IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO SUPREME COURT RULE 13

No. M2003-02181-SC-RL2-RL - Filed June 1, 2004

DISSENTING AS TO SECTION III, EX PARTE HEARINGS

Chief Justice Frank F. Drowota, III, with whom Justice William M. Barker joins, dissenting.

I.

I cannot agree with the majority's decision to reject the proposed amendment to Section 5(a)(1)-(3)[1] and (b)(4)[2] of Tennessee Supreme Court Rule 13 and retain the current language of

[1]The proposed amendment to Section 5(a)(1)-(3) provides as follows:
(a)(1) When requesting funding for expert or investigative services or other similar services in capital trials, capital direct appeals, and capital post-conviction proceedings, counsel may file *ex parte* the motion seeking such funding. See Tenn. Code Ann. § 40-14-217; Tenn. Code Ann. § 40-30-215; Owens v. State, 908 S.W.2d 923 (Tenn. 1994).
(2) When requesting funding for psychiatric and/or psychological expert assistance in non-capital criminal trials and direct appeals, counsel may file *ex parte* the motion seeking such funding. See Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Barnett, 909 S.W.2d 423 (Tenn. 1995).
(3) In non-capital criminal trials and direct appeals, counsel may file *ex parte* the motion requesting funding for investigative, expert, or other similar services. However, unless the motion is requesting funding of a psychiatric and/or psychological expert, the trial court may determine after reviewing the *ex parte* motion that maintaining the confidentiality of the request is not constitutionally required. See Barnett, 909 S.W.2d at 428 n.4; State v. White, 457 S.E.2d 841 (N.C. 1995); State v. Ballard, 428 S.E.2d 178, 180-81 (N.C. 1993); State v. Phipps, 418 S.E.2d 178, 190-91 (N.C. 1992). In such circumstances, the trial court has the authority to require defense counsel to serve a copy of the motion on the district attorney general and to hold a contested hearing on the request.

[2]The proposed amendment to Section 5(b)(4) provides:
(4) If a motion satisfies these threshold requirements, the trial court must conduct a hearing on the motion. **If the motion is requesting funding pursuant to section 5(a)(1) or (2), the hearing shall be *ex parte*. If the motion is requesting funding pursuant to section 5(a)(3), the trial court has the discretion to determine whether the hearing should be *ex parte* or open and**

Section 5. This Court has long held that Rule 13 does not itself create rights and that it is instead the procedural mechanism for implementing rights. See Owens v. State, 908 S.W.2d 923, 928 n.10 (Tenn. 1995); Allen v. McWilliams, 715 S.W.2d 28, 29 (Tenn. 1986) (recognizing that Rule 13 does not create rights and that it is instead the procedural mechanism for implementing rights). In keeping with this purpose, the proposed amendment to Section 5(a) and (b) neither extended nor limited existing law. The proposed amendment instead carefully and painstakingly incorporated – indeed essentially codified – existing law on *ex parte* hearings. By rejecting the clarity and precision of the proposed amendment to Section 5 and retaining the broad language of current Section 5, the majority intends to perpetuate the existing, erroneous impression that current law mandates *ex parte* hearings on all funding requests by indigent parties.[3] The erroneous interpretation that *ex parte* hearings are required on all funding requests obviously exists. Its existence is evidenced by the fact that in the nine years since State v. Barnett, 909 S.W.2d 423 (Tenn. 1995), this Court has never been presented with an appeal from a trial court's denial of an *ex parte* hearing on a funding request. As explained hereinafter, the erroneous belief that *ex parte* hearings are required in all circumstances has no basis in existing Tennessee case law. This erroneous belief instead emanates from the broad language of existing Section 5 of Rule 13, language that the majority refuses to refine and clarify.

As explained hereinafter, current law clearly does not mandate *ex parte* hearings on all funding requests. Furthermore, as explained below, a trial judge is ethically obligated to refuse to conduct an *ex parte* hearing unless the trial judge is convinced that the *ex parte* hearing is constitutionally or statutorily required. Therefore, trial judges should not and must not interpret Section 5 of Rule 13 as a blanket authorization to conduct *ex parte* hearings on all funding requests. Instead, under existing law, trial courts must conduct *ex parte* hearings only if an indigent defendant requests funding for a psychiatric expert in a capital or non-capital case, or a capital post-conviction petitioner requests funding for expert, investigative, or other support services. As to all other funding requests, trial courts should decide on a case-by-case basis two issues: 1) Whether the state or federal constitution mandates provision of the requested expert, investigator, or other service as part of the basic tools of an adequate defense; and 2) If so, whether the state or federal constitution mandates that the request for funding be filed and considered *ex parte*; For the reasons explained herein, the proposed amendment to Section 5(a) and (b) accurately and clearly reflect this two-step process.

II.

Although the Tennessee District Attorneys General Conference ("District Attorneys") has passionately argued to the contrary, under existing law in this State *ex parte* hearings are constitutionally required when an indigent defendant requests funding for a psychiatric expert to

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contested. (Emphasis added.)

[3]The Joint Commentors asserted that proposed Section 5(a)(2) and (3) improperly created constitutional jurisprudence via a rule rather than through case law. To the contrary, however, it is the Joint Commentors who have erroneously interpreted the language of current Section 5 as extending constitutional jurisprudence to require *ex parte* hearings on all funding requests.

evaluate the defendant for the purpose of raising an insanity defense at trial. See Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Barnett, 909 S.W.2d 423 (Tenn. 1995). Furthermore, in Owens v. State, 908 S.W.2d 923 (Tenn. 1995), a majority of this Court interpreted Tennessee Code Annotated section 40-14-207(b) as entitling capital post-conviction petitioners to funding for expert, investigative, and other support services and as mandating *ex parte* hearings on such funding requests.[4] Therefore, in these limited contexts, existing law mandates *ex parte* hearings.

However, Barnett and Owens were drafted in a limited manner, and by no means do they stand for the broad proposition that *ex parte* hearings are required on any and all indigent defense funding requests. The majority decision in Barnett, as well as the United States Supreme Court's decision in Ake, were expressly limited to the issue presented, i.e., whether *ex parte* hearings are required when an indigent defendant requests funding for psychiatric experts to evaluate the defendant's sanity. Ake, 470 U.S. at 82 ("[W]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."); Barnett, 909 S.W.2d at 428 (" [T]he issue in this case is whether an *ex parte* hearing is authorized or required by the federal constitution in the context of requests by indigent defendants for state-funded psychiatric expert assistance.") Indeed, the majority in Barnett went to great pains to emphasize the limited nature of its decision. The majority first pointed out that

> as a general proposition, *ex parte* hearings are disallowed. Indeed, in Tennessee, a judge is prohibited "except as authorized by law," from considering "*ex parte* or other communications concerning a pending or impending proceeding." Tenn. Sup. Ct. R. 10, Canon 3(A)(4). This is a result of the Due Process guarantee of notice and an opportunity to be heard that is found in both the Fourteenth Amendment to the federal Constitution and Article I, § 8 of the Tennessee Constitution. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976); State v. Pearson, 858 S.W.2d 879 (Tenn.1993).

Id. (emphasis added). The majority next stressed that unique considerations pertain to a request for a psychiatric expert because the

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[4]Justice Anderson authored the majority opinions in Barnett and Owens. In Barnett, I agreed with the majority that indigent defendants are constitutionally entitled to have access to psychiatric experts upon a showing of particularized need, but I dissented from the majority's conclusion that *ex parte* hearings are constitutionally mandated when indigent defendants request funds for psychiatric expert assistance. I, along with Special Justice Lewis, dissented from the majority's decision in Owens and instead would have held that Tennessee Code Annotated section 40-14-207(b) is wholly inapplicable to post-conviction proceedings and that neither the federal nor the state constitution requires the State to provide post-conviction petitioners with experts at state expense. Despite my dissenting opinions in these cases, I nevertheless recognize that, until and unless a majority of this Court overrules Barnett, the majority decision in Barnett is the governing law in this State. Likewise, until and unless the General Assembly amends Tennessee Code Annotated section 40-14-207 or a majority of this Court overrules Owens, the majority decision in Owens represents the governing law in this State. Therefore, I support the proposed amendment to Section 5(a) and (b) which would have codified the majority decisions in both Barnett and Owens.

> object of scrutiny involved in determining an indigent defendant's right to a psychiatric expert 'is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. The public, adversarial nature of an open hearing is inevitably intimidating ... and can daunt the defendant's desire to put before the trial court all his evidence in support of his motion.'

Id. at 428-29 (quoting State v. Ballard, 333 N.C. 515, 428 S.E.2d 178, 180-81 (1993)). The limited nature of the decision in Barnett was further highlighted by the majority's expressed holding: "We agree with the North Carolina Supreme Court and conclude that, at least in the context of a request for a psychiatric expert, an *ex parte* hearing is required." Barnett, 909 S.W.2d at 429 (citations omitted) (emphasis added). To be perfectly sure that the boundaries of its holding had been properly defined, the majority in Barnett further explained the limitation in footnote four, stating:

> We note that the North Carolina Supreme Court has not required *ex parte* hearings when an indigent defendant requests a non-psychiatric expert. See State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995); State v. Ballard, 428 S.E.2d at 180 (discussing the distinction); State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992). We express no opinion on that issue, which is not presented in this case. See note 7, infra.

Barnett, 909 S.W.2d at 428 n.4 (emphasis added). Perhaps even more illustrative of the limited nature of the decision in Barnett is footnote seven, referred to in footnote four above. In footnote seven, the majority states:

> We note that the expert assistance requested in this case was the same as that requested in Ake. The question of whether due process requires provision of non-psychiatric experts has not been resolved by the United States Supreme Court. Indeed, in Caldwell v. Mississippi, 472 U.S. 320, 324, n.1, 105 S. Ct. 2633, 2637, n. 1, 86 L. Ed.2d 231 (1985), the Court explicitly declined to rule on that issue. We likewise express no opinion on the merits of that issue since its resolution is not necessary to the decision in this case.

Barnett, 909 S.W.2d at 430 n.7 (emphasis added). The majority decision in Barnett therefore stands for the following, extremely narrow proposition: indigent defendants have a constitutional right to state-funded psychiatric expert assistance, and when an indigent defendant requests funding for a psychiatric expert, *ex parte* hearings are required.

The decision in Owens is likewise limited. As previously stated, in Owens, released October 23, 1995, a majority of this Court interpreted Tennessee Code Annotated section 40-14-207(b) as applying to capital post-conviction proceedings. The majority further held that this statute affords indigent capital petitioners the right to request funding for expert, investigative,

and other support services and the right to an *ex parte* hearing on the request. The majority in Owens declined to consider whether funding for support services in capital post-conviction proceedings would be constitutionally mandated in the absence of a statute.[5] However, in House v. State, 911 S.W.2d 705 (Tenn. 1995), authored by Justice Anderson and released just one month before Owens on September 25, 1995, a unanimous Court, the same Panel that decided Owens, held that the State is not constitutionally required to provide counsel to indigent capital post-conviction petitioners. Likewise, in Davis v. State, 912 S.W.2d 689 (Tenn. 1995), released November 15, 1995, less than one month after Owens, a unanimous Court, the same Panel that decided Owens, held that neither the federal nor the state constitutions mandate funding for support services for indigent non-capital post-conviction petitioners. Id. Thus, the decisions in Davis and House persuasively and logically point out that any rights capital post-conviction petitioners currently have to request and receive funding for support services and to have such funding requests considered in *ex parte* hearings, derive solely from Owens's interpretation of Tennessee Code Annotated section 40-14-207(b), rather than the state or federal constitution. Therefore, while the majority decision in Owens is the governing law in this State until and unless the General Assembly chooses to legislatively overrule or modify it by amending Tennessee Code Annotated section 40-14-207(b), its scope is narrow and its rationale based entirely on a statute.

The foregoing discussion demonstrates that the proposed amendment to Section 5 (a) and (b) of Rule 13 reliably preserved and carefully memorialized the majority decisions in Barnett and Owens. Indeed, given that Rule 13's purpose is to implement existing rights rather than create new rights, the proposed amendment could have done no less. Thus, the majority's refusal to adopt the proposed amendment is troubling.

Furthermore, the majority's assertion that the proposed rule does not provide sufficient guidance to trial judges is not persuasive. Trial judges are afforded the discretion to decide many issues: evidentiary issues, motions to continue, and recusal motions, to name only a few.[6] The exercise of a trial court's discretion is governed by existing law on whatever issue the trial court may be considering. In determining whether an *ex parte* hearing is required on a particular request for expert funding, trial courts should be guided by the majority's decision in Barnett, as well as the North Carolina cases upon which the majority in Barnett relied. See, e.g. State v. White, 457 N.E.2d 841 (N.C. 1995); State v. Ballard, 428 S.E.2d 178 (N.C. 1993). I am confident that trial judges are capable of applying these principles and determining on a case-by-case basis whether an *ex parte* hearing is required.

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[5]The majority in Owens explained:
"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." 908 S.W.2d at 928.

[6]State v. Saylor, 117 S.W.3d 239, 247 (Tenn. 2003) (admissibility of evidence); State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994) (motions to continue); State v. Smith, 993 S.W.2d 6, 27 (Tenn. 1999) (recusal motions).

Finally, I cannot agree with the majority's assertion that the District Attorneys have made no convincing showing that the proposed rule would have reduced costs. To the contrary, the District Attorneys at oral argument pointed to numerous cases where defendants pleaded guilty after obtaining substantial funding in *ex parte* hearings. At the very least, trial courts likely would have delayed ruling on these requests until the plea negotiations had concluded if trial courts had known of the plea offers. If this is not a convincing showing that costs would be reduced, then what would constitute such a showing? Against this legal and factual background, I am constrained to conclude that the majority's purpose in rejecting the proposed amendment is to perpetuate the fallacy that *ex parte* hearings are required on all funding requests by indigent parties.

In my view, trial judges in Tennessee accept at their own peril the fallacy that *ex parte* hearings are required on all funding requests by indigent parties. Only in limited circumstances are trial judges ethically permitted to initiate *ex parte* communications or conduct *ex parte* hearings. See Supreme Court Rule 10, Canon 3(B)(7). One exception, contained in Supreme Court Rule 10, Canon 3(B)(7)(e), provides that

> [a] judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Id. (emphasis added.) However, as demonstrated by the foregoing analysis, I am simply unable to find any "law" either implicitly or "expressly" authorizing trial judges to hold *ex parte* hearings in contexts other than capital post-conviction cases, as described in Owens, and indigent defense requests for psychiatric experts, as described in Barnett. Furthermore, it can be argued, as the District Attorneys pointed out, that the validity of Barnett and Owens has been called into question to some degree by the statutory victims's rights legislation, enacted after those decisions,[7] and by the state constitutional amendment affording to victims "[t]he right to be present at all proceedings where the defendant has the right to be present." Tenn. Const. Art. I, § 35, ¶ 3. For these reasons, trial judges wishing to comply with the Code of Judicial Conduct, Supreme Court Rule 10, should not, indeed, must not interpret existing Section 5 of Rule 13 and the majority's refusal to adopt the proposed amendment to Section 5(a) and (b), as a blanket mandate for *ex parte* hearings on all funding requests.

Instead, trial judges must exercise discretion and consider each funding request on a case-by-case basis, taking into account the majority decisions in Barnett, and Owens, Supreme Court Rule 10, Canon 3(B)(7)(e), the victims's rights legislation, Tennessee Code Annotated sections 40-38-101 et seq., as well as Article I, section 35 of the Tennessee Constitution. As suggested earlier in this opinion, as to each funding request a trial court must determine: 1) Whether the state or federal constitution mandates provision of the requested expert, investigator, or service as one of the basic tools of an adequate defense; and, 2) If so, whether the state or federal constitution mandates that the request for funding be filed and considered *ex parte*. Only if trial

[7] See Tenn. Code Ann. §§ 40-38-101 et seq.

judges refuse to accept the fallacy that *ex parte* hearings are mandatory under existing law will this Court be presented with an opportunity to decide this issue once and for all in the appellate process.

For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice William M. Barker concurs in this dissenting order. Let me take this opportunity to commend the Administrative Office of the Courts for being such an excellent steward of the state's money and for the competent and efficient way in which it has managed the Indigent Defense Fund in this State.