cases are complex or extended and situations when alternative agreements may be used to help provide representation for indigent individuals.

Section 1 - Right to Counsel and Procedure for Appointment of Counsel

This section provides guidance on the types of cases and proceedings that are eligible for appointed counsel and procedures for appointments and compensation.

Proposed additions to the rule create a financial responsibility for "parents, legal custodians, or guardians" who are deemed "financially able to defray a portion or all of the cost of the guardian ad litem..." This requirement applies to cases with reports of abuse or neglect, investigation reports and in proceedings to

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TENNESSEE BAR ASSOCIATION

terminate parental rights *(Section 1 provisions (d)(2)(C) & (D)).* The explanatory comments note that "the finding of indigency must be evidenced by a court order" and emphasizes that courts have a "statutory duty to consider whether the indigent party can afford to defray a portion or all of the costs of representation."

The intended purpose seems to be that parties who have the means and are responsible for minor children also be held financially responsible for GAL fees incurred due to those parties' neglect or abuse. However, the proposed provisions risk unintended consequences for the GAL, potential temporary custodians and most significantly, the children involved.

First, this provision shifts the burden to the appointed GAL to collect (some or all) fees via court order. Attorneys appointed as GALs are already contending with inadequate compensation and heavy caseloads. This provision adds an unwarranted encumbrance to the appointed GAL role, increasing the complication, delay, and uncertainty of compensation by requiring they take action against the parents or guardians in order to be paid.

TBA is also concerned that the new provisions may discourage relatives or other potential caretakers from stepping forward to take temporary legal custody of a child otherwise at risk of being in foster care. The potential for courts to impose fees for appointed GALs against these temporary custodians will make placing children more difficult because relatives or other possible caregivers may fear some unknown financial burden to pay guardian ad litem fees. The alternative is that children facing difficult and urgent situations have fewer resources for care, and the state then bears the financial responsibility anyway though the placement of those children in foster care.

One suggestion to address this particular concern is to include an exception making it clear that the potential for financial responsibility does not apply to a person who takes custody because of the D&N filing and is not a party who was legally responsible for the child at the time the child became dependent and neglected.

Individuals receiving counsel under Rule 13 are indigent and these new provisions create additional burdens on children and families seeking stability, including those working toward reunification via a Permanency Plan. The rationale for the new provisions is not clear in the proposed rule changes and may result in unintended burdens on all parties in the action.

Section 2 - Compensation of Counsel in Non-Capital Cases

This section provides guidance on compensation rates and maximums, as well as procedures for cases designated as complex or extended.

The proposed addition of procedure for review of complex or extended orders that are not initially approved includes a deadline for response that may be difficult to comply with. Specifically, the proposed section includes a requirement that counsel submit a request for review within 10 business days or it will be deemed waived. The proposed language does not include any exceptions or allow discretion by the Court to consider the request.

Section 7 - Contracts for Indigent Representation

This section provides authorization for the Administrative Office of the Courts to enter into alternative agreements to provide representation to indigent persons in some situations.

Specifically, this section authorizes "agreements with attorneys, law firms or associations of attorneys to provide legal services for a fee to indigent persons" in specified situations. The agreements may specify number and type of cases, but the fixed fee may not exceed the established rates.

The current rule authorizes these arrangements in certain cases involving (1) emergency involuntary judicial hospitalization actions; (2) child support enforcement proceedings; and (3) allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights. The proposed change eliminates authorization for all types of cases except for those that involve emergency involuntary judicial hospitalization actions.

Given the current challenges facing our indigent representation system, and a need to explore options to improve the administration of justice, it seems inconsistent with that goal to narrow the areas where alternative agreements for representation may be utilized. The rationale for eliminating types of cases in Section 7 is unclear and the proposal does not include an explanatory comment for this change. Going forward, it seems prudent to encourage alternatives to address the current challenges.

Conclusion

The TBA commends the Court's ongoing efforts toward attaining additional compensation for appointed counsel, including through current and anticipated revisions to Rule 13. Addressing the current crisis in indigent representation remains a top priority for TBA, and we look forward to continuing to work alongside the Tennessee Supreme Court, the Administrative Office of the Courts, and policymakers on this crucial issue.

The Tennessee Bar Association thanks the Court for the opportunity to provide these comments for consideration.

Sincerely,

Sheree Wright
Executive Director

cc: TBA Executive Committee
John Farringer - TBA Board of Governors & Access to Justice Committee
Lisa Gill - Chair, TBA Family Law Section
Joy Longnecker - Chair, TBA Criminal Law Section
Linda Seely - Chair, TBA Access to Justice Committee

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: REVISION TO TENNESSEE SUPREME COURT RULE 13

No. ADM2024 - 00227

COMMENT REGARDING PROPOSED CHANGES TO SECTION 5 OF THE TENNESSEE SUPREME COURT RULE 13

The proposed changes remove the ability of indigent clients represented by the Office of the Post-Conviction Defender (OPCD) to seek investigative and expert funding through Tennessee Supreme Court Rule 13. For capital post-conviction petitioners represented by private appointed counsel, the proposed changes do not resolve the existing lack of transparency in how the Administrative Office of the Courts (AOC) and the Chief Justice provide approval to release the funds necessary to support a claim of a constitutional violation. The Rule allows capital post-conviction petitioners to be denied funding necessary to obtain and present evidence of constitutional errors based solely on financial reasons, irrespective of their constitutional rights.

The proposed rule states that "where the Office of the Post-Conviction Defender represents a petitioner, funding for investigative services and expert services and tests shall not be paid pursuant to this rule." Proposed Tenn. Sup. Ct. R. 13, § 5(d)(4). According to the Explanatory Comment, this change was triggered by the General Assembly's appropriation of funds "for experts and investigators" to the Office of the Post-Conviction Defender effective July 1, 2024. Proposed Explanatory Comment § 5(d)(4). The proposed change is based on inaccurate

information as it relates to investigative services and fails to consider the potential loss or insufficiency of the expert funding provided to the OPCD by the legislature.

Although the OPCD obtained recurring annual funding for expert services in its Fiscal Year 2024 budget, this did not include money for investigators. The OPCD has investigators on staff, who handle almost all the investigative work on behalf of clients. It is rare that the OPCD asks for additional funding for investigative services through Rule 13. It has done so at times of staffing shortages or when a substantial amount of investigation needed to be completed in another state, and retaining a local investigator was necessary to accomplish the work in a timely manner. Given that the OPCD's budget does not include funding for such additional investigative services, the OPCD is no different from any other public defender office with investigators on staff. Yet, under the proposed changes, those offices retain the ability to apply for funding for additional investigative services through Rule 13 when needed, whereas the OPCD does not. The OPCD respectfully requests that the amended Rule 13 allow for the retention of investigative services through the AOC for those rare cases where they are necessary.

In addition, although the OPCD's budget now includes dedicated expert money, the amount may prove to be insufficient at some point in the future. If a situation arises where litigation necessitates retention of a majority of experts in a case within the same fiscal year (rather than the costs being spread through multiple fiscal years as they typically are), or if the office's caseload increases, driving up the demand for experts overall, the funds currently allocated in the

budget may not be enough.[1] Similarly, the legislature may one day decide to remove the expert funding from OPCD's budget altogether, in which case the majority of death-sentenced individuals would be unable to procure expert services.

Although the OPCD is committed to continually advocating for the necessary expert funding and managing the funds it does have in a fiscally responsible manner, a situation may arise where additional funding is necessary for a capital petitioner to support a claim of a constitutional violation. The inability to request funding through Rule 13 under such circumstances could lead to a failure of a meritorious constitutional claim due to want of proof. Such a miscarriage of justice could be prevented if the OPCD's clients were allowed to seek funds through Rule 13 when there are no other funding alternatives available, and the facts of the case warrant that the funding be granted.

In addition to excluding the OPCD's clients, the proposed rule does not resolve the lack of transparency in the AOC's and Chief Justice's determination of whether expert funding should be made available to an indigent petitioner. The proposed changes to the Rule provide for the following review of a trial court's authorization of expert services by the Director of the AOC and the Chief Justice:

> **Prior Approval by the Director Required**: Once the [expert] services are authorized by the court in which the case is pending, the order and any attachments must be submitted in writing for the director for prior approval. **Review Process if Request is Denied by the Director**: If the director denies prior approval of the request and the requesting attorney requests in writing within 10 days of the date of the notice of denial for review of the

[1] In the recent weeks the Tennessee House and Senate passed a bill expanding the death penalty to non-homicide cases. https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1663. The legislation, if signed by Governor Lee, will take effect July 1, 2024, and will eventually lead to an increase in the capital post-conviction caseload and higher expert costs.

> request by the chief justice, the claim will be transmitted to the chief justice for disposition and prior approval. The determination of the chief justice is final.

Proposed Tenn. Sup. Ct. R. 13, § 5(e)(4) and (5). On its face, the Rule provides no guidance regarding how the Director (or another employee) [2] of the AOC decides whether to provide prior approval of the requested expert services. The same is true for the Chief Justice's review upon the denial by the AOC.

In *Dotson v. State*, 673 S.W.3d 204 (Tenn. 2023), this Court addressed the Director of the AOC/Chief Justice's denial of expert services. There, this Court ruled that the AOC Director's and Chief Justice's review of a funding authorization does not constitute a substantive review. *Id.* at 215. Rather, this Court found that the "denial of prior approval by the AOC Director and the Chief Justice can be based on a prior authorization order that is non-compliant with Rule 13 or an administrative funding decision." *Id.* The Court noted that it must "efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases." *Id.* Because of the "finite pool of funds," some requests for expert services, even though they have been found to be necessary to protect a constitutional right, must be denied. *Id.*

Initially, other than addressing technical errors in funding authorization orders, it is difficult to discern how a determination of compliance with Rule 13 does not constitute a substantive review. If the court order on its face contains all the necessary findings, any other review necessarily involves applying the Rule to the

[2] The proposed Rule states that any reference in its provisions to the Administrative Director of the Courts ("director") encompasses his or her designee(s)." Proposed Tenn. Sup. Ct. R. 13, §1(a)(3).

facts of the case. This constitutes the same substantive review that appellate courts conduct in cases where the lower court, and not the AOC or the Chief Justice, denies funding. *See, e.g., Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013) (reviewing the trial court's denial of expert funding under Rule 13 under an abuse of discretion standard).

Furthermore, most budget-based denials entail at least some substantive assessment of approved expert services. It appears there are two possible scenarios under which the Director/Chief Justice could deny court-authorized expert services for budgetary reasons. First, the Director/Chief Justice could deny services because there is no money left to pay for the requested assistance. While this type of denial would obviously constitute a non-substantive reason for denying the expert services, that information should be provided to the indigent post-conviction petitioner. If there was no money left, defense counsel could wait until the State's coffers are replenished and make the request again. In doing so, the post-conviction petitioner could potentially obtain the requested services later, and thereby resolve the constitutional problems with the denial of an expert necessary to vindicate a constitutional right.

A second, and more likely, form of budgetary denial arises when there is money available, but the Director or the Chief Justice determines that the money would be better spent elsewhere.[3] This determination necessarily involves the

[3] *See Dotson*, 673 S.W.3d at 215 ("A prior authorization order from a post-conviction court is no guarantee or promise of payment. Otherwise, the AOC Director would simply verify compliance with Rule 13 an pay out the authorized funds chronologically until the funds are depleted.")

Director or Chief Justice weighing the need for the requested services against requests from other cases. However, neither the existing rule nor the proposed changes set forth any sort of objective criteria under which that decision is made. Nor does the rule or the proposed changes provide for an explanation of budget-based denials of this kind. Without objective criteria to guide the decision-making process, the rule and the proposed changes invite inconsistency in how budget-based decisions are made. And by failing to require that budget-based denials be explained to the indigent individual requesting the services, there is a lack of transparency in how the process works.

Consistency and transparency are necessary to ensure fair and objective application of the Rule. The current Rule and proposed changes empower an unelected government administrator (the Director or another AOC employee) and a single judge serving in a non-judicial capacity (the Chief Justice) to make decisions regarding services that a trial court has deemed necessary to ensure that constitutional rights are not violated. If that is the course this Court wishes to chart, this Court should implement guardrails to ensure the process is fair and transparent, in keeping with constitutional considerations of open courts, checks and balances, and due process.

In addition, both *Dotson* and the proposed Rule leave open the possibility that a capital petitioner will be denied funding, and thus be rendered unable to present evidence of a constitutional violation, solely for budgetary reasons. Fiscal constraints should not excuse the denial of constitutionally necessary expert

services. Failure to implement a mechanism that prevents such a result creates a risk of executing a person that would have otherwise been entitled to relief. Based on statutes and case law, Tennessee has elected to channel Sixth Amendment claims of ineffective assistance of counsel to post-conviction proceedings. Trial counsel ineffectiveness claims "frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued." *Shinn v. Ramirez*, 596 U.S. 366, 402 (2022) (Sotomayor, dissenting). For such claims to prevail, a defendant must necessarily present evidence outside the direct appellate record, i.e., the evidence that the allegedly ineffective counsel failed to present. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (finding the "defendant must show that the deficient performance prejudiced the defense").

This Court has found constitutional violations in the post-conviction setting based on expert witnesses' testimony on several occasions. *See Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (trial counsel found ineffective in failing to produce an expert witness to testify that petitioner had been diagnosed with post-traumatic stress disorder arising out of his harrowing Vietnam military service experience and his wife's infidelity while he served there); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011) (death sentence reversed based on expert testimony during post-conviction hearing that petitioner was intellectually disabled); *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (death sentence reversed on other grounds and case remanded for further hearings regarding intellectual disability based on expert testimony that

petitioner was intellectually disabled); *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) (trial counsel found ineffective based on expert testimony presented in post-conviction hearing). Had budgetary concerns precluded those petitioners from retaining and presenting expert witnesses during post-conviction, they would not have obtained relief—even though the State's budget has nothing to do with the strength of their constitutional claims. They might have even been executed.

If this Court does not implement safeguards to ensure that all indigent petitioners are provided with constitutionally necessary support services, Tennessee will cede control over its capital sentences to the federal courts handling federal habeas corpus petitions. Generally, federal habeas courts are limited to the record developed in state post-conviction proceedings. *See, e.g.*, *Shinn*, 596 U.S. at 478. However, federal courts may excuse defaulted claims in habeas actions under certain circumstances. To show cause for excusing a defaulted claim, the defendant must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The State's budgetary denial of necessary experts is "external to the defense" and can serve to deny the opportunity to pursue a meritorious claim. This will open the door for federal courts to disturb state adjudications in habeas corpus proceedings.

Because the legislature passed the Tennessee Post-Conviction Procedure Act, in part, to give Tennessee courts the first pass at correcting constitutional infirmities in criminal convictions, this Court should promote that goal by ensuring

that claims of ineffective assistance of counsel and other constitutional violations, including those requiring experts, get a fair determination in Tennessee courts. *See House v. State*, 911 S.W.2d 705, 709 (1995) (Post-Conviction Procedure Act was Tennessee's response to the United States Supreme Court call in *Case v. Nebraska*, 381 U.S. 336 (1965) for enactment of statutory state post-conviction procedures that allow defendants to litigate claims of constitutional violations). In no case is this responsibility greater than in one where a person receives the punishment of death, and the failure to address constitutional infirmity may result in the execution of a person who should have never been convicted or sentenced to death in the first place.

Given the above, the undersigned recommend that this Court amend Rule 13 to inform the petitioner in writing of the reason why the AOC or the Chief Justice is denying previously approved expert or investigative witness services. We recommend that this Court provide a mechanism to ensure that budgetary limitations do not serve to deny the constitutional rights of an indigent petitioner in need of expert assistance—i.e., a rule that enables the indigent party denied resources on budgetary grounds to seek and obtain a continuance until the court-approved funding can be provided. We further recommends that, for capital cases involving Sixth Amendment ineffectiveness allegations, any budgetary determination explicitly consider that such claims can only be pursued through post-conviction proceedings and that the denial of expert witness supporting an ineffectiveness claim serves as a denial of the claim itself, even if it would otherwise

prevail. Finally, we ask that OPCD's clients retain the ability to petition through Rule 13 for funding for additional investigative resources just like any other public defender office in the state, and for expert funding if in the future the OPCD's budget no longer has sufficient funds to pay for the necessary expert services.

Respectfully submitted,

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Index of Exhibits for Petitioners' Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?

Note: Exhibits A-D, part of Petition for Judicial Review.
Exhibits A2-D2, part of Motion for Accommodations
Exhibits A3, part of Reply to Respondent's Response in Opposition to Motion for Accomodation
Exhibits A4-E4, part of Motion for Accessible Justice

Exhibit A4 - Email Exchange with Tennessee Judicial Branch ADA Coordinator

Exhibit B4 - (Under Seal) 2019 Medical Appeal Medical Records as 49 Digital Files

Exhibit C4 - Screenshots of 2023 Complaint-Appeals Google Docs Revision History

Exhibit D4 - A full copy of: Chelsea Marx. (2018). Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities, 95 Denv. L. Rev. F. Retrieved: https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1035&context=dlrforum

Exhibit E4 - (Under Seal) File names: "Tennessee Justice Center Call Notes.odt" and "Tennessee Justice Center Call Recording_2024-01-02 13.54.50.mp3"

Dated April 24th 2024.

Exhibit A4

Email Exchange with Tennessee Judicial Branch ADA Coordinator

Gmail **Sean Smith <thelastquery@gmail.com>**

Basis for not providing attorneys to disabled adults?

6 messages

Sean Smith <thelastquery@gmail.com> Sun, Mar 31, 2024 at 8:52 PM
To: adacoordinator@tncourts.gov

Hi Tennessee Judicial ADA Coordinator,

I understand it is your general policy that if a disabled adult pro se litigant requests to be provided an attorney as an ADA "reasonable accomodation", that requested accomodation would be denied. I would like to better understand why that is by reading through a detailed and comprehensive argument explaining matters. Could you provide a concise explanation alongside some references to case law specific to that subject that I could read through?

Sincerely,
Sean Smith

---

adacoordinator <adacoordinator@tncourts.gov> Wed, Apr 10, 2024 at 7:37 AM
To: Sean Smith <thelastquery@gmail.com>

Mr. Smith,

Good morning. Thank you for your inquiry regarding the assistance of counsel under the ADA. Generally, the right to appointed counsel arises in criminal proceedings wherein federal and/or state constitutional rights attach. If the proceeding under which you are seeking an ADA accommodation is a criminal proceeding, you may seek appointed counsel under the Tennessee constitution in the trial court. If, however, the proceeding under which your are seeking an ADA accommodation is not a criminal proceeding but rather a civil matter, generally there is no constitutional right to counsel unless fundamental constitutional rights are involved such as, for example, a termination of parental rights matter. In addition, although a litigant may qualify for an accommodation under the ADA, the ADA itself does not provide an inherent or absolute right to counsel. You have requested references to case law in this regard. First, I would invite you to read the ADA statutes themselves, which can be found at 42 U.S.C. 12101 et seq. You may search for the ADA code section here: https://www.law.cornell.edu/*. Secondly, I have attached a few cases, as requested, corroborating the points above.*

Thank you.

Gene F. Guerre
Assistant General Counsel
State Judicial Branch ADA Coordinator
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219
(615) 741-2687
Fax (615) 253-0017
adacoordinator@tncourts.gov

>>> Sean Smith <thelastquery@gmail.com> 3/31/2024 8:52 PM >>>
[Quoted text hidden]

4 attachments

Smith v Dugas (No Right to Counsel under the ADA).pdf
154K

Smith v Robertson (No Inherent or Absolute Right to Counsel under ADA).pdf
201K

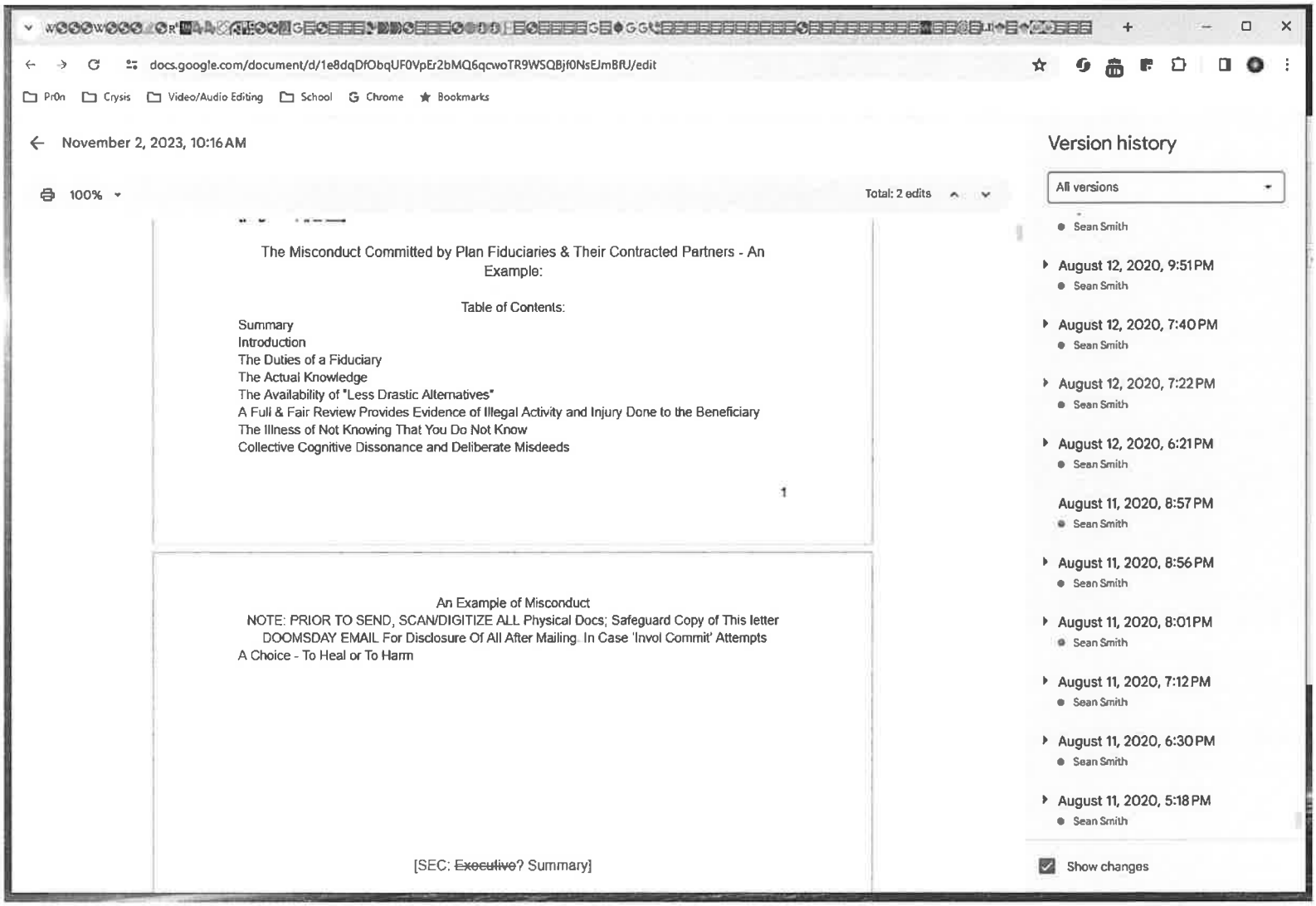
Stone v Town of Westport (No Inherent Right to Appointed Counsel).pdf
112K

White v Franks (No Appointment of Counsel under ADA).pdf
169K

Sean Smith <thelastquery@gmail.com> Wed, Apr 10, 2024 at 7:47 PM

Exhibit C4

Screenshots of 2023 Complaint-Appeals Google Docs Revision History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Video/Audio Editing
School
Chrome
Bookmarks
November 2, 2023, 10:16 AM
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Total: 2 edits
The Misconduct Committed by Plan Fiduciaries & Their Contracted Partners - An Example:
Table of Contents:
Summary
Introduction
The Duties of a Fiduciary
The Actual Knowledge
The Availability of "Less Drastic Alternatives"
A Full & Fair Review Provides Evidence of Illegal Activity and Injury Done to the Beneficiary
The Illness of Not Knowing That You Do Not Know
Collective Cognitive Dissonance and Deliberate Misdeeds
1
An Example of Misconduct
NOTE: PRIOR TO SEND, SCAN/DIGITIZE ALL Physical Docs; Safeguard Copy of This letter
DOOMSDAY EMAIL For Disclosure Of All After Mailing. In Case 'Invol Commit' Attempts
A Choice - To Heal or To Harm
[SEC: ~~Executive~~? Summary]
Version history
All versions
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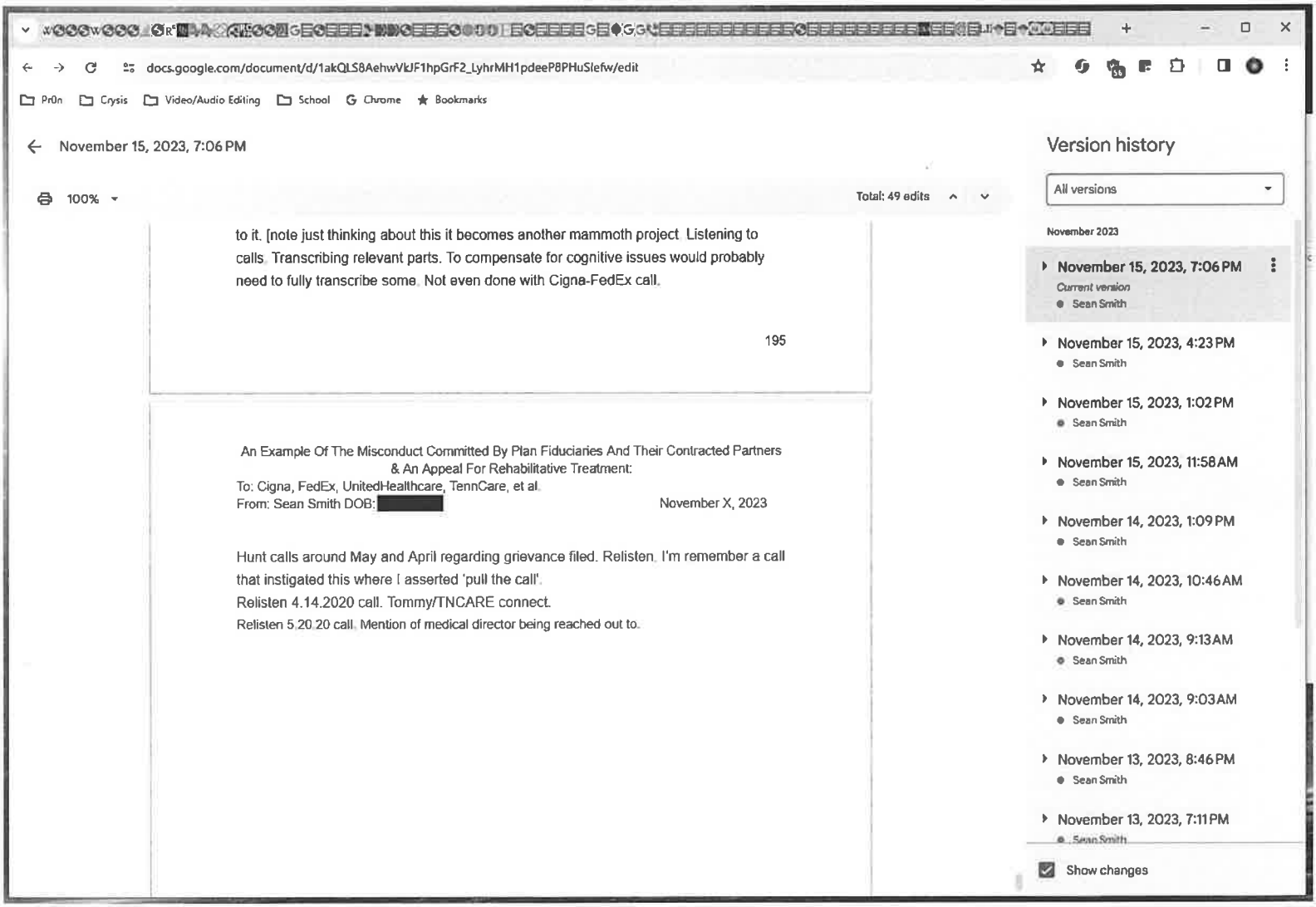
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PrOn
Crysis
Video/Audio Editing
School
Chrome
Bookmarks
November 15, 2023, 7:06 PM
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Total: 49 edits
to it. [note just thinking about this it becomes another mammoth project. Listening to calls. Transcribing relevant parts. To compensate for cognitive issues would probably need to fully transcribe some. Not even done with Cigna-FedEx call.
195
An Example Of The Misconduct Committed By Plan Fiduciaries And Their Contracted Partners & An Appeal For Rehabilitative Treatment:
To: Cigna, FedEx, UnitedHealthcare, TennCare, et al.
From: Sean Smith DOB: [redacted] November X, 2023
Hunt calls around May and April regarding grievance filed. Relisten. I'm remember a call that instigated this where I asserted 'pull the call'.
Relisten 4.14.2020 call. Tommy/TNCARE connect.
Relisten 5.20.20 call. Mention of medical director being reached out to.
Version history
All versions
November 2023
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Exhibit D4

A full copy of: Chelsea Marx. (2018). Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities, 95 Denv. L. Rev. F.

Retrieved: https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1035&context=dlrforum

Denver Law Review Forum

Volume 95 Article 26

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Accomodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities

Chelsea Marx

Accomodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities

ACCOMMODATIONS FOR ALL—THE IMPORTANCE OF MEANINGFUL ACCESS TO COURTS FOR PRO SE LITIGANTS WITH MENTAL DISABILITIES

I. INTRODUCTION

The Americans with Disabilities Act (ADA) requires all public entities, including courts, to provide reasonable accommodations to individuals with disabilities to ensure equal access to programs and to prevent discrimination. Unfortunately, there has been little attention paid to reasonable accommodations for mental disabilities under the ADA because "after the ADA passed . . . the statute as applied to physical disabilities received the most attention."[1] However, the percentage of complaints filed under the ADA alleging discrimination based on mental disabilities is steadily increasing.[2] Currently, the National Alliance on Mental Illness estimates that "approximately 1 in 25 adults in the U.S.—9.8 million, or 4.0%–experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities." Thus, these individuals qualify for protection under the ADA.[3] Due to the increasing prevalence of mental disabilities in America, it is imperative for the Colorado court system to consider how to accommodate these individuals like other public entities have, especially when individuals with mental disabilities are representing themselves pro se in civil proceedings.

In Colorado, despite the work of Colorado Legal Services and attorneys taking pro bono cases, the overwhelming majority of individuals in civil adjudicative proceedings represent themselves.[4] Recent statistics show that:

> [i]n Colorado domestic relations cases over the last three years, roughly three-quarters of litigants were unrepresented. In two-thirds of domestic relations cases, there was no lawyer on either side. In county court civil cases, consisting primarily of collections, evic-

1. U.S. COMM'N ON CIVIL RIGHTS, No. 005-907-00594-4, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), www.usccr.gov/pubs/ada/ ch5.htm.

2. *See id.* (discussing that from 1992-1999 charges filed with the EEOC for discrimination based on mental disabilities began to outpace charges filed based on physical disabilities).

3. NAT'L ALL. ON MENTAL ILLNESS, *Mental Health by the Numbers*, https://www.nami.org/learn-more/ mental-health-by-the-numbers (last visited Mar. 22, 2018).

4. William Hood and Dan Cordova, *The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources through Technology*, THE COLO. LAWYER, October 2016 at 55.

> tions, and restraining orders, the pro se rate for responding parties held steady at 98% over the same period of time.[5]

In 2016, Colorado Supreme Court Chief Justice Nancy Rice sought to respond to "the challenges facing unrepresented civil litigants" by connecting these litigants to legal resources through technology.[6] However, this effort fails to fully support those litigants that are amongst the 260,000 Colorado residents estimated to have mental disabilities.[7] In order for the Colorado Supreme Court to fully provide equal access to justice for these individuals, it must re-evaluate the current deficit in court rules addressing disability accommodations.

In 2004, former Chief Justice Mullarkey of the Colorado Supreme Court signed Directive 04-07, *Access to Court Services and Programs for People with Disabilities*, to "ensure equal access and full participation" in the Colorado judicial system for individuals with disabilities.[8] Although the Colorado Judicial Department's resource guide for providing reasonable accommodations to people with disabilities specifically discusses how "providing a coach or support person at the proceeding" may be a necessary accommodation for individuals with cognitive or developmental disabilities,[9] it does not have the force of a formal court rule. The only court rules regarding disability accommodations in Colorado govern court interpreters for individuals with hearing impairments.

This article argues the Colorado Supreme Court should adopt a comprehensive court rule providing individuals with mental disabilities otherwise unrepresented in civil proceedings individualized assistance, by a skilled individual appointed by the court, to ensure meaningful access to the legal process for all Coloradans. Part two addresses the federal law requirements public entities, including courts, must comply with under Title II of the ADA. Part three briefly describes how skilled support persons are widely used by courts to accommodate individuals with physical disabilities. In contrast, part four discusses how other public entities use skilled individuals as reasonable accommodations to support individuals with mental disabilities. Finally, part five proposes that Colorado adopt the "suitable representative" model recently created by the Washington Office of Administrative Hearings.

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5. *Id.*
6. *Id.*
7. Jennifer Brown, *Breakdown: Mental Health in Colorado*, DENVER POST, http://extras.denverpost.com/mentalillness/index.html (last visited Apr. 2, 2018).
8. COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 4 (2004).
9. *Id.* at 9.

II. TITLE II OF THE ADA REQUIRES ALL PUBLIC ENTITIES TO ACCOMMODATE INDIVIDUALS WITH DISABILITIES.

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[10] Courts must "broadly construe" the ADA because it is a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society."[11] Title II of the ADA prohibits public entities from discriminating against a "qualified individual with a disability" by excluding the individual from participation in services, programs, or activities of the public entity or denying the individual the benefits of such services, programs, or activities.[12]

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services for the participation in programs or activities as provided by the public entity."[13] Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[14] A mental impairment may be "any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability."[15]

Under Title II, public entities, including courts, must ensure their services, programs, and activities are "readily accessible and usable" by people with disabilities when viewed in the entirety.[16] A public entity can make programs accessible by modifying policies, practices, or procedures or by providing auxiliary aids and services, also known as accommodations, to the individual with a disability.[17] Moreover, courts have interpreted the access requirement under Title II to require provision of an affirmative accommodation to ensure "meaningful access to a public service."[18] Specifically, a public entity must furnish an accommodation "where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."[19] The public entity shall give "primary consideration" to the accommodation requested by the individual with a

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10. 42 U.S.C. § 12101(b)(1) (2012).
11. Kinney v. Yerusalim, 812 F.Supp. 547, 551 (E.D. Pa. 1993).
12. 42 U.S.C. § 12132 (2012).
13. 42 U.S.C. § 12131(2) (2012).
14. 42 U.S.C. § 12102(1) (2012).
15. 28 C.F.R. § 35.108(b)(1)(ii).
16. 28 C.F.R. § 35.150(a).
17. *See* 28 C.F.R. § 25.130(b)(7)(i); *see also* 28 C.F.R. § 35.104 (providing examples of auxiliary aids and services).
18. Nunes v. Massachusetts Dept. of Correction, 766 F.3d 136, 145 (5th Cir. 2014) (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 273–76 (2d Cir. 2003)).
19. 28 C.F.R. §35.160(b)(1).

disability, however the administrative authority may decide if an "equally effective" alternative accommodation will be made.[20]

A public entity is not required to make modifications that "would fundamentally alter the nature of the service, program, or activity" or impose an undue burden or hardship on the program provider.[21] "The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program."[22] The public entity bears the burden to prove that the accommodation would fundamentally alter or cause an undue burden.[23] Courts have determined that if a public entity provides an accommodation in one context, it is not unreasonable to provide that accommodation in all facets of the program.[24]

III. SKILLED INDIVIDUALS ARE COMMONLY USED TO ACCOMMODATE INDIVIDUALS WITH PHYSICAL DISABILITIES IN STATE COURTS.

Title II regulations provide several examples of skilled individuals supplying services to facilitate the participation of an individual with a disability in a public entity's program, including, but not limited to, interpreters, notetakers, and readers as "auxiliary aids and services" to accommodate individuals with disabilities.[25] Many states include provisions in state court rules about disability accommodations codifying a process to manage accommodation requests generally.[26] However, the majority, including Colorado, only discuss accommodations in the context of providing interpreters, focusing on providing accommodations for individuals with hearing impairments.[27] Like interpreters, notetakers, and readers, Colorado should create an accommodation that employs skilled persons to assist individuals with mental disabilities. Thus, allowing those with mental disabilities to meaningfully participate in civil court proceedings.

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20. 28 C.F.R. § 35.160(b)(2); *see also* COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATION FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 3 (2004), https://www.thearc.org/file/ADAresourceguide.pdf (asserting "the courts are to give primary consideration to the accommodation requested by the person with the disability").

21. 28 C.F.R. § 35.130(b)(7)(i); *see, e.g.*, Galusha v. New York State Dep't of Envtl. Conservation, 27 F. Supp. 2d 117, 117 (N.D.N.Y. 1998).

22. Easley by Easley v. Snider, 36 F.3d 297, 305 (3rd Cir. 1994).

23. 28 C.F.R. Pt. 35, App. A. § 35.164; *see also* Center v. City of West Carrollton, 227 F. Supp. 2d 863, 867 (S.D. Ohio 2002).

24. Soto v. City of Newark, 72 F. Supp. 2d 489, 496 (D.N.J., 1999) (holding that it was a reasonable accommodation for a municipal court to provide sign-language interpreters at weddings when the municipal court provided sign-language interpretation at other functions).

25. 28 C.F.R. § 35.104.

26. *See, e.g.*, CA ST ALL COURTS Rule 1.100; FL ST J ADMIN Rule 2.540; Md Rule 1.332.

27. *See, e.g.*, AK R ADMIN Rule 6.1; AZ ST GILA SUPER CT Rule 4; NJ Directives DIR. 01-17.

IV. UNDER TITLE II, SKILLED INDIVIDUALS ARE A REASONABLE ACCOMMODATION FOR INDIVIDUALS WITH MENTAL DISABILITIES.

a. Other public entities use skilled individuals to accommodate individuals with a mental disability.

Under Title II, public entities use skilled individuals to accommodate individuals with mental disabilities. For example, the Title II Technical Assistance Manual describes how a public entity may have an obligation to provide "individualized assistance" to an individual with a mental disability to participate in programs.[28] In the illustration, the manual uses the example of an application process for county benefits that "is extremely lengthy and complex."[29] The manual asserts that, because of the complexity of the process, individuals with mental disabilities may not be able to complete the application without individualized assistance or other accommodations. Thus, these individuals are "effectively denied benefits to which they are otherwise entitled."[30] Therefore, the county has an "obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits."[31]

Additionally, public post-secondary education institutions are public entities under Title II that have developed several accommodations to support individuals with mental disabilities using skilled individuals. Academic experts urge higher education institutions to "appoint individuals who can assist [students with mental disabilities] as note-takers, reader, scribes, or other essential roles."[32] Additionally, experts from the University of Washington identify several accommodations for students with mental disabilities, including assigning a classmate to be a volunteer assistant, notetakers, and alternate formats for exams and homework.[33]

Employing a skilled individual as an accommodation to support persons with mental disabilities navigate the civil court system is analogous to programs that public universities and county assistance programs are already expected to use as public entities. Although many state judiciaries have yet to adopt similar programs, they still have the legal obligation to ensure individuals with mental disabilities are meaningfully participating in judicial proceedings.

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28. U.S. DEP'T OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL loc. II-3.600 (1993) (ebook).

29. *Id.*

30. *Id.*

31. *Id.*

32. *College Guide for Students with Psychiatric Disabilities: How Schools Accommodate Students with Psychiatric Disabilities*, http://www.bestcolleges.com/resources/ college-planning-with-psychiatric-disabilities/ (last visited Mar. 19, 2018).

33. ALFRED SOUMA, ET AL., ACADEMIC ACCOMMODATIONS FOR STUDENTS WITH PSYCHIATRIC DISABILITIES 3 (2012).

b. A few courts, including federal administrative courts, are beginning to address accommodations for individuals with mental disabilities.

As the demand grows for reasonable accommodations for individuals with mental disabilities in the judicial system, courts must ensure compliance with federal law. A few court systems, including the federal administrative courts, have started to recognize the importance of making accommodations for individuals with mental disabilities. First, in *Franco-Gonzales v. Holder*, a California district court held that mental disabilities may impede an individuals' ability to meaningfully access immigration removal proceedings. Thus, the court concluded, individuals with mental disabilities are entitled to a "qualified representative" as a reasonable accommodation under federal disability law.[34] Here, the court concluded that after a "fact-specific individualized analysis of the disabled individual's circumstances and the accommodations that might allow meaningful access to the program" it was a reasonable accommodation to provide these individuals a qualified representative, an attorney providing services pro bono or at the government's expense.[35]

Similarly, some state court systems recognize the importance of providing accommodations for individuals with mental disabilities. The Washington State Court system has General Rule 33 which provides that reasonable accommodations may include "as to otherwise unrepresented parties to the proceeding, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability."[36] Washington's General Rule 33 also requires a court to "make its decision on an individual-and-case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation."[37]

Additionally, some states and advocacy organizations have recognized the importance of non-attorney support persons to assist individuals with disabilities in court proceedings. The Judicial Council of Georgia identifies support service providers, individuals who assist persons who are deaf-blind or those who have intellectual, or other cognitive disabilities with court appearances.[38] The Judicial Council of Georgia's ADA Handbook provides that "[i]n addition to helping reduce the anxiety of court proceedings for a person with cognitive or intellectual disabilities, a support person may also assist the person by explaining court proceedings in simple terms, explaining paperwork or follow-up obliga-

34. 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010).
35. *Id.* at 1054–58.
36. WASH. GR 33.
37. *Id.*
38. JUDICIAL COUNCIL OF GA., ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES: A GUIDE FOR GEORGIA COURTS (2017).

tions, or identifying signs of confusion or misunderstanding."[39] The Council's recommendations are based in part on a report by The Arc, the largest national advocacy organization for individuals with cognitive and intellectual disabilities, that discusses different ways that states can support these individuals in judicial proceedings.[40]

Just as these other courts, Colorado should adopt a court rule that specifically sets forth a process to accommodate individuals with mental disabilities in the civil court system. Without proper guidance on accommodations, individuals with mental disabilities will likely be unable to navigate the complex civil litigation process and meaningfully access their rights in Colorado courts. Colorado must act to ensure equal access for all individuals with disabilities, physical and mental, to Colorado courts.

V. THE "SUITABLE REPRESENTATIVE"—A PROPOSED MODEL

Earlier this year, the Washington State Office of Administrative Hearings amended its "Accommodation" rule in the administrative code to conform with Washington State Court General Rule 33.[41] The administrative code does not identify "representation by counsel" as an accommodation for otherwise unrepresented individuals with disabilities in administrative hearings.[42] Rather, the code defines a "suitable representative" as an individual who is qualified under the code "to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the adjudicative proceeding."[43]

A suitable representative may be appointed if, after considering several factors pertaining to the individual's capacity for understanding procedural rights and ability to engage in the proceedings, an ADA coordinator determines that a party is "unable to meaningfully participate in the adjudicative proceeding as a result of the disability."[44] If, after considering these factors, the ADA coordinator determines that the party is unable to meaningfully participate in the adjudicative proceeding, the coordinator will determine if a suitable representative is the "most appropriate accommodation."[45] If so, the ADA coordinator "will identify an

39. *Id.*

40. THE ARC OF THE U.S., THE ARC'S JUSTICE ADVOCACY GUIDE: AN ADVOCATE'S GUIDE ON ASSISTING VICTIMS AND SUSPECTS WITH INTELLECTUAL DISABILITIES 11–12 (2006) (noting Vermont's "Communication Specialist" program "that is similar to an ASL interpreter for someone who is deaf which allows the person with a disability to communicate effectively with attorney, judge, court staff and others in the judicial system").

41. *See* WASH. ADMIN. CODE § 10-24-010 (2018).

42. *See id.*

43. WASH. ADMIN. CODE § 10-24-010(2)(b) (2018).

44. WASH. ADMIN. CODE § 10-24-010(7) (2018).

45. WASH. ADMIN. CODE § 10-24-010(8) (2018).

individual to assist the party at no cost to the party" as a suitable representative.[46]

A suitable representative is not an attorney, rather it is an individual the ADA coordinator appoints that receives "uniform qualification training, or demonstrate[s] equivalent experience or training, as established by the chief administrative law judge."[47] The individual is identified after consideration of the party's preferences, the "knowledge of or the ability to attain knowledge of" procedural rules and substantive issues, the "experience and training in advocating for people with disabilities", and the "individual's availability to meet the timelines and duration of the particular adjudicative proceeding."[48] No individual that is employed by the office of administrative hearings or is prohibited by law from representing the party is eligible to be appointed as a suitable representative.[49] Additionally, the party must accept the appointment in writing and be given the opportunity to contact the ADA coordinator if he or she disagrees with the appointment.[50]

Colorado should adopt an accommodation process for individuals with mental disabilities akin to Washington's suitable representative because it affords these individuals meaningful access to the Colorado justice system. The suitable representative model is analogous to interpreters and readers already required by the vast majority of court rules for individuals with physical disabilities. Moreover, while some state and federal courts require the appointment of legal representation for certain individuals with mental disabilities, the suitable representative program employs a skilled individual to accommodate the party without having to provide costly legal representation. Finally, the suitable representative model will likely improve judicial efficiency by helping an individual without other representation navigate a process that might otherwise be daunting and exclusionary because of their disability.

*Chelsea Marx**

46. WASH. ADMIN. CODE. § 10-24-010(10) (2018).
47. WASH. ADMIN. CODE. § 10-24-010(20) (2018).
48. WASH. ADMIN. CODE. § 10-24-010(11) (2018).
49. *Id.*
50. *Id.*

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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Sean P. Smith,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	**Case No. 24-0074-I**
	)	
	)	**Chancellor Patricia Moskal**
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

Petitioners' Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?

THE MOTION FOR ACCOMODATIONS IS TO BE HEARD ON FRIDAY, May 10TH, 2024, at 11:00 a.m OR AS SOON THEREAFTER AS THE MOTION MAY BE HEARD via *ZoomGoV* Video Conference. FAILURE TO TIMELY FILE AND PERSONALLY SERVE A RESPONSE TO THE MOTION, IN ACCORDANCE WITH RULE 26 OF THE DAVIDSON COUNTY LOCAL RULES OF PRACTICE, WILL RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.

ARGUMENT AND ANALYSIS

1 - Justice Has Been Disabled for the Disabled by the Able

The Court stated in its March 7th 2024 Order that as a pro se litigant I am "entitled to fair and equal treatment by the Court, and the Court will grant him [Mr. Smith] some leeway in reading his pleading and other papers. See Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) (citations omitted). At the same time, Mr. Smith must follow the same rules that attorneys and other self-represented parties are required [sic] follow, and he may not "shift the burden of the litigation" to Respondents or the Court. Id. at 903-04." The Court reiterated this point in its March 19th 2024 Order, stating "the Court must "be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary." Hessmer v. Hessmer, 138 S>W.3d 901, 903."

Unexamined in Hessmer v. Hessmer and not directly addressed in the Court's March 7th and 19th Orders, is a question of great relevance to my case:

> For disabled adults who must engage in pro se litigation as a last desperate means by which to plead for assistance in order to protect their health, well-being, and fundamental human rights, at what point are the burdens of litigation to be considered discriminatory against their disabilities or in violation of their constitutional rights?

This is a question that seems worthy of careful examination by the Courts. One that I believe I need to extend to the Court at this time. I need the Chancellor and the Attorney General and any parties that might in the future read through this case to be cognizant of this concern. Perhaps not even just for my sake, but for all the disabled adults throughout Tennessee who the legal community currently refuses or neglects to provide adequate legal assistance to.

Disabled adults who in order to attempt to access justice are limited to attempting the seemingly impossible task of performing successful pro se litigation against the Attorney General of Tennessee and TennCare, State agencies that respectively receive $70 million and $15.4 billion dollars in annual funding[1], have an army of lawyers, no shortage of political capital, a long list of corporate allies, receive limited public scrutiny or regulatory oversight, and retain many other resources and forms of support. Tenncare and the Attorney General fight from a position so advantaged, so biased towards their success, that full fledged medical doctors and

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[1]State of Tennessee. The Budget Fiscal Year 2024-2025. Retrieved: https://www.tn.gov/content/dam/tn/finance/budget/documents/2025BudgetDocumentVol1.pdf

attorneys, large medical practices and law firms, nonprofits that title themselves "Disability Rights TN" and "Tennessee Justice Center" deem it too difficult to fight against them for these issues that I have placed before the Court with my case, and here is the Court insisting that I, a disabled adult pro se plaintiff whose request for relief is essentially asking the Court to make my health plans stop abusing me so that I don't suffer further physical, mental, financial, and social injuries, or get killed, and can have the opportunity to be 'able' to fully participate in society, I Must Shoulder More Burdens, because it would be considered an unfair imposition for TennCare, the Attorney General, or the Court to shoulder some of these burdens on my behalf.

I asked the Tennessee Administrative Office of the Courts ADA Coordinator via Email to explain the "Basis for not providing attorneys to disabled adults?" and the explanation provided to me was that, "generally there is no constitutional right to counsel unless fundamental constitutional rights are involved" and that "although a litigant may qualify for an accommodation under the ADA, the ADA itself does not provide an inherent or absolute right to counsel.". [Exhibit A4].

As a disabled adult I am dependent upon State and Federal programs for my income, my healthcare, and many other basic necessities. What I can afford and access is largely and at times entirely dictated by the resources I am granted, be it through direct aid such as SSI and Medicaid, or indirect aid through nonprofit organizations provided grants and state agencies funded to provide services. It has been dictated to disabled adults that we shall not be allowed to obtain the financial resources required to hire attorneys or be able to afford to pay for the specialized healthcare services required to rehabilitate us.[2] If we accrue more than $2000 we incur penalties to our income. If we get a job the income from that job reduces our SSI income $1 for every 2$ we earn over $65. The money earned at a $10 hr job then 'pays' at $5 hr, making one work more than twice as hard for half the pay[3].

More than twice as hard because not only is our income reduced, but our disabilities generally make tasks at jobs more challenging to complete. This type of income adjustment for disabled adults is a way to discriminate against people with disabilities while trying to make it seem nondiscriminatory. Were a place of business, like a grocery store, to pay disabled adults seeking part time positions 50% below the minimum wage while those without disabilities got full

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[2] While SSI is a federal program, States can supplement the SSI payment, and thus a disabled adults net SSI related income is ultimately determined by the State. Tennessee is one of 7 states that do not supplement the SSI payment. https://www.ssa.gov/ssi/text-benefits-ussi.htm

[3] https://www.ssa.gov/ssi/text-work-ussi.htm "EARNED INCOME EXCLUSION We do not count the first $65 of earned income plus one–half of the amount over $65. Therefore, we reduce your SSI benefit only $1 for every $2 you earn over $65."

pay, that would be viewed as outright discriminatory. The net result is that quite often the resources gained are not sufficient to warrant spending that time engaging in gainful employment rather than investing it in *working* on self-care of one's disabilities or seeking rehabilitative care or attending to the many other seemingly insurmountable problems that disabled adults face due to a lack of resources or assistance.

Sometimes the benefit of avoiding the risk of injury that is present from attempting to work outweighs any potential benefits from the slight increase in total income one could obtain from working. Especially when one's health plan is engaged in misconduct which limits or prevents needed care, as after sustaining further injury the health plan can be expected to continue to limit or prevent needed care. As a direct example, my attempts to attend college and work in 2011-2013 resulted in repeated orthopedic injuries and complications [Exhibit B4, 14 Tabor Ortho, Results PT, Oral Surg CT&MRI TMJ.pdf] and then compounding those injuries was a 2014 head injury [Exhibit B4, 5 St. Franicis ER 5.30.2014.pdf] and in 2016 I learned these injuries were directly related, even caused, by my jaw-airway issues [Exhibit B4, 8 Dr. Melody Barron DDS TMD & SRDB evaul.pdf]. Each of those records just referenced were submitted to my health plans with my 2019 Medical Appeal. The impairments from those and many subsequent injuries were additive to the impairments I already had from my existing disabilities. One should keep in mind that the severity of my disability has qualified me to receive SSI since ~2005.

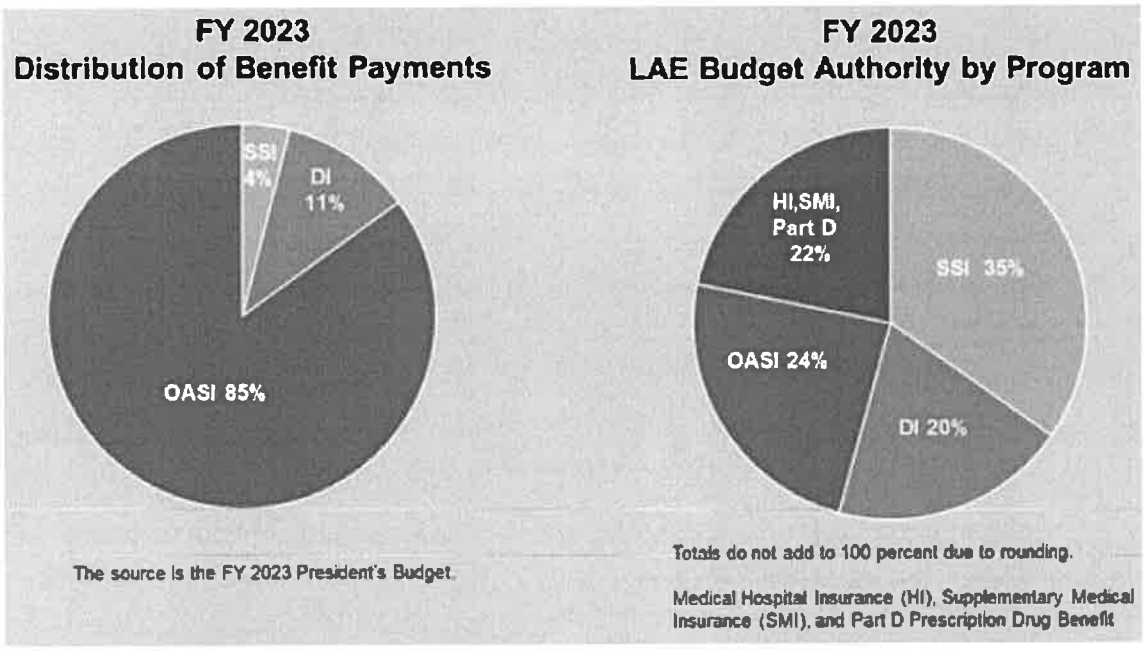
To date the misconduct of private and state operated health plans limits or prevents me from receiving appropriate care for those jaw-airway issues and the lingering effects of those and other injuries. Instead of the risks that some disabled adults incur from attempting to work being recognized and accommodated with something akin to Hazard Pay, our pay is reduced by 50%.

> "SSI benefits are reduced by 50 cents for every $1 of wages in excess of $65 each month and by a full $1 for every $1 of "unearned income" after the first $20 each month".
> "The $20 unearned and $65 earned income disregards have remained fixed since SSI was first created in 1974.199 Had these thresholds risen in line with inflation, they would be $127 and $414, respectively, today.200 And had the income disregards risen in line with average wage growth, as measured by the SSA, they would have been $151 and $490, respectively, as of 2021.201"
> "SSI asset limits have only been raised once since the program's creation in 1972—in 1989—and that did not even make up for inflation at the time. To keep up with inflation today, limits would need to be more than four times as high as they were in 1972."

One of the primary goals of the Americans with Disabilities Act was to better include people with disabilities in the workforce by preventing disability discrimination and requiring reasonable accommodations [42 U.S. Code § 12101]. In contrast are these rules for the SSI program which discourage disabled adults from fully participating in the workforce. Even more curious is that were an employer to implement rules like this in adjusting the pay of people with disabilities it would be regarded as an intolerable instance of disability discrimination. These SSI rules not only compromise the pursuit of The Nations Proper Goals for people with disabilities, but also create costly inefficiencies in the SSA's administration of SSI:

> "SSI is expensive to administer because its complex rules require SSA staff to continually monitor recipients' living arrangements, incomes, savings, support from family and friends, marital status, and more. SSI benefits make up only 5 percent of the payments that SSA makes, but the program requires 35 percent of the agency's budget to administer.[12] In contrast, SSA spends 20 percent of its budget to administer SSDI, even though it has 1.5 million more beneficiaries than SSI."

Benefits And Administrative Budget By Program[4]:



And if those problems weren't bad enough:

[4] Social Security Administration. (March 2022). FY 2023 Congressional Justification. Pg. 7

".. it is expensive to be disabled.19[5] Households with disabled adults need 28 percent more income, on average, to achieve the same standard of living as adults without a disability.20[6] Moreover, the added costs of medicines and medical procedures, accessibility accommodations in homes and transportation, and many other regular expenses are exacerbated by the fact that disabled workers—if they are able to work and are employed—earn just 74 cents for every dollar earned by their nondisabled counterparts;" "The extra cost of living for disabled people is often referred to as the "disability tax.22[7]"[8]

The State of Tennessee could acknowledge that the cost of living for disabled adults is greater than it is for able bodied persons by supplementing SSI payments to adjust for cost of living, but chooses not to.

"In recognizing that there were variations in living costs across the Nation, Congress added section 1618 to the Social Security Act to encourage States to supplement the Federal payment. This ensured that SSI recipients received the full benefit of each cost-of-living adjustment. States may administer their own State supplement programs or have us administer the programs on their behalf." .[9]

The assistance granted to disabled adults by the State of Tennessee and U.S. Government is structured to make it impossible for us to afford attorneys and makes it exceedingly difficult or impossible to perform the tasks that are part of the "burdens of litigation". That the hardships and needs of disabled adults are generally neglected by the State of Tennessee is compounded by its agencies whose conduct creates additive undue hardships, such as physical or psychological injuries, that can further increase the cost of living for a disabled adult. The State

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[5] Sarah Hawthorne, "7 Hidden Costs of Disability," Medium, August 22, 2021, available at https://medium.com/@sarahhawthorne/7-hidden-costs-of-disability-f2756645723f; Zachary Morris, Nanette Goodman, and Stephen McGarity, "Living with a disability is very expensive – even with government assistance," The Conversation, March 23, 2021, available at https://theconversation.com/living-with-a-disability-is-very-expensive-even-with-government-assistance-157283; Sophie Mitra and others, "The hidden extra costs of living with a disability," The Conversation, July 25, 2017, available at https://theconversation.com/the-hidden-extra-costs-of-living-with-a-disability-78001.

[6] Nanette Goodman and others, "The Extra Costs of Living with a Disability in the U.S. — Resetting the Policy Table" (Washington: National Disability Institute, 2020), available at https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf.

[7] Jasmine E. Harris, "Taking Disability Public," *University of Pennsylvania Law Review* 169 (9) (2021): 1681–1749, available at https://scholarship.law.upenn.edu/faculty_scholarship/2743.

[8] Justin Schweitzer, Emily DiMatteo, Nice Buffie, Mia Ives-Rublee. (Dec, 5, 2022). How Dehumanizing Administrative Burdens Harm Disabled People. Retrieved: https://www.americanprogress.org/article/how-dehumanizing-administrative-burdens-harm-disabled-people/

[9] Social Security Administration. (March 2022). FY 2023 Congressional Justification. Pg. 127.

of Tennessee stacks the deck against us, gaining an advantage so unfair and unjust it is comical to think that there might be any way to level the playing field let alone disadvantage the State and its agencies against a disabled adult pro se litigant. It's like trying to referee a fair fight between a professional boxer and a two year old child, and if the child manages to get a hit in award penalties because their strikes land below the belt, and that is against the rules.

The burdens of litigation are more challenging than the employment that a great many 'able' Amercians engage in, as the existence of the profession of the Lawyer and their $350-$750 an hour fees necessitates this to be. Disabled adults can't function well enough to work, but are being required to do tasks that are the purview of lawyers and doctors to try to receive the rehabilitative care they need in order to be able to work. The demands of these legal-medical tasks exceed my ability, exceed the ability of most disabled adults, and in my attempt to perform those tasks I have suffered injuries and as I continue to try to perform them can be expected to continue to suffer such injuries.

This creates a paradox. In order for some Disabled Adults in Tennessee to try to access rehabilitative care they have to engage in a pro se litigation process which discriminates against their disabilities and creates burdens that are injurious because of those disabilities. A disabled adult's ability to have the autonomy to exercise liberty and be independent becomes further compromised by sustaining injuries that cause one's disabilities to become more severe. The State of Tennessee's discriminatory procedures of due process causes the State of Tennessee to deprive disabled adults of their health, wellbeing, and limited resources[10] by the State without due process.

The reason there are Fair Hearings and Petitions for Judicial Review about Fair Hearings related to TennCare's administrative decisions is that the State is not permitted to deprive its citizens of their property without due process [5th & 14th Amend. U.S. Const., Goldberg v. Kelly, 397 U.S. 254 (1970)]. By making it impossible for disabled adults to afford attorneys, and making the burdens of litigation so demanding that they exceed the ability of most disabled adults to safely meet them as pro se litigants, the State of Tennessee defeats the intended protective purpose of Fair Hearings and Petitions for Judicial Review. One of the

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[10] A Disabled adults capacity to work is already compromised, so it seems safe to assert that there is *definitely* no chance of trying to engage in gainful employment while trying to pro se litigate while disabled. Further, the costs of litigation hurt the meager resources disabled adults have, which are already inadequate to allow disabled adults to meet their existing disability needs, and therefore, by further depriving a disabled adult of their existing resources they further deprive them of being able to accommodate their disabilities, which then leads to further inability to conduct themselves in society (which is the exercise of liberty) and meet the burdens of litigation; the burdens of litigation can become a discriminatory deprivation that compounds itself.

primary Causes of Action in my case involves the State of Tennessee Department of Finance and Administration through its division TennCare depriving me of the due process of a fair hearing [Am. Pet. Rev. pg. 12 ¶ 5]. Tenncare, the State of Tennessee, has already acted to circumvent the process of due process. That in Tennessee the burdens of litigation created by the procedures of due process could itself further circumvent the process of due process is, well, it is quite remarkable.

States are specifically prohibited from depriving its citizens of life, liberty, or property without due process [14th Amend U.S. Const.].

My being a Disabled Adult on SSI, having TennCare, means it has been established that I am already burdened beyond my capacity to bear and require assistance from the State in order to meet my most basic needs. Under such circumstances, imposing additional burdens is adding salt to an open wound. There is nothing reasonable or fair about being disabled and suffering repeated injuries from treatable, even curable, health conditions simply because health insurance plans skirt the law because the legal community and the justice system conduct themselves in a manner that makes justice inaccessible to disabled adults with certain disabilities and legal complaints.

As I have struggled to meet the burdens of litigation I have pondered the question of what is an appropriate burden and what is a discriminatory burden; what is justice for disabled adults in Tennessee. On March 15th 2024 I wrote:

> "The Law should protect me and other disabled adults from being physically and psychologically tortured by the abuse and exploitation of health insurance plans, but the people of Tennessee refuse to take the actions required for those laws to be enforced.
>
> I've come to a conclusion that:
>
> Requiring indigent disabled adults to hire a lawyer or find pro bono representation to be able to access justice is like requiring a person in a wheelchair to hire or find a person to carry them in order to access a court house. And if by some miracle they manage to crawl up the stairs on their own, penalize them for showing up late.
>
> The impairments I have due to the health conditions causing my disabilities makes it an impossible task to do the job of a lawyer. My job isn't really to win this lawsuit against TennCare. It's to communicate that I'm a disabled adult, I'm being abused and exploited, I need assistance, I need someone to protect me, and if the Attorney General and TennCare and Deputy Director Stephen Smith decide to use legal process like a

baseball bat to beat me 6ft under the ground, I just need to make sure all of them knew what it is that they were doing, so that when it's done, any sane, moral, prudent person will understand how wrong it was, and law or not, find cause that they should be held accountable."

I read and reread the rules, the orders, the laws, the case law I can find, my notes, my filings, over and over. I keep forgetting things, having to reread things. My physical and mental disabilities, my health conditions unmet due to health plan misconduct, they are known to cause brain injury; dysautonomia; psychiatric conditions; cognitive and emotional disabilities; musculoskeletal related neurological impairments to cognition, mood, digestion, and motor control of my hands and legs; they cause further impairment the more I sit at a computer trying to work towards getting care and justice. I read and I work until I can't function well enough to even understand what I'm reading, then I keep reading and rereading the same paragraph, or the same sentence, and write and rewrite and then read and reread what I wrote, and keep at it until my efforts become so unproductive or harmful that I have to stop. And then when I stop to lick my wounds and try to recover, my mind then no longer occupied with the demands of those tasks, it is in that pause that my mind finds its way to wondering:

What is the point of all of this?

Why do I keep trying to get care?

Why haven't I killed myself?

These questions have been in my mind for over a decade. I used to have answers to these questions. As a child and adolescent I told myself I just needed to hold on while medicine advanced and my doctors figured out how to fix me. In my late twenties when it became clear that my doctors weren't going to figure things out on their own, I answered that I owed it to myself to do everything I could on my own to try to understand what was causing my disability. And when I figured out the causes of my disabilities, then the answer was that I owed it to myself to try to get care for those causes of disability. And then the answer became that I owed it to myself to understand why I was not being allowed to get the care that I needed. And upon figuring out that the reason I could not get needed care was due to health plan misconduct and that people refuse to take the necessary actions to curtail that misconduct, I stopped having an answer.

It is with that process and with those questions that I researched my health conditions, figured out the causes of my disabilities, the treatments required, the doctors who provide such care, and why those doctors were not and would not be expected to become in-network, all while my health plans prevented or limited me and others like me from being able to see the

doctors who possess the specialization required to diagnose and treat the health conditions causing our disabilities. That's how I wrote my medical appeals. That's how I studied the law. That's how things are for me in a society that shifts the burden of holding accountable private and state operated health plans to the disabled adults that they are abusing and exploiting.

My process for working on my 88 page complaint-appeal sent to my health plans in November of 2023, which is central to this case, was to read the entire main body of the text on those 88 pages and additional sections and resources contained in the drafting document. The drafting document at its largest was 196 pages long [Exhibit C4]. The original drafting document dates back to 2020, as evidenced by the Google Documents version history [Exhibit C4]. It took 50.6 hours for me to transcribe the Cigna-Fedex Conference Call referenced in the complaint-appeal according to the work time record at the start of the document [Pet. Jud. Rev. Ex. B Digital References, Cigna-Fedex Conf. Call Transcript]. Corroborating my record of work time is the file properties of the transcripts .odt file show the editing time to have been 45:24:57. Listening to the conference call to create the transcription continually provoked my PTSD, and the time I spent managing my PTSD flares and related suicidal ideation is not included in that work time tally. The excerpted quotations of the scientific publications referenced throughout my 2023 complaint-appeal, particularly pages 51-63, were obtained by reading through each of the 50 referenced articles, which in total have over 580 pages and include references of their own many of which I read through and decided not to include in my complaint-appeal.

I would read my complaint-appeal draft and make changes as I read it, then read it again, and make more changes, do research and rewrite things, include more references and supplementary documentation, reread articles I'd read and referenced to double check information, and do that over and over, month after month. And after having spent an extensive number of hours reading and rereading it, I can't remember a lot of what I wrote, but retain now mostly a generalized remembrance of what things it contains. That's what I have to do to work on things. I try until I become too dysfunctional to try any more, and then try hard to manage my disabilities, and then try again to work on things, and repeat that process over and over. And in so doing I suffer injuries, I get more impaired, I get more disabled, and I try harder, because you all require that of disabled adults in Tennessee; you burden us with that. And for my efforts I am denied with no more justification than a single sentence claiming, "It's too late to appeal your request for OUTPATIENT PHYSICAL THERAPY". You all place my obtaining of my health and my rights at the top of a staircase I can't climb, and from that superior position, then lob rocks at me, and call it fair and equal treatment.

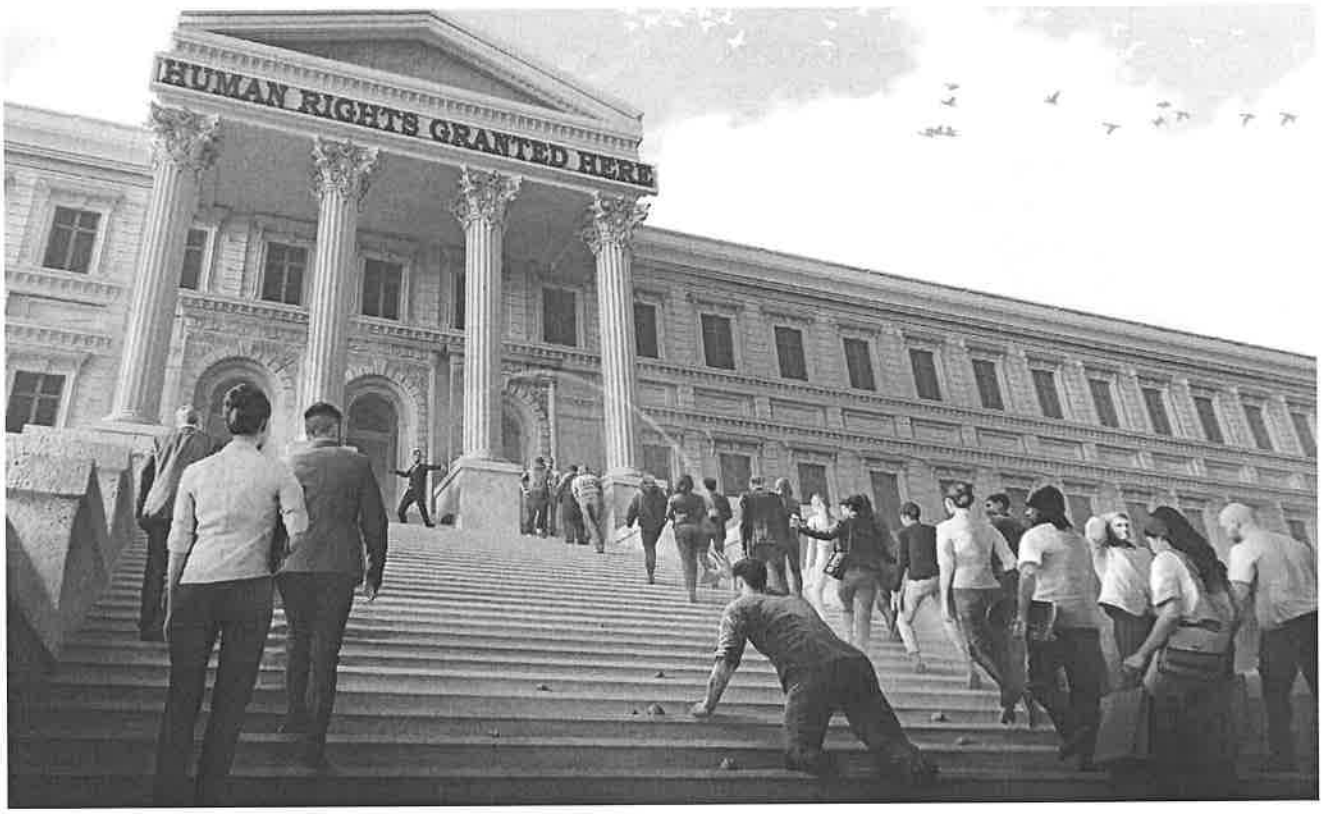

Image Title: Crawling to Justice.

The court easily understands that it would be discriminatory to hold a hearing in which a deaf pro se plaintiff was without a real-time video transcription or sign language interpreter. Or to require a person in a wheelchair to attend a hearing in a building without wheelchair access. I concede that it is not a simple or easy thing to understand how my health conditions impair me and cause my disabilities and therefore it is even more difficult to understand what must be done to avoid discriminating against my disabilities. Compounding that is the fact I have been prevented or limited from working with the healthcare specialists and/or an attorney which could help explain matters on my behalf. Complicating matters further is that as a disabled adult pro se litigant I don't have the education or experience necessary to fully understand what the burdens of litigation are or how to meet them. That my disabilities impair me so much that they compromise my ability to discern and communicate my claims, the abuse I've suffered, and what disability related accommodations I might need in order to be able to meet the burdens of pro se litigation further exacerbates these compounded and complicated matters.

It is difficult to find a justification for it to be the burden of disabled adults to educate a health insurance plans administrators and its doctors or the Court and its staff so that they can comprehend our disabilities well enough to avoid discriminating against us and depriving us of

our fundamental rights. Yet, that burden is imposed upon me by health plan misconduct, by the Respondents, the Courts requirements, and societies inattention and inaction to the plight of disabled adults in their community. This is a full-time job that I don't receive compensation for doing. A job that when I do it I am often subjected to more abuse, discrimination, and injuries that I receive no workers comp for. It is a burden in addition to already overwhelming burdens. I've had to try harder in the last decade than most people have to during their entire lifetime, and despite trying so hard, and gaining the hard-won experience that comes with such persistent diligent effort, I still fail and get injured because I am a disabled adult - Because I Am Not Able.

2 - What Burdens Are Discriminatory Against the Disabled

The question of what burdens are discriminatory against a person with disabilities is a complex one and it warrants consideration at every stage in my case and the cases of any other disabled adult pro se litigants.

I asked myself this question throughout January to March of 2024 as I struggled to learn and meet the demands of the Tennessee Rules for Civil Procedure and Local Rules for service of process, notarizing affidavits, and filing procedures. I ponder this question even more intensely as the Court's April 22nd 2024 Order denied my *Motion for Accommodations* and I find myself unable to understand the Order's reasons to deny. I wrestle with this question as I seek to understand and respond to the *Respondents' Motion to Dismiss* , wondering if my *Motion for Accessible Justice* will even be heard if I managed to get it filed in time, or will I lose my case because my disabilities impaired me so much I couldn't understand how to argue and complete my Motion for Accessible Justice until it was too late?

My Petition for Judicial Review included what I thought to be competent evidence supporting my allegations. My Motions included Exhibits which presented even more documentation that I thought would be competent evidence further supporting the allegations in my Petition and in my 2023 complaint-appeal. The court's ruling seems to suggest to me that it considers what I've presented so far are allegations absent competent evidence.

Am I so cognitively impaired by my disabilities that I can't figure out what is and is not competent evidence? Or did I present competent evidence but my cognitive impairments prevent me from properly communicating that evidence? Is there a Rule about evidence that my mental disabilities are once again preventing me from understanding?

As I write this paragraph on April 22nd I am confused, distraught, and walking around my neighborhood in circles trying unsuccessfully to get my brain to stop thinking about committing suicide. I am reading through the Courts April 22nd Order, reading the case law in it, reading Rules for Evidence, reading through Tenn. R. Civ. P. 65.03 Restraining Order and trying to understand why my Petition, Motion, and Exhibits aren't enough to warrant an injunction against the Respondents ongoing abuse. Why does a disabled adult with severe mental disabilities have to be able enough to understand what is competent evidence and be able enough to competently present that evidence? Why do I have to do that just to stop the abuse that occurs because of the incompetence of the able persons who are failing to prevent the abuse?

I keep wondering how I can stop being abused by my health plans. I don't know. I don't understand. It doesn't make sense. As I try to make sense of it all my suicidal ideation gets stronger because I know if I go kill myself the abuse will definitely stop. My mental disabilities don't stop me from understanding that. In fact my mental disabilities help me understand how helpful suicide really can be to this situation. So much so that it often seems the best solution because it appears to be the only solution the State of Tennessee and the citizens therein will make accessible to me and other disabled adults.

Is my last paragraph competent evidence? Or just allegations of having experienced anguish? Is the potential of self-harm too hypothetical for the court to address? Is my opinion not expert enough? Every other state agency in Tennessee I have complained to about my health plans has said it's not their job to deal with, so why then should it be the courts?[11]

Rules by which an individual's disability can be determined have been set forth within the Americans with Disabilities Act (ADA) [42 U.S.C. 12102] and its related Code of Federal Regulations (CFR) [28 CFR § 35.108]. These define disability as, "A physical or mental impairment that substantially limits one or more of the major life activities of such individual". An impairment is regarded as a disability when it "substantially limits the ability of an individual to perform a major life activity[12] as compared to most people in the general population." and

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[11] Exhibit B from the Petition for Judicial Review and Exhibit A3 from Reply to Respondents Response In Opposition to Plaintiffs Motions for Accommodation has documents which are competent evidence that corroborates the allegation made. I don't understand why disabled adults should be required to be able to do more than I have been able to do to evidence I am being abused and that the people that should take action to stop this abuse are not.

[12] 42 U.S.C. §12102

(2) Major life activities

(A) In general

"whether an impairment substantially limits a major life activity requires an individualized assessment." [28 CFR § 35.108(a), (d)(v)-(vi)]

I have communicated to my health plans and the Court that I have multiple health conditions that cause multiple impairments that substantially limit multiple major life activities in my 2019 Appeal [Am. Pet. Rev. Ex. B. Digital Refs., 2019 Med. App., file: "Sean Smith's 2019 Medical Appeal (redacted for court 2024).pdf", pg. 53-58, see also pg. 12-13, 18-23, 25, 27, 29, 33-36], November 2023 Complaint-Appeal [Am. Pet. Rev. Ex. B pg 2, 8, 12, 15-16, 22-24, 31, 36, 37, 41, 47-49, 50-61, 63, 68-69, 73-75], Email to Deirdra at FedEx HR [Am. Pet. Rev. Ex. B. Digital Refs, file: "Email to Deirdra at Fedex HR Apr-May 2020.pdf" pg. 2-4, 7], Amended Petition for Judicial Review [pg 1-3], Motion for Accommodations [ran out of time], Reply to Respondents Response in Opposition to Petitioners Motion for Accommodation [ran out of time], and in this Motion for Accessible Justice [ran out of time]. Medical records submitted to my health plans alongside my 2019 Appeal provided extensive proof of how long-standing my symptoms of jaw-airway issues were [Exhibit B4]. Three of my declared health conditions (Major Depressive Disorder, Bipolar Disorder, PTSD) are specifically mentioned in the CFR as substantially limiting brain function [28 CFR § 35.108(d)(2)(iii)(K)].

It is worth noting that I developed PTSD because of the abuse perpetrated by my health plans and parties that my health plans and their in-network providers involved in healthcare operations. That same abuse is understood to worsen Bipolar Disorder and Major Depressive Disorder, which further exacerbates the PTSD. I also have my other health conditions, which include but are not limited to, Mast Cell Activation Syndrome, Dysautonomia, Obstructive Sleep Apnea, TMD, MSK Dysfunction, neurological issues, chronic pain, etc, which cause substantially limiting impairments that are additive to those understood to be related to my psychiatric diagnoses, even as many of my psychiatric diagnoses can be understood to be as a result my other health conditions.

My development of PTSD can be understood per the publications I referenced to have occurred not merely because I was abused, but because my existing disabilities disposed me to

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For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
(B) Major bodily functions
For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." (emphasis added to highlight my disabilities) [see also, 28 CFR § 35.108(b)(1)(I)]

developing the PTSD when being abused. Which was communicated in my 2019 medical appeal [Ex. B4 2019 Med. App. pg 17-19, 22, 27-28], and once again communicated in sections of my 2023 complaint-appeal which quoted excerpts from the scientific literature that I referenced in the 2019 appeal [Am. Pet. Rev. Ex. B. pg 54-61, 69] which the Court and Respondents were supplied digital copies of as part of the Petition for Judicial Review's Exhibit B[13].

The work of Dr. Krakow highlights that while sleep breathing disorders can make it more likely one develops PTSD, PTSD can also worsen sleep disordered breathing (SDB). In the references section of both the 2019 and 2023 appeal at "87. Barry J. Krakow, et al. (2015)" is an excerpt from that article by Krakow, which states, "...among more recent reviews, there is a growing indication that individuals with PTSD suffer a disproportionately higher rate of SDB compared to the general population." . The information from articles referenced in the 2019 appeal - these same articles also being extensively quoted with excerpts in the 2023 complaint-appeal - communicate how sleep breathing disorders can cause and worsen mood disorders like Major Depressive Disorder and Bipolar Disorder. On page 50 of the 2023 complaint-appeal is communicated that, "Indeed some authors note, "Once thought to be relatively rare, there is increasing evidence that obstructive sleep apnea (OSA) is both common and associated with significant medical and psychiatric comorbidities." [Christopher A. Baker et al., 2016], with some studies observing rates of OSA prevalence as high as 84% in psychiatric populations [Knechtle et al., 2019]."

The adversary I face in my case isn't limited to the Attorney General acting as the Respondents counsel, or even the process of due process imposed by Tennessee's Judicial Branch which discriminates against disabled adults with mental and cognitive disabilities, but my own mind, my neurological and psychological injuries and impairments, my diseases disordering my mood and deficiting my cognition. My mental disabilities file their own Motions to Dismiss Me from existence. Motions I must argue in a 'Court' in which its rules operate with indifference and absolute tyranny, enacting dictates that are both capricious and arbitrary and seek to serve no party or common good. A place without compromise, accommodation, agendas, reasoned argument, good or bad, just or unjust, only actions and outcomes transpiring in accordance with rules dictated by natural laws. The Cosmos Doesn't Care, It Just Is, And Will Be.

In order to defend one's rights one must be able to perform with minimal impairment multiple major life activities such that one may either acquire the resources to hire legal

[13] A USB with the files was mailed with the Petition for Judicial Review filed on 1.26.2024. An email delivering those same files within a .zip archive was supplied to Respondents counsel on April 6th 2024.

representation or to perform pro se litigation. A process by which one can determine if an individual is substantially limited in performing the major life activities required of pro se litigation against the State is delineated in 28 CFR § 35.108(d)(3)(i)-(ii).

3 - Realizing The Nation's Proper Goals Requires Accessible Justice

My mental and cognitive disabilities impair my ability to do mentally demanding tasks and even some cognitively simple tasks. It takes me longer to perform tasks based upon how severely impairing my disabilities are at a given time. I've been trying to learn to perform pro se litigation. It takes me a long time to try to figure out what to do and longer to try to do it. Sometimes it takes me a long time just to discover I'm not able to do something the court requires me to do and even longer to try to figure out how to correct the mistakes I made while trying to perform those initial tasks. So by the time I learn enough to understand I needed accommodations and what those accommodations needed to be in order for me to be 'able' to do something it's often too late - Is my Motion for Accessible Justice too late? I then have to try to figure out a new set of problems caused by my mistakes and don't know what accommodations I might need to be able to meet the demands of those new problems. While affording me more time to litigate might seem a reasonable accommodation, more time spent litigating increases the time I spend without rehabilitative care and subjected to these abusive and injurious conditions.

The misconduct of TennCare and Unitedhealthcare Community Plan (UHCCP) has played a central role in limiting and preventing me from receiving needed care. One should note that UHCCP and TennCare have been operating as secondary health insurance plans, and one might thereby reason that their role could not have been central. However, were TennCare and it's MCO UHCCP to operate in compliance with the laws, to provide full and fair review of appeals and grievances, upon discovering that my primary private health insurance plan was engaged in misconduct and willful noncompliance, as any prudent person would, I as a disabled adult would designate TennCare and UHCCP as the primary insurance so that I would get full and fair review of my care requests and thereby access the medical assistance necessary to facilitate my rehabilitation. I would be able to use my medicaid health program benefits, my property, to achieve the intended purpose of the medicaid program [42 U.S.C. § 1396–1].

The misconduct of TennCare and UHC:CP has deprived me needed care just-as-much as the misconduct of Cigna and Fedex, and arguably even more so, as designating

Cigna-Fedex as a primary insurance then requires myself and my parents to meet a costly annual deductible which we would not have to pay if UHCCP-TennCare were my primary insurance plan. UHCCP and TennCare limiting and preventing care has caused me to suffer numerous physical, mental, and financial injuries which increased the severity of my already severe disabilities. That causes me greater impairment, and those undue impairments and more severe disability act as an imposed restraint on my ability to function. TennCare imposes this restraint on my function which is limiting or preventing me from being 'able' to meet the burdens of litigation; to act as my own lawyer, to be a witness, to present and communicate evidence. TennCare's imposed restraint is obstructing justice [18 U.S.C. 1503]. "The United States Supreme Court appears to favor a broad reading of the omnibus clause."[14]

The burdens of litigation that the Court demands disabled adult pro se litigants with mental and cognitive disabilities meet becomes even more of a discriminatory requirement given the restraints on function imposed on disabled adult pro se litigants by TennCare's misconduct. The State of Tennessee and the U.S Government limit the resources of disabled adults to prevent us from affording attorneys or needed care. The State of Tennessee creates restraints that further impair disabled adults by engaging in misconduct to prevent us from receiving rehabilitative care. And then the State of Tennessee requires us to meet litigation burdens our disabilities prevent us from meeting.

How the Davidson County Chancery Court handles my case and accommodates my disability needs is a slippery slope to traverse. Especially when allegations and evidence indicate TennCare and other State agencies have acted to defeat or neglected to uphold the administrative processes, rules, and laws intended to protect disabled adults from discrimination, neglect, abuse, and exploitation.

Were the Attorney General to assist Tenncare in a manner which enables them to continue engaging in discriminatory practices which then perpetuate the neglect, abuse, and exploitation of disabled adults, or were the Chancery Court to conduct its operations in a manner which discriminates against my disabilities and further obfuscates my Access To

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14 https://www.justice.gov/archives/jm/criminal-resource-manual-1724-protection-government-processes-omnibus-clause-18-usc-1503
See also:
https://www.justice.gov/archives/jm/criminal-resource-manual-1721-protection-government-processes-obstruction-justice-scope-18-usc

Justice, that would be a problem as such conduct is specifically prohibited by federal laws. It is clearly the intent of Congress that State's not find ways to defeat the protections of the ADA:

28 CFR § 35.130

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing **accomplishment of the objectives of the public entity's program with respect to individuals with disabilities;** or

(iii) **That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.**

(emphasis added)

There is also a disturbing similarity between the burdens of my health plans appeals process and the burdens of litigation being placed upon disabled adults by the Tennessee Courts, as can be observed by my statements at the 2019 TennCare Block Grant hearing:

> "[UHCCP-TennCare] essentially torture people who can barely function by requiring them to navigate one obstacle after another, and when I have asked for assistance with the appeals process I get told that there is no one to assist." [Am. Pet. Rev. Ex. B, pg 33]

Earlier in my case, even though I read through the sections of the Tennessee Rules for Civil Procedure and Local Rules related to initiating a civil suit and service of process multiple times, I failed to understand and completely follow the rules. The arguments set forth by the Respondents in their April 22nd *Motion to Dismiss* reaffirms that my ability to function is too impaired to understand and effectively communicate my situation. That my disabilities are largely why I have had such failures doesn't change that my prior failures cause me to question what other legal matters I'm not understanding. Yet, as I doubt the validity of my perception of what access to justice should be for disabled adults in Tennessee, I remind myself why the Amercians with Disabilities Act was passed in 1990, and that even after passing it the courts failed to interpret it as Congress intended, which is why the 2008 amendments were made, and why ADA related CFR makes repeated mention of "broad" coverage and states "The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA." [28 CFR § 35.101(b)].

The failure of State courts to interpret and apply the ADA as intended are manifested in instances where States, such as Tennessee, resisted compliance, arguing exemption via 11th Amendment immunity, a sovereignty to conduct itself as it pleased, seeking to perpetuate its existing discriminatory practices, reinforcing the fact the State didn't view people with disabilities as being worthy of inclusion in society, worthy of accessing justice, requiring them to argue their

case in federal court all the way to the U.S. Supreme Court, just so that they didn't have to literally crawl on their bellies to get to a court hearing in Tennessee Courts. The 2004 Supreme Court case Tennessee v. Lane and the cases cited in it reminds me that I can't let my doubts yield my perceived rights to State agencies that have such a long track record of holding to discriminatory prejudiced perceived certainties regarding whether disabled adults have a right to Justice and other fundamental rights:

> "Difficult and intractable problems often require powerful remedies, and this Court has never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. One means by which the Court has determined the difference between a statute that constitutes an appropriate remedy and one that attempts to substantively redefine the States' legal obligations is by examining the legislative record containing the reasons for Congress' action." Kimel, 528 U. S., at 88
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> "It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."
>
> "The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response.""
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> "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U. S. C. §12131(2)."
>
> "Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." South Carolina v. Katzenbach, 383 U. S. 301, 308 (1966). See also Florida Prepaid, 527 U. S., at 639–640; Boerne, 521 U. S., at 530."
>
> "This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. Boddie, 401 U. S., at 379"
>
> [Tennessee v. Lane, 541 U.S. 509, 2004]

I want to live in a Society, a State, a Nation where disabled adults can access justice and rehabilitative care. I want fair and equal treatment and the opportunity to fully participate in all aspects of society. At this time I do not expect the Court to fully understand how to provide non-discriminatory access to justice for disabled adults. But I would like the Court to

be made aware that I believe it is obligated to try. At Least As Much As I Am Trying To Shoulder The Burdens of Litigation. And perhaps when we both fail at our respective tasks we can try to be forgiving of each other in order to focus upon succeeding in our shared pursuit of Justice.

> "Even though the courts cannot create claims or defenses for pro se litigants where none exist, *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn.Ct.App. 1994), **they should give effect to the substance**, rather than the form or terminology, of a pro se litigant's papers." Hessmer v. Hessmer, (Tenn. Ct. App. 2003). (emphasis added)

The Courts have been required to be made physically accessible to people whose disability limits their ambulation. The Courts have been required to be made accessible to those whose indigency prevents paying for Court costs. The Court should likewise endeavour to allow justice to be accessible to disabled adults whose disabilities impair, limit, or prevent them from securing legal representation or representing oneself effectively. Such a requirement is in keeping with Congress's intent for persons with disabilities, as declared in 42 U.S. Code § 12101(a), which states:

> "The Congress finds that
>
> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (7) **the Nation's proper goals** regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
>
> (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity **to compete on an equal basis** and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and

nonproductivity."

In order to have human rights one must be able to defend one's rights from violations. To defend one's rights one must utilize the law to take private legal actions. If the accommodations required to allow a disabled adult pro se litigant to defend their rights, to make justice accessible to them, are deemed unreasonable, by proxy the Court is declaring that it is not reasonable for those disabled adults to have civil and constitutional rights. Which would subvert the notion that disabled adults are entitled to and being afforded the due process that can provide equal protection of the law.

42 USC § 12132:

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 USC § 12131:

"(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and"

"(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Many disabled adults who rely upon a wheelchair have as equal an opportunity to climb stairs as a person with functioning legs. In fact, one might even point towards the Capitol Crawl Protest[15], and point out that people in wheelchairs proved that they could crawl up the stairs. It takes them longer, and some could 'hypothetically'[16] get hurt in their

[15] "Shortly before the act [Americans with Disabilities Act] was passed, disability rights activists with physical disabilities coalesced in front of the Capitol Building, shed their crutches, wheelchairs, powerchairs and other assistive devices, and immediately proceeded to crawl and pull their bodies up all 100 of the Capitol's front steps, without warning."
https://en.wikipedia.org/wiki/Americans_with_Disabilities_Act_of_1990 "Capitol Crawl".

[16] Congress passed the ADA due to pervasive instances of disability discrimination dictating a need for prophylactic measures to prevent future hypothetical instances of discrimination and harm through deterrence. And when those deterrent measures prove inadequate, the ADA provides remedies. The ADA

attempt, but they can 'do' it. Yet, the thing to which they are to have equal opportunity to access isn't the climbing of stairs, or the rooms inside the building atop the stairs, it is to access and fully participate in the proceedings in those rooms wherein members of free society congregate to engage in activities such as a court hearing where they and their fellows can defend and thereby obtain their rights through judicial processes providing equal protection of the law [42 U.S.C. §§ 12131(2), 12132]. Likewise, having an equal opportunity to file lawsuits and attend hearings isn't the same as having an equal opportunity to Access Justice.

> "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." [28 CFR § 35.150(a)].

And because the burdens of litigation can make justice inaccessible to a great many disabled adults with disabilities impairing their mental, cognitive, and physical function, essentially excluding this class of individuals from being 'able' to *effectively* pursue private action against parties that violate their rights, the appropriate regulatory action of private legal actions cannot be applied to State agencies. As a result, when TennCare and its MCOs fail to do the job they're funded to do, there are no meaingful consequences to them. This is what makes it possible for TennCare and its Managed Care Organizations to engage in extensive fraud against taxpayers, and directly contribute to that "billions of dollars in unnecessary expenses" that our Congress has so expressly condemned. Until justice is made accessible to disabled adults, the intent of Congress as it relates to persons with disabilities will remain defeated by the misconduct of private and state operated health plans. The Courts will, in effect, fail to achieve what Congress has defined as being The Nations Proper Goals.

4 - Constitutional Violations

A. 1st Amendment of the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people

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is in effect a Restraining Order from Congress upon the States due to the States past history of disability discrimination and abuse. My Motion for Accomodations sought a similar form of Restraining Order against the Respondents, but the Court denied my request as it deemed my situation does not warrant any prophylactic protection from the Respondents activities causing me further injury.

peaceably to assemble, and to petition the Government for a redress of grievances."

The current environment created by the State of Tennessee and U.S. Government prevents disabled adults from obtaining adequate legal representation or engaging in pro se litigation in an effective manner. The functional capacity of many disabled adults is so limited that it is a challenge for us, for me, to even figure out how to submit complaints. To figure out how to submit a complaint one must 1) be 'able' enough to become aware that there is a procedural process to submit a complaint; 2) to be 'able' enough to review that procedural process and understand the actions required to perform it; 3) to be 'able' enough to perform the procedure in its *entirety*. These requirements can be exceptionally challenging and injurious, and at times impossible, for persons with mental, cognitive, and certain physical disabilities which substantially limit their ability to perform the major activities of living required of the actions that are part of the procedural process.

Even when a complaint is submitted the task of keeping on top of things is very demanding. Those demands can easily exceed the capability of disabled adults because their disabilities prohibit them from being able to meet them. The current system of petitioning the State of Tennessee for redress of grievances discriminates against disabled adults with mental, cognitive, and certain physical disabilities. With most disabled adults being unable to engage in effective litigation against State agencies, there are no meaningful consequences to those agencies when they do not attend to appeals, complaints, grievances, and other disputes in good faith with conformity to the law. Thereby disabled adults are deprived from being 'able' to *effectively* petition for an equitable resolution of a dispute with the State of Tennessee. This violation of the First Amendment rights of disabled adults in Tennessee then leads to violations of other civil and constitutional rights.

B. 5th Amendment of the U.S. Constitution:

"nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Medicaid health plan benefits are the property of qualifying disabled adults. When TennCare and its MCOs deprive their disabled adult plan beneficiaries from accessing and benefiting from their benefits, the State and its contractors have effectively seized that property, reappropriating it for their own agendas. TennCare depriving me of full and fair review of my requests for care, my complaints and grievances, depriving me of the due process of a fair hearing, depriving me of being able to access my benefits to receive rehabilitative care, has caused numerous physical and psychological injuries and a multitude of other damages, for which no offer of just compensation has ever been made.

The process of engaging in litigation is itself an exercise of liberty. That the State of Tennessee has created and maintains a judicial environment where disabled adults are being excluded from being able to effectively engage in litigation due to restrictions, rules, and burdens that discriminate against their disabilities violates the Fifth Amendment rights of these disabled adults. Compounding that offense is that TennCare and other parties, that the State of Tennessee and U.S. Government are required to regulate, are preventing disabled adults from meeting their disability needs and as a result the State of Tennessee and U.S. Government are imposing undue impairments upon these disabled adults.

These unmet health needs causing disabled adults to suffer more severe disability related impairments act as physical and mental restraints that further compromise a disabled adults already limited ability to conduct themselves in society. In the State of Tennessee the misconduct of private and state operated health insurance plans, the state's prohibition against disabled adults having enough resources to afford attorneys, the neglect of the legal community to provide pro bono representation for these legal complaints, and the discriminatory nature of the judicial systems pro se litigation process, is depriving disabled adults of their Liberty, Property, access to Justice, the opportunity to achieve Independence and pursue Happiness, and at times even their Life. As previously argued, the discriminatory process of due process in Tennessee is itself circumventing due process, and thereby these deprivations of constitutional rights occur without due process.

C. 14th Amendment of the U.S. Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The privileges and immunities conferred to disabled adults by the Americans with Disabilities Act and other laws serve to protect their fundamental rights, such as exercising liberty, achieving independence, protecting their property, preserving their life, engaging in gainful employment, the pursuit of happiness, etc. When the Tennessee Rules for Civil Procedure and other TN laws that are part of the burdens of litigation are enforced in a manner that abridge those privileges and immunities so conferred by the ADA and other laws enacted to protect disabled adults, then it is in violation of the 14th Amendment of the U.S. Constitution.

The State of Tennessee's abridging of those conferred legal protections creates a process of due process that does not provide due process to disabled adults with mental and cognitive disabilities and certain physical disabilities. The State of Tennessee's current practices

making justice inaccessible to most disabled adults has been preventing disabled adults from having the opportunity to obtain equal protection of the law.

POSSIBLE REMEDIES

1.) A Constitutional Remedy:
The 6th amendment of the Constitution might be interpreted to suggest a remedy to providing due process for disputes between the State and citizens in which a citizen's fundamental rights are at stake. One could thereby infer that it would be a reasonable accommodation for the Court to provide disabled adults whose fundamental rights are being violated by the State a competent attorney whose legal practice includes an area of focus for the issues involved in the complaint. This is arguably the simplest and most complete remedy to level the playing field for indigent disabled adults whose adversary is the State.

2.) Established Practices in Other States:
An alternative remedy to appointing an attorney that has been adopted in some States, and is argued in detail by Chelsea Marx in the article "Accommodations for All - The importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities" [Exhibit D4], is to appoint a "suitable representative", which is an individual who has "the "knowledge of or the ability to attain knowledge of" procedural rules and substantive issues, the "experience and training in advocating for people with disabilities", and the "individual's availability to meet the timelines and duration of the particular adjudicative proceeding.".

A QUANDARY FOR MY CASE AND THE COURT

Given the extent to which I have sought legal counsel and determined that throughout the State of Tennessee there appears to be no attorneys who are willing or able to practice this specific area of law related to the misconduct of private and state operated health plans that neglect, abuse, exploit, and injure disabled adults, it begs the question as to whether or not the court can appoint an attorney who would possess the experience and expertise required to be able to competently litigate my complaint. In my perception it seems to be that the only reason I am having to engage in pro se litigation at all is due to a collective failure on the

part of the legal community within the State of Tennessee.

In example, I contacted the Nashville Bar Association (NBA) on Jan 3-4 2024 to use their attorney referral service. The NBA didn't know of any attorney throughout the entire state of Tennessee who handles cases like this. NBA office manager Vicki Shoulders opted to refund the attorney service referral fee I had paid. I think those events aptly corroborate that there appears to be no attorneys in Tennessee who actively practice this area of law. Further demonstrating this would be that of the many attorneys who declined my case I would ask if they could refer me to an attorney who could help or know of someone who could help. I would often be directed to contact legal aid societies or private attorneys who would eventually direct me to the Tennessee Justice Center (TJC). I was directed to TJC by professionals in related fields, such as social workers, disability rights advocates, disability nonprofit organizations (empower TN, others], PhDs in health policy, and the non-profit organization Disability Rights Tennessee.

At one point I looked through past lawsuits filed against TennCare to try to find private attorneys who might help and tried to contact them. The attorney I was able to get in contact with said that the only reason she was able to litigate the complaint over a decade ago is because she got assistance from Tennessee Justice Center attorneys who walked her through the process. My contact with TJC resulted in being told that they only help people with the application process to get on or stay on TennCare. That once people are on Tenncare and experiencing wrongful service denials or other problems the Tennessee Justice Center does not provide assistance [Exhibit E4, digital files, TJC Call Notes and Recording].

The question I must ask of myself and the court is can I or the court find an attorney who has the education, expertise, and experience needed to be able to improve my access to justice?

I don't know what the right answer is here, other than to conclude that an effective remedy is needed. Finding the right answer requires more than just my mind to analyze this problem and explore possible solutions. Perhaps what my request for relief needs to be is that the court commits to making justice accessible on an ongoing basis by addressing each problem that is anticipated or encountered that limits or prevents my access to justice throughout this case.

REQUESTED RELIEF:

1. For the Court to provide the relief required to make Justice Accessible to Mr. Smith and other disabled adults in Tennessee with mental, cognitive, and physical disabilities compromising their ability to meet the burdens of litigation.
2. DEFEND THE DISABLED

Dated April 24th 2024.

Sincerely,

Sean Smith
6402 Baird lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Affidavit of Motion for **Accessible Justice's Informational Accuracy**

I Sean Smith do hereby affirm that the information I present in my Motion for Justice is to the best of my knowledge and ability true and correct and representative of past events per my memory of past events and/or documentation of those events, and submit my Motion for Accessible Justice as both a Motion and a Testimony, as at this time I am too impaired to gather, examine, analyze, and present all of the evidence I have or know of within the time limits I have to complete and submit this Motion.

Dated April 24th 2024.
Sincerely,
Sean Smith
6402 Baird lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

Certificate of Service

I Sean Smith hereby certify that a true and correct copy of *Motion for Accessible Justice - When Are the Burdens of Litigation Discriminatory Against Disabled Adults?* and the *Affidavit of Motion for Accessible Justice's Informational Accuracy* is being forwarded via email and USPS certified mail to the following:

Respondents Counsel
HAYLIE C. ROBBINS (BPR# 038980)
Assistant Attorney General
Office of the Tennessee Attorney General
Haylie.Robbins@ag.tn.gov

Dated April 24th 2024.
Sincerely,
Sean Smith
6402 Baird Lane
Bartlett TN, 38135
(901) 522-5775
TheLastQuery@gmail.com
DefendTheDisabled.org

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Sean P. Smith,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	**Case No. 24-0074-I**
	)	
	)	**Chancellor Patricia Moskal**
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

PETITIONERS' REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR ACCESSIBLE JUSTICE

My Motion for Accessible Justice was filed as a sworn Affidavit and my arguments and statements were made in good faith for the purposes declared. Which in brief summary would be for justice to be equally accessible to disabled adults in Tennessee. Respondents' Response in Opposition to Motion for Accessible Justice makes no such sworn statement or equivalent affirmation. Their arguments may be driven by motives that are not in alignment with equitable justice or the nation's proper goals for individuals with disabilities. I believe it is worth noting that if my statements and claims are more than just "true and correct" "to the best of my knowledge and ability" and are objectively true and correct, which I continue to believe they will prove to be if properly tested, then Respondents counsel as Attorney General will have - or has? - an ethical dilemma.

Like TennCare's administrators an AG also makes an oath to fulfill their duties faithfully with fidelity and in support of the State and Federal Constitutions. TennCare's actions as I have described them have worked against our Constitutions. Knowingly helping TennCare avoid the

remedial reformative process of legal consequences for their offenses so that they may persist in their offending actions would also act against our Constitutions. At what point in these proceedings will the AGs duty to defend TennCare be superseded by their duty to investigate and prosecute TennCare?

One might try to play the game of "allegations" "are not, of course, evidence of the facts averred" [Hillhaven Corp. v. State ex Rel. Manor Care, 565 S.W.2d 212 (Tenn. 1978)] but this offers little shelter. It is far from supporting our Constitutions to make it the job of indigent disabled adults with substantially limited brain function to pro se litigate such a complex legal matter in order to aver the allegations. And by proxy opposing that I and those like me be appointed counsel seems in service of an agenda not in alignment with proper governmental purpose. That much like with my complaints and appeals the Respondents seek to dismiss and deny without considering their oath and obligations. Which is unacceptable conduct for those acting in stewardship of our State of Tennessee and United States of America. The common good that our Constitutions are sentinels of is owed greater devotion.

ARGUMENT AND ANALYSIS

1. A Full and Fair Review of Case Law Supports Petitioner's Right to Appointed Counsel

In *Respondents' Response in Opposition to Petitioner's Motion for Accessible Justice* they cite the Tennessee Judicial Branches ADA policy which states that "the appointment of an attorney to represent a party to a civil case cannot be required." Respondents claim the policy "is well grounded in Tennessee law." [pg. 1 ¶ 1]. Respondents' cite Bell v. Todd, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005) which says "it is now well-settled that there is no absolute right to counsel in a civil trial. See Knight v. Knight, 11 S.W.3d at 900; Memphis Bd. of Realtors v. Cohen, 786 S.W.2d 951, 953 (Tenn.Ct.App. 1989)."

Bell v. Todd cites *Knight v. Knight*, 11 S.W.3d at 900 which states:
"There is no absolute right to counsel in a civil trial." reasoning "The Sixth Amendment right to counsel is limited by its terms to criminal prosecutions." and cites, "*Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn.App.1988); *In re Rockwell*, 673 S.W.2d 512, 515 (Tenn.App. 1983)."

And in *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn.App.1988):
"The thirteenth issue apparently complains that the trial judge did not appoint counsel for Husband in the trial court. There is no absolute right to counsel in a civil trial. See In re Rockwell, 673 S.W.2d 512 (Tenn. App. 1983). This issue is without merit."

In re Rockwell, 673 S.W.2d 512 (Tenn. App. 1983):
"The Sixth Amendment right to counsel is limited by its terms to criminal prosecutions. There is no absolute right to counsel in a civil trial. Barish v. Metropolitan Government, Etc., 627 S.W.2d 953 (Tenn. App. 1981)."

In Barish v. Metropolitan Government, Etc., 627 S.W.2d 953 (Tenn. App. 1981):
"There is no absolute right to counsel in a civil trial. *See* U.S.Const. amend. VI; Tenn.Const. Art. I, § 9. *Cf. Lassiter v. Department of Social Services of Durham County, North Carolina,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Turner v. Steward,* 497 F. Supp. 557 (E.D.Ky. 1980); *State v. Tyson,* 603 S.W.2d 748 (Tenn.Cr. App. 1980).".

And on and on it goes from 2005 to 1981 each case citing another case and providing little information as to the basis for the claim that there is no absolute right to counsel beyond a brief mention of the Sixth Amendment of the US Constitution. Nowhere in these cases is examined the issues I have presented to the court for consideration in my Motion for Accessible Justice, where I asserted that I and disabled adults like me have a *conditional* right to legal assistance provided by an attorney and/or qualified representative based upon the severity of our need (some persons with disabilities will be disabled enough to need some help, but not so disabled they need an attorney) in order to Access Justice. I asserted that current policy and procedure in the Tennessee Courts to refuse appointment of counsel as an ADA accommodation leads to violations of my/our fundamental rights conferred by the 1st, 5th, and 14th Amendments to the U.S. Constitution.

I should have included in my Motion for Accessible Justice the TN Constitution art. 1 sec. 8 due to its specific wording of "or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land." and do here now include it in argument. For I have certainly been destroyed in my fundamental rights by the misconduct of TennCare's Plan administrators who swore an oath to fulfill their official duties "faithfully" and

with "fidelity" in "support" of the Constitution of Tennessee and the United States [Am. Pet. Jud. Rev. Ex. C].

In my Motion I explained a statutory and constitutional basis by which disabled adults have a conditional right to counsel. I did not assert an absolute right to counsel based upon the 6th Amendment to the U.S. Constitution. Respondents' did not examine my claim, and this becomes further apparent when we carefully examine the cited case law.

Respondents' cite Hessmer v. Miranda, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003) to assert my indigency does not confer either a "constitutional nor the statutory right to appointed Counsel." I did not examine or argue whether indigency itself confers such a right. I argued that the State of Tennessee limits the resources of disabled adults, my resources, and forces indigency upon me. My indigency is imposed by the State and acts as a financial restraint, in addition to the physical and mental restraints it also imposes [Mot. Acc. Just. pg. 17 ¶ 1-2] . I am indigent because the state deprives me of my right to rehabilitative treatment and prevents me from being able to engage in gainful employment and then further restricts what resources I can acquire or retain and then makes justice Inaccessible; the State violates my statutory and constitutional rights. I am disabled by "treatable, even curable, health conditions simply because health insurance plans skirt the law because the legal community and the justice system conduct themselves in a manner that makes justice inaccessible to disabled adults with certain disabilities and legal complaints." [Id. pg. 8 ¶ 2].

Bell v. Todd cites *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003) which reads: "Indigent civil litigants, unlike indigent criminal defendants, possess neither a constitutional nor statutory right to court-appointed assistance. *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002);"

Hessmer v. Miranda cites *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002):
"Indigent civil litigants possess neither a constitutional nor a statutory right to appointed counsel. See Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997). Nevertheless, Congress has granted district courts statutory authority to "request" appointed counsel for indigent civil litigants. See 28 U.S.C. § 1915(e)(1) (providing that "[t]he court may request an attorney to represent any person unable to afford counsel"). This Court has interpreted § 1915 as affording district courts "broad discretion" to determine whether appointment of counsel in a civil case would be appropriate. See Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). The Tabron court

found that the decision to appoint counsel may be made at any point in the litigation, and may be made by a district court sua sponte. Id. at 156."

"In Tabron, we developed a list of criteria to aid the district courts in weighing the appointment of counsel for indigent civil litigants [FN9, *Infra* pg. 5 ¶ 3]. As a threshold matter, a district court must assess whether the claimant's case has some arguable merit in fact and law. Tabron, 6 F.3d at 155; see also Parham, 126 F.3d at 457. If a claimant overcomes this threshold hurdle, we identified a number of factors that a court should consider when assessing a claimant's request for counsel. These include:

1. the plaintiff's ability to present his or her own case;
2. the difficulty of the particular legal issues;
3. the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;
4. the plaintiff's capacity to retain counsel on his or her own behalf;
5. the extent to which a case is likely to turn on credibility determinations, and;
6. whether the case will require testimony from expert witnesses.

Tabron, 6 F.3d at 155-57.

We have noted that "this list of factors is not exhaustive, but should serve as a guidepost for the district courts." Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 155). In addition, we have cautioned that courts should exercise care in appointing counsel because volunteer lawyer time is a precious commodity and should not be wasted on frivolous cases. Id. at 458."

Footnote 9 from above;

"**This court has rejected the rule of our sister circuits that have held that appointment of counsel under § 1915(e)(1) is justified only under "exceptional circumstances."** See, e.g., Lavado v. Keohane, 992 F.2d 601, 605-06 (6th Cir. 1993) ("Appointment of counsel in a civil case . . . is a privilege that is justified only by exceptional circumstances."); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) ("[T]his court has limited the exercise of [the District Court's discretionary power under the statute] to exceptional circumstances."). We explained in Tabron that "[n]othing in [the] clear language" of the statute ("the court may request an attorney to represent any person unable to afford counsel"), "[nor] in the legislative history . . . [,] suggests that appointment is permissible only in some limited set of circumstances." Tabron, 6 F.3d at 155." (emphasis added)

[I have wondered throughout this review why pick Lavado v. Keohane's "exceptional circumstances" over the Tabron standard. Maybe it's as simple as the people who detest poor people like disabled adults choose Lavado v. Keohane, and the people who want to pursue the Nation's Proper Goals pick Tabron? Yes, that's an oversimplified inflammatory quip (even if it could sometimes be true), but I think even so it draws closer to the matter at hand. There needs to be a well-reasoned reason to pick one over the other to avoid that selection being prejudiced and discriminatory, and so far the above is the closest I've found to a well-reasoned reason. Constraints on time limit how thoroughly I can examine both sides of this particular issue. Which is unfortunate as John Stewart Mill argued in *On Liberty*, "He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion... Nor is it enough that he should hear the opinions of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. He must be able to hear them from persons who actually believe them...he must know them in their most plausible and persuasive form." (emphasis added)
"Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think..."
And particularly fitting to my situation with TennCare and the inaccessibility of justice:
"The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."]

"As a threshold matter, we must assess whether Montgomery's case, in which he claims that the defendants violated his civil rights under 42 U.S.C § 1983 by depriving him of prescribed medical treatment, has "some arguable merit in fact and law." Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 155); see also Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986)"

"We agree and find that Montgomery has satisfied the first prong of Estelle by demonstrating a serious medical need. See Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (instructing that the seriousness of a medical need "may . . . be determined by reference to the effect of denying the particular treatment")."[1]

[1] "I strongly urge you to cover the cost of this therapy. Failure to do so would place the patient's health in jeopardy." [Pet. Jud. Rev. Exhibit B pg. 68 ¶ 5, Mot. Acc. Just. Exhibit B4 file:"Dr. Rice Vivos Dx Tx.pdf"]

"we find that Montgomery has adequately demonstrated the subjective component of the Estelle standard. See Durmer v. O'Carroll, M.D., 991 F.2d 64, 68 (3d Cir. 1993) (noting that deliberate indifference may exist in a variety of different circumstances, including where "prison authorities prevent an inmate from receiving recommended treatment," or "where knowledge of the need for medical care[is accompanied by the] intentional refusal to provide that care")."

[In my own case the effect of denying medical care leaves me disabled by treatable, even curable illness, has caused injury and puts me at risk of further injury, which increases the severity of my disability, all of which works to deprive me of my fundamental rights. Likewise, the denial of my care shows deliberate indifference and irrationality by the health plan (aka arbitrary and capricious agency decisions and actions). My 2019 complaint-appeal explained in great detail how the research literature shows that people like me have increasingly high medical utilization the longer that we go without appropriate care for our jaws-airways. Meaning that it costs less to treat us appropriately than it does to deny care.[2] (Pet. Jud. Rev. Ex. B digital files, file:"Sean Smith's 2019 Medical Appeal (redacted for court 2024).pdf" pg. 30 ¶ 1, pg. 12-13.) However, it can be argued that rather being solely an act of irrationality it is also one of malfeasance intended to exploit disabled adults and defraud taxpayers by leveraging the capitated payment model that is a hallmark of Medicaid MCO health plans by retaining as many plan beneficiaries as possible while paying the least amount of money they can for needed care.]

"we agree with Montgomery that the District Court abused its discretion in failing to appoint counsel, we will vacate the District Court's judgment and remand the case with instructions to appoint counsel to assist Montgomery in the preparation and presentation of his case.

We review a district court's decision to deny counsel to an indigent civil litigant for abuse of discretion. *Hamilton v. Leavy,* 117 F.3d 742 (3d Cir. 1997). We have determined that a district

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[2]Review complaint-appeal references for publications validating statements. Pg. 12 "What treatment was supplied had limited to no efficacy in symptom management and
offered practically no substance in regard to an etiological explanation that moved towards achieving a resolution of primary complaints; I observe this trend to be a common story amongst patients with Temporomandibular Disorders (TMDs) and/or disordered breathing [6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36]."
Pg. 30 "Absent treatment patients are often
observed to do poorly with increased healthcare costs that place substantial burdens upon families, employers, third-party payers, and our society [18, 52, 139, 140, 141]"

court abuses its discretion if its decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Newton v. Merrill Lynch,* 259 F.3d 154, 165-66 (2001) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 783 (3d Cir. 1995))."

Montgomery v. Pinchak cites Hamilton v. Leavy whose summary on casetext.com is a quote from Burk v. Runk, 1:19-CV-01358 (M.D. Pa. Dec. 28, 2021), footnote 81. I find it interesting to compare it to my situation despite the differences between my case and it. Especially given what I argued in my Amended Petition for Judicial Review and my Motion for Accommodations, now argue in my Motion for Accessible Justice and have been drafting in my forthcoming Response to Respondents Motion to Dismiss Am. Comp. Pet. Jud. Rev.:
"See Hamilton v. Leavy, 117 F.3d 742, 746-47 (3d Cir. 1997) (finding that prison official could be held liable for transferring plaintiff to a prison where he was attacked because official knew of excessive risk to plaintiff's safety and failed to act); Young v. Quinlan, 960 F.2d 351, 36263 (3d Cir. 1992) (holding that prison officials, who ignored inmate's repeated notifications of physical assaults and requests for placement in protective custody, could be found deliberately indifferent).".

I'm not a prisoner with a warden, but TennCare acts as a trustee of my property-benefits, and acts as a type of caregiver for my health and safety. I believe my dispute being 'under' the jurisdiction of this Chancery Court means something here too, though I'm not sure what, even though it's clear to me that the Court in adjudicating my case will act as a sort of caregiver for Justice, of the civil and fundamental rights of myself and other disabled adults and all the other 'inmates of society', such as the Respondents.

An analysis and comparison of *Hamilton v. Leavy,* 117 F.3d 742 (3d Cir. 1997) to my case yields interesting insights and questions:

Case:
"Hamilton has a long history of being assaulted throughout the Delaware prison system."

Comparative Analysis:
I have a long history of getting injured due to my health plans limiting and preventing me from getting rehabilitative care with jaw-airway specialists.

Case:
"After reviewing Hamilton's history of being assaulted in prison, the MDT unanimously recommended that Hamilton be placed in protective custody. But despite their own recommendation, the MDT took no immediate action to protect Hamilton."
"The MDT's report and recommendation were forwarded to the CICC, chaired by Lewis. The CICC thereafter made a unanimous determination to take "no action.""

Comparative Analysis:
Some of my doctors have enough education to understand I need jaws-airway care, and some understand enough to recommend I receive such care but can take no immediate action themselves to provide it. Their recommendations were forwarded to UHCCP-TennCare who took "no action" to assure my health and safety to the extent as is required by their duties and obligations.

Case:
"Consequently, Hamilton remained in the general population. Less than two months following the CICC's "no action" determination, on August 5, 1992, Hamilton was assaulted by another prisoner." "As a result of the assault, Hamilton required surgery to repair two jaw fractures and currently has two metal plates in both sides of his jaw.".

Comparative Analysis:
This is where our cases diverge. Unlike Hamilton I have not been able to get treatment for the injuries related to my jaw-airway issues and live with my injuries and the preexisting danger to my health and safety. Sarcastic Supposition: to get jaw-airway care I should commit a crime, go to prison, and get assaulted. Analysis of Sarcastic Supposition: If Prison Officials do their job, they will prevent the assault and my plan will fail and I won't get assaulted and receive jaw-airway care. Conclusion: Law-breaking UHCCP-TennCare prevents jaw-airway care for law-abiding disabled adults, law-abiding Prison Officials prevent jaw-airway care for law-breaking disabled adults. *Brain Explodes*

Case:
"Hamilton thereafter filed suit in district court, claiming that prison officials violated state prison regulations and showed a deliberate indifference to his safety"

"The district court granted summary judgment in favor of the MDT defendants on the ground that they recommended that Hamilton be placed in protective custody, and were without authority to effectuate that recommendation."

Comparative Analysis:
I submitted complaints and appeals and doctors recommendations to UHCCP-TennCare, and UHCCP-TennCare responded by showing deliberate indifference to my health, safety, disability needs, and their statutory obligations (I cited them in my complaint-appea)l. It's UHCCP-TennCare who prevents both me and my doctors from doing what is needed. Even those doctors who did not do all that they should to help me, these doctors conducted themselves in that manner because the "deliberate indifference" of UHCCP-TennCare conditioned them to believe that no matter how hard they tried UHCCP-TennCare wouldn't let them help people like me. UHCCP-TennCares response to my complaint-appeals proved them correct.

Case:
"While "[i]t is not . . . every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for a victim's safety," "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" Farmer, 114 S. Ct. at 1977 (quoting Rhodes v. Chapman, 452 U.S. 337, 345 (1981))."

Comparative Analysis:
Health plans are not going to be perfect places either. Some people will not get the care they need at the time that they most need it. Their needs might exceed what is medically possible or financially responsible. Or the complexity of their case as yet requires further diagnostics and analysis before It becomes clear what's causing the health conditions causing one's disabilities and how to treat them rehabilitatively. However, the Respondents engage in misconduct to make succeeding in the diagnostic and treatment identification process as impossible as possible. And if by chance one does succeed UHCCP-TennCare then endeavors to limit and prevent access to rehabilitative treatment. There comes a time when a health plans conduct becomes misconduct and is a "cruel and unusual" "unnecessary and wanton infliction of pain." We are well past that time with respect to my case.

Case:
"("[O]ur cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."). Specifically, the inmate must show that the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference." Id."

Comparative Analysis:
Given the extent of my communications to UHCCP-TennCare via my 2019 and 2023 complaint-appeals and supporting medical records, I believe the Respondents' are certainly aware of my situation. My diagnoses, the causes of the health conditions causing my disabilities, my need for rehabilitative care, and how I have not been allowed to access the care I need. How because of that I have sustained serious harm and I'm at risk of sustaining further serious harm. I also believed I had made the Court aware of these matters, but the Courts April 22nd denial of my Motion for Accomodations indicates that they believe my risk of injury is too 'hypothetical' and the evidence I have presented to not be 'competent'.

Case:
"Hamilton also alleges that the district court erred by denying his request for the appointment of counsel." (749)
"the district court considered the factors we announced in Tabron v. Grace, 6 F.3d 147, 155-56 (3d Cir. 1993), for determining whether the appointment of counsel is warranted."
"In Tabron we held that when deciding whether to appoint counsel for indigent litigants, district courts should consider the merits of the plaintiff's claim, the plaintiff's ability to present his or her case, the difficulty of the legal issues, and the degree to which the case will require extensive factual investigation or turn on credibility determinations. Id. at 156"
"After weighing the various Tabron factors, the district court concluded that Hamilton could not demonstrate "special circumstances indicat[ing] the likelihood of substantial prejudice to him resulting . . . from his probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984).

We are unable to agree with this conclusion for two reasons: first, the district court erred in concluding that Hamilton did not have a colorable claim; second, the record indicates that

Hamilton may be ill-equipped to represent himself or to litigate this claim inasmuch **as there is unrebutted medical evidence that he suffers from a paranoid delusional disorder**. The district court's failure to consider the weight of this fact demonstrates that more serious consideration should have been given to Hamilton's request for the appointment of counsel. We will therefore reverse on this issue and remand to the district court with instructions to appoint counsel for Hamilton. See Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991) (appointment of counsel appropriate when plaintiff presented colorable claim of deliberate indifference to serious medical needs resulting in permanent deformities)." (emphasis added)

Comparative Analysis:
Mental and cognitive disabilities which substantially limit brain function have been recognized as requiring the appointment of counsel in certain civil cases independent of the ADAs protections. The court's indifference to my likelihood of incapacitating injury or death seems like a bit of a problem given the ADA related CFR [28 CFR § 35.130] and that my case is against TennCare for their "deliberate indifference" of my "serious medical needs resulting in" them abusing, exploiting, and injuring me repeatedly over a number of years causing me to become more severely disabled and simultaneously deprived of my fundamental rights.

Respondents' claim that, "appointment of counsel in a civil case is "justified only by exceptional circumstances." Lavado v. Keohane, 992 F.2d 601, 606 (6th Cir. 1993). No such circumstances are presented here. Indeed, Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party" [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 1]. Respondents' claim that no such exceptional circumstances are present, but Respondents do not specify why they believe this to be the case nor how they arrived at that determination. Nor do respondents argue why the exceptional circumstances standard should be used when other courts emphatically and explicitly reject it [*Supra* pg. 5 ¶ 3]. Which seems to me to make Respondents' claim quite specious. Let us nevertheless examine "exceptional circumstances" in the spirit of performing a full and fair review.

Bell v. Todd cites *Hessmer v. Miranda* cites *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993) which states:
"In determining whether "exceptional circumstances" exist, courts have examined "the type of case and the abilities of the plaintiff to represent himself." *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987); *see also Poindexter v. FBI,* 737 F.2d 1173, 1185 (D.C. Cir. 1984). This generally

involves a determination of the "complexity of the factual and legal issues involved." *Cookish v. Cunningham,* 787 F.2d 1, 3 (1st Cir. 1986)."

Lavado v. Keohane cites *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987):
"Appointment of counsel is authorized in § 1983 actions only in "exceptional circumstances." *Id.* at 412.[*Robbins v. Maggio,* 750 F.2d 405, 413 (5th Cir. 1985).]"

Archie v. Christian cites *Robbins v. Maggio,* 750 F.2d 405, 413 (5th Cir. 1985):
"In *Caston,* this Court expressed the view that a layman unschooled in the law in the area of civil rights who had been inappropriately denied assistance of appointed counsel had little hope of successfully prosecuting his case to final resolution on the merits. *Id.* at 1308. This statement is no less true after *Coopers Lybrand.* Indeed, there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims."

Lavado v. Keohane cites *Cookish v. Cunningham,* 787 F.2d 1, 3 (1st Cir. 1986):
"Whether exceptional circumstances exist requires an evaluation of the type and complexity of each case, and the abilities of the individual bringing it. *Branch v. Cole,* 686 F.2d 264, 266 (5th Cir. 1982)."
"Some factors which courts have found to bear on the question of exceptional circumstances in a particular case include the indigent's ability to conduct whatever factual investigation is necessary to support his or her claim, *Peterson v. Nadler,* 452 F.2d 754, 758 (8th Cir. 1971); the complexity of the factual and legal issues involved, *Childs v. Duckworth, supra,* at 922; and the capability of the indigent litigant to present the case. *Maclin v. Freake, supra,* at 888."

Cookish v. Cunningham cites *Childs v. Duckworth,* at 922:
"However, the prisoner has no constitutional right to such an appointment unless the denial of proper representation would result in fundamental unfairness impinging upon the prisoner's due process rights[3] or, as we have stated recently in *Merritt v. Faulkner,* 697 F.2d 761, 764 (7th Cir.

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[3]Mot. Acc. Just. pg. 7-8
"The State of Tennessee's discriminatory procedures of due process causes the State of Tennessee to deprive disabled adults of their health, wellbeing, and limited resources by the State without due process"
"That in Tennessee the burdens of litigation created by the procedures of due process could itself further circumvent the process of due process is, well, it is quite remarkable."

1983), "the circumstances of a particular case may make the presence of counsel necessary." *See also LaClair v. United States,* 374 F.2d 486 (7th Cir. 1967)".

"It is the recognized duty of the trial court to insure that the claims of a *pro se* client are given a "fair and meaningful consideration," *Madyun v. Thompson,* 657 F.2d 868 (7th Cir. 1981), particularly when his First Amendment rights are concerned[4], and also to give liberal construction to a *pro se* plaintiff's pleadings. *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). In *Maclin v. Freake,* 650 F.2d 885 (7th Cir. 1981), we have set forth a variety of factors which should be weighed in determining whether counsel for a *pro se* litigant should be appointed. The threshold question is whether there are merits to the indigent litigant's claim." (emphasis added)

"Once this threshold is passed, the other factors to be considered are whether: the litigant has the ability to investigate the factual issues in dispute; evidence introduced will be in the form of conflicting testimony, thus requiring the need for cross-examination by an attorney; the litigant is capable of presenting his own case; and the legal and factual issues are complex."

Childs v. Duckworth cites Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981):

"The decision must rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel." (emphasis added)

"First, the district court should consider the merits of the indigent litigant's claim."

"Once the merits of the claim are considered and the district court determines the claim is colorable, appointment of counsel may or may not be called for, depending upon a variety of other factors. One such factor is the nature of the factual issues raised in the claim. Where the indigent is in no position to investigate crucial facts, counsel should often be appointed."

"Counsel may also be warranted where the only evidence presented to the factfinder consists of conflicting testimony. In such cases, it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination."

"Another factor to be considered is the capability of the indigent litigant to present the case. In *Drone v. Nutto,* 565 F.2d 543 (8th Cir. 1977), the district court was ordered to reconsider

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[4] Mot. Acc. Just. pg. 22-23 "With most disabled adults being unable to engage in effective litigation against State agencies, there are no meaningful consequences to those agencies when they do not attend to appeals, complaints, grievances, and other disputes in good faith with conformity to the law. Thereby disabled adults are deprived from being 'able' to effectively petition for an equitable resolution of a dispute with the State of Tennessee. This violation of the First Amendment rights of disabled adults in Tennessee then leads to violations of other civil and constitutional rights."

appointing counsel for the indigent plaintiff because the record indicated **the plaintiff suffered from mental disease and therefore could not conduct the case unaided.**" (emphasis added)

"More generally, the Fourth Circuit has stated that "[i]f it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him." *Gordon v. Leeke,* 574 F.2d 1147, 1153 (4th Cir.), *cert. denied sub nom. Leeke v. Gordon,* 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978)."

"On the other hand, where it appears the indigent litigant is competent to pursue the claim, courts have denied requests for appointment of counsel. A refusal to appoint was upheld in *Hudak v. Curators of the University of Missouri,* 586 F.2d 105 (8th Cir. 1978), *cert. denied,* 440 U.S. 985, 99 S.Ct. 1799, 60 L.Ed.2d 247 (1979), where the indigent was a former law professor whom the court deemed competent to handle her case unaided."

"The district court should also take into consideration the complexity of the legal issues raised by the complaint."

"We think it follows that where the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis." (emphasis added)

"The factors we have discussed thus far are those most often cited by other courts presented with requests for counsel. They are, in addition, the factors most relevant to the case before us now. They are by no means an exclusive checklist, however. In some other case other elements will no doubt be found significant — even, perhaps, controlling."

"Maclin has presented a colorable claim for relief. He is a paraplegic and, according to the limited record presented here, received no physical therapy for his condition from the time he entered prison"

"Confined to a wheelchair and in constant pain, he can hardly be thought capable of conducting an adequate examination of his own medical records, let alone of developing evidence of the medical treatment he ought to have received. Should his case go to trial, we think he will need an attorney to elicit relevant, comprehensible testimony that will elucidate for the factfinder the treatment he received and the adequacy of that treatment."

"Finally, this is not a case in which the indigent plaintiff has demonstrated a workable knowledge of the legal process, *cf. Davis v. United States, supra,* 214 F.2d 594 (7th Cir. 1954)."

"Under all the circumstances presented here, we conclude the district court should have granted Maclin's request for appointed counsel. We reverse the grant of summary judgment to the

defendant and remand for appointment of counsel and for further proceedings. Circuit Rule 18 shall apply."

Childs v. Duckworth cites *Merritt v. Faulkner,* 697 F.2d 761, 764 (7th Cir. 1983):
"Indigent civil litigants have no constitutional or statutory right to be represented by a lawyer. Nevertheless, particularly when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility. *See Bounds v. Smith,* 430 U.S. 817, 821-24, 97 S.Ct. 1491, 1494-1496, 52 L.Ed.2d 72 (1977); *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972). This principle of meaningful access is reflected in many decisions by the United States Supreme Court and by this court. Congress, in 28 U.S.C. § 1915 (1976), has indicated that the federal courts must be a judicial forum truly available to the rich and poor alike."
"In some civil cases meaningful access requires representation by a lawyer. In *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932), Justice Sutherland observed that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [sic] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more is it of the ignorant and illiterate, or those of feeble intellect."

"Even when there is no absolute right to counsel, *see, e.g., Scott v. Illinois,* 440 U.S. 367, 369, 99 S.Ct. 1158, 1159, 59 L.Ed.2d 383 (1979) (no right to counsel when potential prison sentence is not actually imposed), the Court has made it clear that the circumstances of a particular case may make the presence of counsel necessary."
"Quite often the factual and legal issues in a civil case are more complex than in a criminal case. *See* Note, *The Indigent's Right to Counsel in Civil Cases,* 76 Yale L.J. 545,

548 (1967). This often will be true in cases presenting constitutional questions. Indeed, surviving a critical motion to dismiss under Fed.R.Civ.P. 12(b)(6) may well depend upon the ability to perform legal research and present sophisticated legal arguments in such doctrinally complex areas as prisoner medical rights or free speech. These are skills which a layman often may not have and in which a lawyer receives professional training. [FN3]

[Footnote 3] The problem is compounded by the inequality which results when the defendant, most often the state, is represented by counsel and the indigent civil litigant is not. An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources. This assumption is destroyed when only one side is represented. *See Bounds v. Smith,* 430 U.S. 817, 826, 97 S.Ct. 1491, 1497, 52 L.Ed.2d 72 (1977)." (emphasis added)

The above cases focus on prisoners, and often cite 28 U.S.C. § 1915 Proceeding in forma pauperis. Maclin v. Freake takes particular note of § 1915 even quoting the entire subsections of (a) and (d). Upon reviewing § 1915 I found subsection (e), which states "(e)(1) The court may request an attorney to represent any person unable to afford counsel.". While other subsections specify "prisoner" this section uses the term "person" suggesting that 28 U.S.C. § 1915(e) applies to people like me. It remains unclear how proceeding in forma pauperis might apply to my situation let alone how to do it. The wording of § 1915(e) suggests it is at the Courts discretion and can be granted with or without request. Google searches seem to equate the Pauper's Oath affidavit for filing as being the same as the In Forma Pauperis affidavit. I filed my case with a Pauper's Oath via the Uniform Civil Affidavit of Indigency.

Tennessee Supreme Court Rule 13 on appointment of counsel to indigent persons has a similarly open wording which seems to apply to persons like me, but is also unclear how exactly it does relative to the criteria set forth in the case law cited above.

"(a)(1) The purposes of this rule are:

(A) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;"

"(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule."

There's a striking similarity between my case and Maclin v. Freake in which the court ruled "the district court should have granted Maclin's request for appointed counsel". That

Maclin was denied appropriate physical therapy is, well, it seems quite fitting that his case be cited here in my case. And like Maclin I have severe disability that doesn't get better on its own, a need for intensive medical assistance, help seeking and receiving that medical assistance, have and continue to be subject to state actions depriving my fundamental rights, and have a lack of familiarity with the legal process.

I didn't understand what a Petition for Judicial Review was in December of 2023, a month before filing my Petition for Judicial Review. I didn't know what a Motion was or what it did or how to do it. When I filed my Petition I didn't understand what I actually needed to put in it beyond briefly explaining my issues with TennCare and what I needed from the court. I looked at other filings via the Chancery Information Access to try to understand things better, but when I encountered phrases like "Causes of Action" I didn't understand what that meant and all it did was cause me confusion. A confusion that grew as It became apparent that even though I read and reread the Tenn. R. Civ. P. and Local Rules sections on service of process multiple times I had misunderstood how to do something as basic as service of legal process. I didn't even know I had to notarize an affidavit. I've known that the Rehabilitation Act of 1974 somehow needs to be included in my case, but don't understand how to include it appropriately or even if I did if it would matter [29 U.S.C. § 794]. I don't understand the differences between the various courts or if there is a court my case would be most appropriate to present to. All I had was TennCare sending me a denial letter telling me the next hoop I was supposed to jump through was to file a petition for judicial review. And after I have, they file a motion to dismiss it claiming I didn't exhaust all administrative remedies.

The Maclin v. Freake judgment occurred in 1981 against the backdrop of the Rehabilitation Act of 1974. The Americans With Disabilities Act was passed in 1990, and the Americans with Disabilities Act Amendments in 2008. A disabled adult's right to counsel, the protections and accommodations which should be afforded, should be stronger now than they were in 1981.

In denying my Motion for Accomodations the Court noted that "The allegations contained in Mr. Smith's Amended Complaint and Petition and his motions are not competent "evidence" in support of his claims. See Hillhaven Corp. v. State ex rel. Manor Care, Inc., 565 S.W.2d 210, 212 (Tenn. 1978)." [4.22.2024 Order Denying Mot. Accom. pg. 3 ¶ 2]. In my Motion for Accessible Justice I express my dismay and confusion at the ruling in the Court's order saying, "My Petition for Judicial Review included what I thought to be competent evidence". "Am I so cognitively impaired by my disabilities that I can't figure out what is and is not competent evidence? Or did I present competent evidence but my cognitive impairments prevent me from

properly communicating that evidence? Is there a Rule about evidence that my mental disabilities are once again preventing me from understanding?" [Mot. Acc. Just. pg. 12 ¶ 4-5].

The inability to present competent evidence is one of many factors in my case "that have been recognized as highly relevant to a request for counsel" [Maclin v. Freake 650 F.2d 885 (7th Cir. 1981)]. Or maybe my impairments are even keeping me from understanding this matter properly too.

Respondents' have called into question my case, even to the point of questioning whether or not I have a case [Resp. Memo Supp. Mot. Dismiss Am. Pet. Rev. pg 1]. Which indeed begs the question of my "capability" [Maclin v. Freake] to present my case, as well as highlights that the complexity of the legal issues in my case are so complex that even the Respondents' struggle to understand them despite how much I'm trying to describe my situation and my claim. Yet, Respondents' also claim I have not amply demonstrated that I am substantially impaired relative to other pro se litigants. I don't understand how one could hold such a belief given the extent of the information I disclosed about how "I have multiple health conditions that cause multiple impairments that substantially limit multiple major life activities" [Mot. Acc. Just. pg 14 ¶ 1]. My explanations focused upon my mental and cognitive impairments and disabilities even pointing out that, "Three of my declared health conditions (Major Depressive Disorder, Bipolar Disorder, PTSD) are specifically mentioned in the CFR as substantially limiting brain function [28 CFR § 35.108(d)(2)(iii)(K)]." [Id.]

It would seem appropriate to extend Justice Sutherland's 1932 statement with an amendment based upon current laws and understanding, that "If that be true of men of intelligence, how much more is it of the ignorant and illiterate, and those of feeble intellect" or those with substantially limited brain function and multiple health conditions that cause multiple impairments that substantially limit multiple major life activities. One should consider that in the 1930s "those of feeble intellect" were often people with mental disabilities. Justice Sutherland's statements can be understood to encompass people like me who have "substantially limited brain function".

It was stated in Maclin v. Freake [*Supra* pg. 14 ¶ 2] that, "Where the indigent is in no position to investigate crucial facts, counsel should often be appointed." To be in a position to investigate one has to be able to perform the tasks of investigation. These tasks generally require subject matter knowledge, sufficient cognitive ability, financial capability, legal expertise, and physical function. An investigator needs to have these abilities and be able to employ them on a consistent basis. I have a limited ability to perform the tasks necessary to litigate my case. I

do not have consistent function. I become increasingly impaired and less functional the longer I try to function despite my disabilities.

An analogy that I've used for years to help my doctors understand my disability situation is that I have to build a sandcastle in the middle of a storm with rain and surf washing it away over and over while everybody else gets to build on a sunny beach, take photos, and compete in sand castle contests. A person being intelligent doesn't make them able. Intelligence can be compromised by impairment. Like how a doctor or lawyer who practices while inebriated is a problem, so too it is a problem for an intelligent disabled adult suffering from substantially limited brain function to engage in pro se litigation.

I think Respondents' statement that "Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party" is a clear instance of disability discrimination. Or perhaps respondents are attempting to argue that substantially limited brain function is a common affliction or that litigation is not a mentally demanding "major life activity" for which someone with substantially limited brain function would be disadvantaged relative to most people who possess no such mental or cognitive disabilities. Respondents do not offer much to support their assertion beyond presenting general rules, policy, and some case studies which do not address whether or not applying such rules and policies would be discriminatory against my disabilities and violate the Motions cited statutes and my fundamental rights granted by the 1st, 5th, and 14th Amendments of the U.S. Constitution. I believe that respondents' denying the impact my disabilities have on my ability to perform a task as mentally demanding as litigation in such a clearly discriminatory manner compromises what little merit their arguments might have been able to have.

My motion for accessible justice has an entire section titled "Constitutional Violations" that define the Constitutional violations that occur by not appointing me an attorney [Mot. Acc. Just. pg 22-24]. Respondents provide no direct, let alone detailed, counter to my arguments and instead make a blanket claim that "Petitioner does not establish a basis for appointing counsel under either the Tennessee or Federal Constitutions or the ADA, and his Motion must be denied." [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 2].

Central to my case is that the Respondents' refuse to provide full and fair review of my 2019 and 2023 complaint-appeals. And here too Respondents seem to refuse to provide a full and fair review of my Motion for Accessible Justice. Providing full and fair review of the very case law they cite in opposition then leads to nearly the same conclusions I arrived at in my Motion for Accessible Justice. Were I truly capable of presenting my case I would have been able to find, review, and cite such case law in support of my Motion earlier. But I did not, which

further demonstrates my general lack of ability to handle this case which clearly involves layers of complexity related to civil and constitutional rights.

My Motion for Accessible Justice isn't even the central issue of my case; it is peripheral to it. If this matter proves so challenging without counsel, then the central matters of my case will be even more so. Respondents' arguments continue to demonstrate the necessity that the Court provide relief to me, for the Respondents refuse to provide the full and fair review that is required for an equitable and just resolution of my dispute which might then allow us to achieve the common good of Defending The Disabled such that we might then pursue and achieve The Nation's Proper Goals for individuals with disabilities [42 U.S.C. § 12101].

When one examines the case law presented by the ADA Coordinator[5] and the case law directly presented by the Respondents', one will note that the question of whether or not disabilities which substantially limit brain function warrant appointment of counsel is not directly evaluated. While there is no absolute right to an attorney in civil cases, there is a conditional right to an attorney in civil cases. A conditional right which I argue disabled adults like me meet in general even without the ADA's protections, but when considering the ADA that right to counsel is further solidified. And when from that solidified position we then contemplate my situation as a whole it becomes clear that there is a strong basis to assert I must be appointed counsel. How 42 U.S.C. §§ 1396-1, 1396a(a)(19), and the other various statutory and constitutional provisions that I discuss in my Motion for Accessible Justice relate to my case and how the State depriving me of counsel would further exacerbate the State's prior violations of my rights and trigger specific ADA related prohibitions on such conduct [28 CFR § 35.130].

I'm a disabled adult. A vulnerable person. I've committed no crime, done no wrong, and warrant no prejudice. I am not accused of causing "Mr. Bell's decapitated, dismembered, and burned body" as in Bell v. Todd. My indigency and my inabilities are not related to being incarcerated or committing a crime. I am wrongfully imprisoned by my disabilities due to the misconduct perpetrated by the State of Tennessee's Department of Finance and Administration Division of TennCare. Rather than being an accused or convicted wrongdoer confined by the consequences of their actions, I'm a seeker of the common good attempting to Defend The Disabled, myself and others, from a great wrong being done by the Respondents and their accomplices. My situation is quite exceptional by many measures.

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[5] [*White v. Franks,* No. 2001-CA-001018-MR, 2003 WL 22520440, at *4 (Ky.Ct.App. Nov. 7, 2003)]
[*Stone v. Town of Westport*, 3:04cv18 (JBA) (D. Conn. 2/23/07), 2007 WL 9754412 *1]
[Smith v. Robertson, 341 So. 3d 608 (La.App. 1 Cir. 3/3/22)]]
[Smith v. Dugas, 2019-0852 (La. App. 1 Cir. 2/26/20), 2020 WL 913673 *2]

It is Discriminatory and Prejudiced to so casually dismiss my arguments based upon past rulings about right to counsel in civil cases where the only factor evaluated was the Sixth Amendment U.S. Const., as the Respondents' did, while ignoring something as basic, as fundamental, as the fact that my disabilities substantially limit brain function and create mental and cognitive impairments that substantially limit my capacity to perform major activities of living relative to most people. I am *severely* disadvantaged by my mental and cognitive disabilities.

Even if by chance the courts pro se parties are predominantly people like me, and so I am not any more disadvantaged than they are, that doesn't stop the policies and rules from being discriminatory against each and every one of us as my Motion for Accessible Justice describes.

2. Requested Relief was Clearly Communicated

Respondents' claim that beyond my request for the court to appoint me counsel the relief I request is "is not adequately defined such as to give Respondents fair opportunity to respond." and is "on its face too vague to identify the requested relief" [Resp. Opp. Mot. Acc. Just. pg. 3 ¶ 2]. It is not for me to define to the court what it can or cannot do to make justice accessible. That is an administrative matter for the court to determine. I can only define what my disabilities are and how the court is made inaccessible to me because of them and the statutory and constitutional basis that the court should make reasonable accommodations and make suggestions as to what those reasonable accommodations should in my view be. What relief is necessary to make justice accessible is a matter that must be determined at the Court's discretion, as the Court's determination and implementation of policy will affect if it might be open to a repeat of suits like Tennessee v. Lane [Mot. Acc. Just. pg.18-19 ¶ 4].

As I stated in my Motion, "It is difficult to find a justification for it to be the burden of disabled adults to educate a health insurance plans administrators and its doctors or the Court and its staff so that they can comprehend our disabilities well enough to avoid discriminating against us and depriving us of our fundamental rights." [Id. pg. 11 ¶ 2] The job of making justice accessible is one for the Court to perform. As an adversely affected party I will assist the court as much as I can so that Justice is Accessible to myself and others. But "as a disabled adult pro se litigant I don't have the education or experience necessary to fully understand what the burdens of litigation are or how to meet them." and thus cannot determine with specificity and particularly the entirety of the relief the court will need to provide in order to make Justice Accessible to myself and other disabled adults.

It is the Court's duty to provide Accessible Justice and it is not the Respondents' place to question how and by what means the Court determines to do so. It is entirely outside of the Respondents jurisdiction to object to the Court making Justice equally Accessible to Disabled Adult Pro Se litigants. That the Respondents' dare to assert they have such a right is a decision "In excess of the statutory authority of the agency" and an "unwarranted exercise of discretion". And while I'm not sure how or if the UAPA applies here directly, I think you know what I'm saying and can see how the Respondent's pattern of behavior gives further merit to my claims. With my requested relief as it is I am entrusting my welfare to the court even as the respondents lob yet another rock at me as I attempt to crawl towards justice.

Image Title: Crawling to Justice.

Dated May 4th 2024.

Sincerely,
Sean Smith
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Bartlett TN, 38135
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Certificate of Service

I Sean Smith hereby certify that a true and correct copy of *Petitioners' Reply to Respondents Response In Opposition to Petitioner's Motion for Accessible Justice* is being forwarded via email to the following:

Respondents Counsel
HAYLIE C. ROBBINS (BPR# 038980)
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Haylie.Robbins@ag.tn.gov

Dated May 4th 2024.
Sincerely,
Sean Smith
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(901) 522-5775
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DefendTheDisabled.org

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE, PART I

SEAN SMITH,	)	
	)	
Petitioner,	)	
	)	**Case No. 24-0074-I**
v.	)	
	)	**Chancellor Patricia Head Moskal**
TENNESSEE DEPARTMENT OF FINANCE & ADMINISTRATION, DIVISION OF TENNCARE; and	)	
	)	
STEPHEN SMITH, DIRECTOR OF TENNCARE, in his official capacity,	)	
	)	
Respondents.	)	

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR ACCESSIBLE JUSTICE

Respondents, the Tennessee Department of Finance & Administration, Division of TennCare ("TennCare") and Stephen Smith, Director of TennCare ("Director") (jointly "Respondents"), by and through counsel, herein respond in opposition to Petitioner's *Motion for Accessible Justice* ("Motion"). Petitioner requests "for the Court to provide the relief required and make Justice Accessible." Not only is the requested relief extraordinarily vague, but to the extent Petitioner seeks the appointment of counsel, the right to an attorney is not an enumerated right to private citizens for civil cases, and is not required by the Americans with Disability Act ("ADA"). Tennessee Court Systems, *Judicial ADA Policy* – "What kinds of assistance cannot be provided?", www.tncourt.gov (last updated 2024), https://www.tncourts.gov/administration/human-resources/ada-policy. Nor is such relief otherwise warranted. Therefore, Petitioner's Motion should be denied.

BACKGROUND

Petitioner filed his *Complaint and Petition for Judicial Review* on January 27, 2024, and an *Amended Complaint and Petition for Judicial Review* on April 7, 2024. Respondents filed a Motion to Dismiss on April 23, 2024, that is set to be heard on May 17, 2024. On April 24, 2024, upon being served with Respondents' Motion to Dismiss, Petitioner filed a *Motion for Accessible Justice* requesting that "the Court to provide the relief required to make Justice Accessible to Mr. Smith" and for this Court to "DEFEND THE DISABLED." In his Motion, Petitioner outlines his process to litigate this case and the effort it takes him to do so. He also describes the various unsuccessful ways he has attempted to find an attorney who will represent him in this litigation. While Respondents sympathize with Petitioner, we respond in opposition due to the lack of relief requested in his Motion.

ARGUMENT

I. Petitioner is Not Entitled to the Appointment of Counsel.

Although Petitioner's motion is somewhat opaque, Respondents understand the Motion as requesting the Cout to appoint counsel for Petitioner. *See* Motion at 25 ("One could thereby infer that it would be a reasonable accommodation for the Court to provide disabled adults whose fundamental rights are being violated by the State a competent attorney."). Specifically, Petitioner seems to request appointment of counsel as an ADA accommodation. *Id.* at 3 (indicating that Petitioner requested the Administrative Office of the Courts ADA Coordinator to appoint counsel).

Appointment of counsel as an ADA accommodation in this case is nor required or warranted. The Judicial ADA Policy for the Tennessee Courts makes clear that "the appointment of an attorney to represent a party to a civil case *cannot be required.*" (Motion, Ex. A4). This policy is well grounded in Tennessee law. "[T]here is no absolute right to counsel in a civil case."

Bell v. Todd, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005). "Unlike indigent defendants in criminal cases, indigent civil litigants possess neither the constitutional nor the statutory right to appointed counsel." *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003). Rather, appointment of counsel in a civil case is "justified only by exceptional circumstances." *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). No such circumstances are presented here. Indeed, Petitioner fails to explain how his alleged disabilities put him at more disadvantage than a standard pro se party, and the Court's ADA assistance cannot "change the basic nature of the judicial system." Tennessee Court Systems, *Judicial ADA Policy* – "What kinds of assistance cannot be provided?" www.tncourt.gov (last updated 2024), https://www.tncourts.gov/administration/human-resources/ada-policy.

Petitioner does not establish a basis for appointing counsel under either the Tennessee or Federal Constitutions or the ADA, and his Motion must be denied.

II. Petitioner Does Not State with Particularity the Relief He is Requesting.

To the extent Petitioner seeks relief other than appointment of counsel, such relief is not adequately defined such as to give Respondents fair opportunity to respond. Petitioner moves the Court to "make Justice Accessible to Mr. Smith and other disabled adults in Tennessee" and to "DEFEND THE DISABLED." Motion, p. 27. Such relief is, on its face too vague to identify the requested relief. Pursuant to the Davidson County Chancery Local Rules, "motions shall clearly state with particularity the grounds therefore and shall set forth the relief or order sought as required by Tenn. R. Civ. P. 7.02." L.R. 26.04(a). The Tennessee Rules of Civil Procedure also require that a motion "shall set forth the relief or order sought." Tenn. R. Civ. P. R. 7.02(1). "Although [Tennessee courts] construe pleadings and motions liberally, parties must still abide by the particularity requirement of Tenn. R. Civ. P. 7.02(1)." *Just. v. Nelson,* No.

E201802020COAR3CV, 2019 WL 6716300 at *5 (Tenn. Ct. App. Dec. 10, 2019). Accordingly, Petitioner, even though pro se, should be required to

CONCLUSION

For the foregoing reasons, Petitioner's *Motion for Accessible Justice* must be denied.

Respectfully Submitted,

JONATHAN SKRMETTI
ATTORNEY GENERAL & REPORTER

/s/ Haylie C. Robbins
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Counsel for Respondents

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this motion, memorandum in support, and all attached exhibits have been served via email and electronic filing on May 2, 2024, upon the following recipients:

COUNSEL OF RECORD	PARTY REPRESENTED
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/s/ Haylie C. Robbins
HAYLIE ROBBINS
Assistant Attorney General