

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

**FILED**

October 23, 1995

**FOR PUBLICATION**

Cecil Crowson, Jr.  
Appellate Court Clerk

GAILE K. OWENS and )  
 PERVIS T. PAYNE, )  
 )  
 Appellants/Appellees, )  
 )  
 V. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Appellee/Appellant. )

Filed: October 23, 1995

SHELBY CRIMINAL

HON. ARTHUR BENNETT  
 and  
 HON. BERNIE WEINMAN,  
 JUDGES

No. 02-S-01-9407-CR-00044

**For Appellants/Appellees:**

Ronald Lee Gilman  
 Rebecca Pearson Tuttle  
 Steven C. Brammer  
 FARRIS, HANCOCK, GILMAN,  
 BRANNAN & HELLEN  
 Attorneys for Owens  
 Memphis, Tennessee

J. Brooke Lathram  
 Willam Lester Jones  
 R. Porter Field  
 BURCH, PORTER & JOHNSON  
 Attorneys for Payne  
 Memphis, Tennessee

**For Appellee/Appellant:**

Charles W. Burson  
 Attorney General & Reporter  
 Nashville, Tennessee

Amy L. Tarkington  
 Assistant Attorney General  
 Nashville, Tennessee

James J. Challen, III  
 Thomas D. Henderson  
 Assistant District Attorneys  
 Memphis, Tennessee

**For Amicus Curiae, Tennessee Association of Criminal Defense Lawyers:**

John E. Herbison  
 Rebecca Freeman  
 Nashville, Tennessee

**OPINION**

REVERSED, IN PART,  
AND REMANDED

ANDERSON, C.J.

We granted this consolidated appeal in order to determine whether the rules, statutes, or constitution of this state, authorize a trial court in a post-conviction capital case to provide expert services if necessary to ensure the constitutional rights of an indigent petitioner. We have determined that this issue is best resolved by an interpretation of the applicable statutes and specifically whether Tenn. Code Ann. § 40-14-207(b) (1990 & 1995 Supp.), (which authorizes expert services if necessary for the protection of the constitutional rights of an indigent defendant), applies to post-conviction capital cases, and whether and under what circumstances an indigent petitioner in a capital post-conviction case is entitled to an ex parte hearing to determine the necessity of such services. We conclude that the statute applies in post-conviction capital cases, and that when certain procedural criteria are satisfied, an indigent petitioner in a post-conviction capital case is entitled to an ex parte hearing on a motion for expert or investigative services. Accordingly, we reverse, in part, the Court of Criminal Appeals' judgment and remand to the respective trial courts for further proceedings consistent with this opinion.

### **BACKGROUND**

Appellant Gaile K. Owens was originally tried with co-defendant Sidney Porterfield in January of 1986. Owens was convicted of one count of accessory before the fact to first-degree murder and sentenced to death. This Court affirmed her conviction and sentence,<sup>1</sup> and the United States Supreme Court denied certiorari review.<sup>2</sup>

In 1988, Appellant Pervis Tyrone Payne was tried and convicted of two counts of first-degree murder and one count of assault with intent to commit first-degree murder. Payne was sentenced to death on each conviction for first-degree

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<sup>1</sup>State v. Porterfield, 746 S.W.2d 441(Tenn. 1988).

<sup>2</sup>Porterfield v. Tennessee, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988).

murder, and received a thirty year sentence on the conviction for assault with intent to commit first-degree murder. This Court affirmed his convictions and sentences.<sup>3</sup> The United States Supreme Court granted certiorari review as to one sentencing issue, but affirmed the judgment of this Court.<sup>4</sup>

Thereafter, Owens and Payne each filed petitions for post-conviction relief. In the course of their separate proceedings, each also moved the trial court for funds for investigative and expert services and requested an ex parte hearing on the motion.

In each proceeding the trial court denied the motion, relying on Teague v. State, 772 S.W.2d 915 (Tenn. Crim. App. 1988), perm. app. denied (Tenn. 1989). In that case, the Court of Criminal Appeals said in dicta that neither Tenn. Code Ann. § 40-14-207(b), authorizing trial courts to hold ex parte hearings on motions requesting funds for investigative and expert services, nor Tennessee Supreme Court Rule 13, empowering trial courts to approve such funds if necessary to protect constitutional rights, apply to post-conviction capital cases. However, the trial court in each case granted Owens and Payne permission to seek an interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9.

The Court of Criminal Appeals granted an interlocutory appeal in each case, and consolidated the cases for hearing and decision. The Court of Criminal Appeals' unanimously affirmed the trial court's denial of the request for an ex parte hearing, concluding that absent statutory authorization or Supreme Court rule, ex parte hearings are not appropriate. In a split decision, however, the panel concluded that open-court hearings on such motions are appropriate, and therefore remanded to the respective trial courts.

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<sup>3</sup>State v. Payne, 791 S.W.2d 10 (Tenn. 1990).

<sup>4</sup>Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Despite agreeing that a remand was necessary, the two judge majority disagreed as to the rationale for the remand. Although finding that Tenn. Code Ann. § 40-14-207(b) does not apply, one judge concluded that under Tenn. Sup. Ct. Rule 13, a trial court may authorize funds for expert services in a capital post-conviction case, if the court determines that such services are necessary to ensure the protection of an indigent capital petitioner's constitutional rights. The other judge relied upon the Court of Criminal Appeals' earlier decision in Teague, and concluded that neither the Supreme Court rule nor the statute authorize investigative or expert services in post-conviction capital cases. Both judges found that Rule 706, Tenn. R. Evid., which allows courts to appoint experts on bench-tried issues, and Burford v. State, 845 S.W.2d 204 (Tenn. 1992), which discusses the dictates of due process in the context of post-conviction proceedings, require that trial courts order funding of support services, if the services are necessary to ensure the protection of the indigent capital petitioner's constitutional rights.

Thereafter, we granted Rule 11 applications for permission to appeal to resolve these important questions of law.

#### **STATUTORY INTERPRETATION**

In this Court, Owens and Payne first assert that Tenn. Code Ann. § 40-14-207(b), and Tenn. Sup. Ct. Rule 13 apply to post-conviction capital cases. Even assuming that the statute and rule do not apply however, they argue that courts have the inherent power under Tenn. R. Evid. 706, and the constitutional authority under Burford, to order funds for experts and investigators in capital post-conviction proceedings. In contrast, the State argues that there is no right to state-funded support services in post-conviction capital cases under any authority, inherent, statutory, or constitutional.

Initially, we observe that under Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties. Watts v. Memphis Transit Management Co., 224 Tenn. 721, 462 S.W.2d 495 (1971); Glasgow v. Fox, 214 Tenn. 656, 383 S.W.2d 9, 13-14 (1964); State ex rel. West v. Kivett, 203 Tenn. 49, 55-56, 308 S.W.2d 833 (1958); City of Greenfield v. Callins, 195 Tenn. 285, 287, 259 S.W.2d 525 (1953); State Board of Architectural & Engineering Examiners v. Blalock, 190 Tenn. 626, 631 231 S.W.2d 326 (1950); State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 444, 225 S.W.2d 263 (1949); Haynes v. City of Pigeon Forge, 883 S.W.2d 619, 620 (Tenn. App. 1994); Bah v. Bah, 668 S.W.2d 663, 668 (Tenn. App. 1983). If issues in a case can be resolved on non-constitutional grounds, courts should avoid deciding constitutional issues. Id. Accordingly, we must first consider whether or not the statute authorizing trial courts to hold ex parte hearings and order funds for expert and investigative services applies in capital post-conviction cases.

Our consideration of this issue is guided by well-established rules of statutory construction. The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. State v. Sliger, 846 S.W.2d 262, 263 (Tenn. 1993). Where, as here, the parties derive different interpretations from the statutory language, an ambiguity exists, and we must look to the entire statutory scheme in seeking to ascertain legislative intent. Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994). Statutes "in pari materia" -- those relating to the same subject or having a common purpose -- are to be construed together. Id. Finally, in construing statutes courts must presume that the Legislature has knowledge of its prior enactments and knows the state of the law at the time it passes legislation. Wilson v. Johnson County, 879 S.W.2d 807, 810 (Tenn. 1994). We must now apply those principles to the statutes at issue in this case.

In support of their argument that trial courts are authorized by statute to hold ex parte hearings and order state-funded investigative and expert services in post-conviction capital cases if necessary to the protection of constitutional rights, Owens and Payne rely upon Tenn. Code Ann. § 40-14-207(b). That statute provides:

(b) In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part, and rules promulgated thereunder by the supreme court.

That statutory provision is incorporated by reference and applies to post-conviction capital cases, Owens and Payne argue, by virtue of the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-121 (1990),<sup>5</sup> which provides that "[i]ndigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by chapter 14, parts 2 and 3 of this title." Title 40, Chapter 14, Part 2 includes Tenn. Code Ann. § 40-14-207(b) above.

The State responds that the Court of Criminal Appeals correctly concluded that Tenn. Code Ann. § 40-30-121 refers only to the counsel and court reporter provisions of Title 40, Chapter 14, Parts 2 and 3, and does not incorporate subsection (b) of Tenn. Code Ann. § 40-14-207, dealing with expert and investigative services.

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<sup>5</sup>As amended in 1995, and effective May 10, this section is to be codified at Tenn. Code Ann. § 40-32-115, but is otherwise unchanged.

We conclude that both the State and the Court of Criminal Appeals interpreted the statutes at issue too narrowly. A brief review of the legislative history of the two statutes will demonstrate the basis of our conclusion.

Though not originally containing a provision relating to expert and investigative services, the statutory provisions contained in a chapter entitled "Rights of Defendants," regarding appointment of counsel for indigent defendants and discretionary appointment of court reporter for indigent capital defendants, were originally enacted in 1955 and codified as Chapter 20 of Title 40. See Tenn. Code Ann. §§ 40-2001 through 40-2013 (1955). In 1965, Chapter 20 was amended and expanded. Thirty-one additional provisions were added, including a provision setting the rates for compensation of counsel for indigent defendants and authorizing reimbursement for counsel's "reasonable and necessary expenses." Tenn. Code Ann. § 40-2023 (1965); Tenn. Code Ann. §§ 40-2001 through 40-2044 (1965).

The Tennessee Post-Conviction Procedure Act was passed two years later in 1967. See Tenn. Code Ann. §§ 40-3801 through 40-3824 (1967). Section 40-3821 of the Post-Conviction Act provided that "[i]ndigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014--40-2043," a part of the "Rights of Defendants" chapter. Therefore, as originally enacted, the post-conviction statute incorporated by reference the provisions of Title 40, ("Rights of Defendants"), governing appointment, compensation, and reimbursement of counsel, and applied those provisions to attorneys appointed to represent indigent petitioners in post-conviction proceedings.

The Post-Conviction Procedure Act was recodified as Chapter 30, Part 1 of Title 40 in 1981, and the statutory provisions relating to compensation and

appointment of counsel were recodified as Chapter 14, Part 2 of Title 40.<sup>6</sup> From its initial enactment until this day, however, the post-conviction statute has always incorporated by reference those statutory provisions relating to compensation and reimbursement of appointed counsel in criminal and habeas corpus cases.<sup>7</sup>

Considering the background and historical development of the various statutes at issue, we think that when the Legislature adopted subsection (b) of Tenn. Code Ann. § 40-14-207 in 1984, it intended for that provision to apply to post-conviction capital cases. As previously stated, courts must presume that the Legislature has knowledge of its prior enactments and knows the state of the law at the time it passes legislation. Wilson v. Johnson County, 879 S.W.2d 807, 810 (Tenn. 1994). There is no specific limiting language within subsection (b) evidencing a legislative intent to limit its applicability to direct trial proceedings.<sup>8</sup> Moreover, the provision was included within a statute dealing specifically with compensation and reimbursement of counsel, and titled "Compensation -- Necessary services for indigent defendants." It follows that the Legislature intended for the provision to apply to post-conviction capital cases. Otherwise, the provision would not have been included in a statute pertaining to a subject that was specifically incorporated by reference into the post-conviction statute - reimbursement of counsel. Any prior Tennessee case to the contrary is hereby expressly overruled.<sup>9</sup>

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<sup>6</sup>In 1981, the Post-Conviction Procedure Act was recodified as Tenn. Code Ann. §§ 40-30-101 through 40-30-124 (1981) and the statutes relating to compensation of counsel were recodified as Tenn. Code Ann. § § 40-14-201 through 40-14-315 (1981).

<sup>7</sup>Tenn. Code Ann. § 40-30-121 (1990 & Supp. 1994), was recodified by a 1995 amendment to the Post-Conviction Procedure Act effective May 10, 1995, as § 40-30-215. 1995 Tenn. Pub. Chap. 207.

<sup>8</sup>The State argues that the use of the term "defendant" indicates that the Legislature intended to limit the application of the provision. The term "defendant" is used throughout Part 2 of Chapter 14, Title 40. It is doubtful that the State would argue that the other provisions of Chapter 14, Part 2, are inapplicable to post-conviction proceedings.

<sup>9</sup>Although Teague v. State, 772 S.W.2d 915 (Tenn. Crim. App. 1988), perm. app. denied (Tenn. 1989), can be read to conflict with our holding herein, and is to that extent overruled, we note that the petitioner in that case was not indigent and had already obtained an investigator at his own expense. Therefore, the Teague court's interpretation of Tenn. Code Ann. § 40-14-207(b) and Supreme Court Rule 13 was dicta.

Having concluded that Tenn. Code Ann. § 40-14-207(b), applies to post-conviction cases, it is not necessary that we address the question of whether courts have inherent or constitutional power to order funds for expert and investigative services. As previously stated, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties. In this case, there is a statutory basis for our decision. Thus, resolution of the constitutional arguments is not necessary.

Our conclusion that Tenn. Code Ann. § 40-14-207(b) applies to post-conviction capital cases should not be interpreted as a "blank check" requiring trial courts to hold ex parte hearings and authorize funds in every case. Tennessee Supreme Court Rule 13, § 2(B)(10) delineates the procedure that both the movant and the trial court are to follow when requesting, or ruling upon a request, for expert or investigative services.<sup>10</sup>

To obtain an ex parte hearing, a capital post-conviction petitioner must submit a written motion to the trial court, alleging why under the particular facts and circumstances of the case, investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights. A bare allegation that support services are needed is not sufficient. In addition, the motion must include: (a) the name of the proposed expert or service; (b) how, when and where the examination is to be conducted or the services are to be performed; (c) the cost of the evaluation and report thereof; and (d) the cost of any other necessary services, such as court appearances. Tenn. Sup. Ct. Rule 13, § 2(B)(10). Once the petitioner satisfies these threshold procedural requirements, the trial court must conduct an ex parte hearing on the motion.

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<sup>10</sup>Rule 13 does not create rights. It merely contains the procedural mechanism for implementing Tenn. Code Ann. § 40-14-207(b). Allen v. McWilliams, 715 S.W.2d 28, 29 (Tenn. 1986).

The trial court should grant the motion if, at the hearing, the petitioner demonstrates that investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights. In the context of direct appeal capital cases we have discussed the showing of particularized need required under Tenn. Code Ann. § 40-14-207(b). We have said that to obtain authorization for funds for support services, "[t]he defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance." State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992). Likewise, we have upheld a trial court's denial of a request for funds to employ an expert when the request "was accompanied by little more than undeveloped assertions that the services were needed to attempt to counter the State's proof." State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994).

Those same principles apply to a trial court's evaluation of a request for expert or investigative services in the post-conviction context. Specifically, a petitioner must demonstrate by specific factual proof that the services of an expert or an investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence. An unsupported allegation to that effect will not suffice.

Of course, Tenn. Code Ann. § 40-14-207(b) vests with the trial court discretion to determine if investigative or expert services are necessary to ensure that the movant's constitutional rights are protected. Accordingly, the guiding principles discussed above must be applied on a case-by-case basis, in consideration of the existing facts and circumstances.

If the motion for investigative or expert services is granted, "the court must grant the prior authorization for these expert services in a reasonable amount to be determined by the court." Tenn. Sup. Ct. Rule 13, § 2(B)(10); see also Tenn. Code

Ann. § 40-14-207(b). In other words, the trial court must specify in its order granting the motion, the particular expert appointed, the hourly rate, and the total monetary amount approved. Tenn. Sup. Ct. Rule 13, § 2(B)(10); see also Tenn. Code Ann. § 40-14-207(b). Requiring prior trial court approval of both the expert and the costs focuses the ex parte hearing and prevents abuse.

Applying those principles to these consolidated cases, we remand to the respective trial courts for a determination, in the first instance, of whether Owens and Payne satisfied the procedural prerequisites to obtaining an ex parte hearing. If so, the ex parte hearing is to be conducted in conformity with this decision.

### **CONCLUSION**

For the foregoing reasons, we conclude that Tenn. Code Ann. § 40-14-207(b), applies to capital post-conviction cases. Therefore, under appropriate circumstances, an indigent petitioner in a post-conviction capital case is entitled to an ex parte hearing on a motion for expert or investigative services. Accordingly, we reverse, in part, the Court of Criminal Appeals' judgment and remand these cases to the respective trial courts for further proceedings consistent with this opinion. Costs of this appeal are taxed to the State of Tennessee.

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RILEY ANDERSON, Chief Justice

### **CONCUR:**

Reid and Birch, JJ.

Drowota, J. and Lewis, Sp.J., dissenting - see separate Dissent