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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CT-00854-SCT

DANTE LAMAR EVANS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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Certiorari from the Court of Appeals of the State of Mississippi,  
Case No. 2009-KA-00854-COA

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SECOND SUPPLEMENTAL BRIEF FOR THE APPELLANT

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ORAL ARGUMENT REQUESTED

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## STATEMENT OF ISSUES

1. Whether the trial court abused its discretion in denying Dante Evans funds to hire an expert on post-traumatic stress disorder (PTSD).
2. Whether the first issue would be more appropriately addressed on a petition for post-conviction relief.

## STATEMENT OF THE CASE

Dante Evans was born into a household where his mother was repeatedly subjected to life-threatening violence by his father, Darold Evans. Mr. Evans's persistent threats to kill Dante's mother and his acts of physical abuse frequently required police intervention, leading to several restraining orders. (Motions Exhibit D-1 at 8.)<sup>1</sup> During one instance, Darold Evans attempted to drown Dante's mother in a bathtub; in another incident, he tried to run over her with a car. (Exhibit S-12 at 31'-38'.) Dante was also victimized by his father, who often lashed out at Dante, punching him and choking him. (Exhibit S-12 at 40'-41'; Motions Exhibit D-1 at 6.) When he was eight years old, Dante was hospitalized for depression and diagnosed with Post-Traumatic Stress Disorder (PTSD). (Motions Exhibit D-1 at 9.) When he was twelve, he had to be hospitalized again because of suicidal ideations related to his trauma. (Motions Exhibit D-1 at 6.)

When Dante turned fourteen, his mother believed she could no longer manage Dante and sent him to live alone with his father in Gulfport, Mississippi, where Darold Evans was residing temporarily in a FEMA trailer park. (Exhibit S-12 at 39'-40'.) Within a short period of time, Dante complained that his father had started to physically abuse him again. (Tr. 312; Exhibit S-12 at 52'-55'.) At a certain point, Dante sought help from his school counselors. Following the advice of

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<sup>1</sup> References to the clerk's papers are cited herein as "C.P. \_." References to the transcript are cited herein as "Tr. \_." References to the videotaped statement are cited to the minute mark on the video and are noted herein as "Exhibit S-12 at \_'."

a school social worker, Dante wrote a letter to his mother asking to return home because of his father's abuse. (Trial Exhibit D-1.) That letter was confiscated and handed over to Mr. Evans. (Tr. 332–33, 341.) Shortly after this, Dante reported to police that his father beat him with a chain, pushed him against the trailer, and threatened to kill him. (Exhibit S-12 at 53'; see also Motions Exhibit D-1 at 7; Tr. 305–09, 336.) On April 13, 2007, Darold Evans was found dead from a gunshot, and Dante was arrested and charged with murder. (Tr. 40-42.)

Dante was convicted of murder, on March 12, 2009, and he was sentenced as an adult to a mandatory term of life imprisonment. (C.P. 5; Tr. 410-11.) The Court of Appeals issued an *en banc* decision with six judges affirming Dante's conviction and sentence, and three judges dissenting. Evans v. State, No. 09-KA-00854-COA, 2011 WL 2323016 (Miss. Ct. App. June 14, 2011), reh'g denied (Sept. 6, 2011). This Court granted certiorari on December 15, 2011. On December 27, 2011, Dante filed a Supplemental Brief pursuant to Rule 17(h) of the Mississippi Rules of Appellate Procedure and incorporated by reference the arguments presented in his Petition for Writ of Certiorari and in the briefs previously filed in the Court of Appeals.

On June 8, 2012, this Court asked the parties to submit further briefing on “whether the trial court abused its discretion in denying Dante Lamar Evans funds to hire an expert on post-traumatic stress disorder (PTSD) and whether this issue would be more appropriately addressed on a petition for post-conviction relief.”

### **SUMMARY OF THE ARGUMENT**

Throughout Dante's childhood, he both witnessed and suffered from his father's domestic violence and abuse that resulted in severe depression and trauma. After police intervention and multiple restraining orders, Dante was nonetheless placed in a living situation alone with his abusive father at the age of fourteen. Allegations of continual abuse by his father were not adequately

addressed by school officials. After Mr. Evans was found dead and Dante was charged with his father's murder, the defense sought to have the jury determine whether Dante was guilty of manslaughter because, in his mind, he was so fearful of his father that he had to act to protect himself from great bodily injury or death.

Central to this theory of imperfect self-defense was Dante's prior diagnosis of post-traumatic stress disorder and its implications on his culpability. PTSD is a clinical condition that creates a combination of emotional detachment and negativity, a hypervigilance to dangers, and a tendency to react in exaggerated and aggressive ways. It was critical that the jury understand not only the symptoms of PTSD but also its particular impact on battered children. Yet before trial began, the court unconstitutionally refused to grant funds for an expert on PTSD who could have explained the factual and scientific basis for Dante's perception of fear, despite the clear recommendation of a court expert, Dr. Smallwood. Thus, the trial court's decision violated state and federal law because it prevented the decisionmakers from being fully aware of the unique challenge of adjudicating the subjective mindset of a child.<sup>2</sup>

## ARGUMENT

### **I. THE DEFENSE THEORY OF IMPERFECT SELF-DEFENSE REQUIRED AN EXPERT ON POST-TRAUMATIC STRESS DISORDER, AND THE TRIAL COURT'S DENIAL OF FUNDS FOR SUCH AN EXPERT WAS AN ABUSE OF DISCRETION AND REVERSIBLE ERROR.**

On September 5, 2008, trial counsel for Dante Evans filed a "Motion for Expert and Funds to Pay Same." (C.P. 33.) In this motion, counsel explained that Dante Evans was "diagnosed with

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<sup>2</sup> The significance of a defendant's child status, along with all its attendant circumstances, has been addressed in a series of United States Supreme Court cases, culminating in the recent decision in Miller v. Alabama, Nos. 10-9646, 10-9647, 2012 WL 2368659, at \*10 (U.S. June 25, 2012), in which the Court stated that "youth matters for purposes of meting out the law's most serious punishments." See, e.g., Roper v. Simmons, 543 U. S. 551 (2005); Graham v. Florida, 130 S. Ct. 2011 (2010); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

post traumatic stress disorder at the age of six. An expert is needed to assist in the preparation of trial and testify as an expert.” (C.P. 33.) The motion specified Dr. C. Gerald O’Brien as the requested expert, and trial counsel asked for funds totaling no more than three thousand dollars (\$3000). (C.P. 33.) After a brief hearing on the motion, the trial court denied Dante’s motion for funds to pay for Dr. O’Brien. (Tr. 20.)

A. Dante Evans Clearly and Concretely Demonstrated a Substantial Need for an Expert on Post-Traumatic Stress Disorder.

Pursuant to court order, Dr. Beverly Smallwood conducted a pretrial psychiatric evaluation of Dante Evans to determine whether he was competent to stand trial and whether he was sane at the time of the offense. (C.P. 26–28.) Her evaluation was introduced under seal as Exhibit D-1 at the pretrial motions hearing on September 11, 2008.<sup>3</sup> (Tr. 6, 17.) In her report, Dr. Smallwood stated the following:

**Dante has been exposed to abuse in his home prior to his parents’ divorce, and these events involved actual and threatened death and serious injury.** During these childhood experiences, Dante experienced fear and a sense of helplessness. Agitated behavior in children is common after trauma. The domestic abuse that Dante’s father perpetrated toward his mother is well-documented by multiple restraining orders for domestic violence and by reports of his mother and Dante’s aunt, Teresa Truesdale. Dante has had intrusive memories of his mother’s abuse for many years. Dante has wanted to avoid things that reminded him of these abusive episodes, and he was very opposed to going to live with his father, who had perpetrated the abuse he witnessed for many years. Dante has a restricted range of affect and a feeling of detachment from others. He has given evidence of numbing of emotions, which is a common post-traumatic reaction. Over the years, Dante has been irritable and has shown outbursts of anger. He has had difficulty concentrating.

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<sup>3</sup> In several of its pleadings, including its supplemental brief before this Court, the State claims that Dr. Smallwood’s report “is not contained in the record.” (See, e.g., Supplemental Br. for Appellee at 5 n.2.) However, Dr. Smallwood’s report was reviewed by the trial court (Tr. 15–17), and it was also made part of the record on appeal (see C.P. Index Page IV).



He has displayed aggressive behavior throughout his childhood. **All of the above are symptoms of Post-Traumatic Stress Disorder.**

Dante was hospitalized for depression at Moses Cone Health System in 2001, originally for depression. **While at the hospital, he was diagnosed with chronic Post-Traumatic Stress Disorder.** A person with PTSD is likely to overreact to “triggers,” or incidents which in any way remind him or [sic] past trauma.

(Motions Exhibit D-1 at 8–9 (emphasis added).) Not only did Dr. Smallwood recognize the possible symptoms of PTSD, but her report also documented the likely triggers for Dante’s trauma:

Juanita Evans [Dante’s mother] said that Dante had “witnessed” domestic violence – more by sound than sight. On numerous occasions, he had overheard his father threatening to kill his mother. Further, he would threaten this directly to Dante, saying that he was going to hire someone to kill Dante’s mother, saying, “I know where she is.” She said that her ex-husband’s behavior was erratic. One minute he’d say he loved Dante’s mother, begging her to come back to him. The next minute he was threatening to kill her. She said that Dante was very confused by this.

...

Ms. Evans said that after Dante moved to live with his father, his father was very controlling, “a bully.” He would stand very close to Dante when he was talking to his mother. Often, he refused to let Ms. Evans talk with her son. This was especially true after the incident at school in which [a] letter was confiscated.

(Motions Exhibit D-1 at 5.)

[Dante] added, “My daddy punished me every time I came home. He put his hands on me, choked me, body shots, punched me in my stomach and ribs.

(Motions Exhibit D-1 at 6.)

There is evidence that in Dante’s history, he had been a witness to domestic violence toward his mother and that his father had actually threatened to Dante to kill his mother. There had also allegedly been violent incidents between Dante and his father since Dante had come to live with him.

(Motions Exhibit D-1 at 11.) Although Dr. Smallwood identified Dante's history of abuse and his symptoms of trauma, she was unable to provide the type of assistance on PTSD necessary for the defense to use at trial. She told trial counsel that she was unqualified to present such testimony. (Tr. 12.) Instead, "she recommended that [the defense] hire Dr. O'Brien, who is a very highly qualified psychologist." (Tr. 18–19.)

Mississippi law acknowledges that, in certain cases, "the state in fairness should be required to pay the cost of an expert needed by the defense to insure a fair trial for an indigent accused." Ruffin v. State, 447 So. 2d 113, 118 (Miss. 1984); see also Harrison v. State, 635 So. 2d 894, 900–02 (Miss. 1994) (citing Ake v. Oklahoma, 470 U.S. 68 (1985)) (finding reversible error in trial court's failure to provide independent pathologist in capital case). A trial court's decision on a motion for experts is reviewed for abuse of discretion. See, e.g., King v. State, 960 So. 2d 413, 421 (¶8) (Miss. 2007) (quoting Grayson v. State, 806 So. 2d 241, 254 (¶36) (Miss. 2001)). And under this Court's precedent, it would be an abuse of discretion for the trial court to deny funds for an expert if a defendant provides concrete reasons showing a substantial need for such assistance. Hansen v. State, 592 So. 2d 114, 125 (Miss. 1991); Ruffin, 447 So. 2d at 118 (quoting Oregon v. Acosta, 597 P.2d 1282, 1284 (Or. Ct. App. 1979)).

Here, Dante more than satisfied his burden to show that an expert in PTSD was necessary for his defense. First, Dr. Smallwood, the court-appointed expert, recommended that the defense hire Dr. O'Brien because he could testify "on the symptoms, characteristics, attitudes from someone who may be suffering from [PTSD]." (Tr. 6, 19.) When the trial court asked whether Dr. Smallwood could provide the same testimony, counsel replied, "No, sir. I have spoken to Dr. Smallwood about that, and she cannot." (Tr. 12.) Dr. Smallwood's explanation of her lack of expertise on PTSD is corroborated by Mississippi courts, which have found that PTSD is a "narrow

area” of expertise, distinct from the larger field of psychiatry. Chapin v. State, 812 So. 2d 246, 249–50 (¶7–8) (Miss. Ct. App. 2002). This is not a case in which the defense sought an independent expert to refute the conclusions of the court’s expert. Indeed, trial counsel agreed that it would not raise the issue of Dante’s competency at trial, given Dr. Smallwood’s conclusions. (Tr. 9.) Rather, trial counsel was acting on the advice of the court’s expert by requesting funds to hire the specific psychologist recommended by Dr. Smallwood.

Second, Dante presented much more than unsubstantiated assertions in support of his motion for funds. Dr. Smallwood’s investigation disclosed that, in 2001, Dante had been diagnosed with PTSD at the Moses Cone Hospital in Greenville, North Carolina, when he was just eight years old. (Motions Exhibit D-1 at 9.) In addition, Dr. Smallwood’s evaluation revealed the following symptoms of PTSD: depression, suicidal ideation, fear and a sense of helplessness, agitated behavior, intrusive memories of past abuse and avoidance of such memories, a restricted range of affect, a feeling of detachment from others, numbing of emotions, irritable, outbursts of anger, difficulty concentrating, aggressive behavior during childhood. (Motions Exhibit D-1 at 8); see also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 309.81 (4th ed. 2000) (diagnostic criteria for PTSD). These were actual, specific findings by the court’s expert that PTSD was essential to a complete understanding of Dante’s actions in this case.

Third, the role of an expert witness, particularly an expert in the field of mental health, is to “ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.” Ake, 470 U.S. at 80–81. They “tell the jury why their observations are relevant[,] . . . translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.” Id. at 80. Trial counsel repeatedly explained that

Dr. Smallwood and other lay witnesses could not “comment on what [Dante] had been diagnosed with prior to this incident which was post-traumatic stress disorder.” Moreover, trial counsel asserted:

In Dr. Smallwood’s investigation of Mr. Evans, she came upon documentations that Mr. Evans had been diagnosed with post-traumatic stress disorder at a very young age, and is from that or may be suffering from that at the time of this alleged incident. We feel that Dr. O’Brien would be able to inform the jury how Mr. Evans – his thought process was at that point or give his opinion on that.

...

**... He’s here to give his opinion on someone suffering from post-traumatic stress disorder, what their characteristics are and what their process was in his opinion, Judge. And we would like the jury to be able to hear that. I don’t have anybody else as a witness that can testify to that . . . .**

(Tr. 10–11 (emphasis added).)<sup>4</sup> Dr. O’Brien’s testimony would have been akin to other PTSD expert testimony allowed in Mississippi trials. See, e.g., Jordan v. McKenna, 573 So. 2d 1371, 1377 (Miss. 1990) (expert testimony regarding effect of PTSD on rape victim in civil case); Norris v. State, 490 So. 2d 839, 843 (Miss. 1986) (expert testimony regarding effect of PTSD on Vietnam War

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<sup>4</sup> Trial counsel renewed this claim in the motion for new trial:

We consulted with Ms. Beverly Smallwood, and at that point we moved the court for funds to hire an expert to explain to the jury what the signs and symptoms of post-traumatic stress disorder were.

...

We were in fact granted funds to do a psychological evaluation for Dr. Smallwood. Based on her report, we wanted to get someone, I dare not say this, but more expert than she was in the disorder of post-traumatic stress disorder. That’s what we wanted the jury to hear. We were denied those funds. . . . We wanted to hire someone more expert than her. She was only hired to do the psychological evaluation. She was not hired to do the analysis or further inquiry in reference to a post-traumatic stress disorder symptom that the defendant had.

(Tr. 416, 423–24.)

veteran in aggravated assault case). The trial court, however, denied the motion, claiming that Dante or other witnesses could testify about the underlying history of abuse at trial. (Tr. 19–20.) The trial court’s rationale shows that it misunderstood the nature and purpose of a PTSD expert – one who could translate the symptoms of PTSD into language that would help the jury understand their relevance to Dante’s state of mind. See Ake, 470 U.S. at 80.

Given this record and the evidence proffered by Dante in support of his motion for expert and funds, the defense met its “burden of showing that a substantial need existed for a court-appointed expert to testify as to the effects of PTSD.” Evans v. State, No. 09-KA-00854-COA, 2011 WL 2323016 (¶49 n.8) (Miss. Ct. App. June 14, 2011) (Carlton, J., dissenting). Based on the facts and circumstances of this particular case, the trial court’s denial of funds for Dante to hire Dr. O’Brien was an abuse of discretion. See, e.g., Grayson, 806 So. 2d at 254 (¶36); Harrison, 635 So. 2d at 900–01.

B. The Trial Court’s Denial of Funds for a PTSD Expert Was a Denial of Due Process Which Rendered Dante’s Trial Fundamentally Unfair.

As explained in Dante Evans’s underlying briefs, his primary theory at trial was imperfect self-defense – that Dante acted “without malice but under a bona fide (but unfounded) belief that [his action] was necessary to prevent death or great bodily.” Wade v. State, 748 So. 2d 771, 775 (¶12) (Miss. 1999). Under the imperfect self-defense theory, the jury must determine whether Dante’s actions were “*subjectively*, in his or her own mind, reasonable.” Cook v. State, 467 So. 2d 203, 207 (Miss. 1985) (emphasis in original). Central to the presentation of this theory of defense was the need for an expert witness on PTSD to explain the “symptoms, characteristics, attitudes from someone who may be suffering from this disorder.” (Tr. 6.) Without this testimony, the jury could not properly understand or contextualize the history of abuse and trauma perpetrated by Dante’s

father. Therefore, the trial court's denial of funds for a PTSD expert, in this case, was "so egregious as to deny [Dante] due process and his trial was thereby rendered fundamentally unfair." See, e.g., Johnson v. State, 476 So. 2d 1195, 1203 (Miss. 1985); see also Evans, No. 09-KA-00854-COA (¶50–53) (Carlton, J., dissenting).

The key question for the jury to resolve under the defense's theory of imperfect self-defense was whether Dante held in his mind a perception of fear that he was in danger of death or great bodily harm at the hands of his father.<sup>5</sup> In this case, Dante's family history and diagnosis of PTSD was the factual basis for an imperfect self-defense claim. Trial counsel argued,

Judge, our defense on this case is going to be an imperfect self-defense. That is our sole purpose – well, that is our defense. Dr. O'Brien, we need his testimony in order to get to that point of presenting the jury – we want the jury to hear our thoughts on the imperfect self-defense, and we need his testimony in order to get me there or get me a chance to present that to a jury. I don't believe, without his testimony, that we can get to that.

(Tr. 9; see also Tr. 20 ("[W]ithout this expert, we can't comment on the symptoms because I don't have an expert to be able to testify to the symptoms of it.")). The trial court stated, **"I don't have any problems with the aspect of an imperfect self-defense theory**, and you will be allowed to present your theory as – within the evidence that's given in the case." (Tr. 19 (emphasis added).) Nevertheless, its denial of funds eviscerated the foundations of the defense's theory, categorically preventing Dante from effectively explaining his perception of fear to the jury.

In State v. Janes, 850 P.2d 495 (Wash. 1993), the Supreme Court of Washington confronted a similar situation, in which a 17-year-old boy shot and killed his abusive stepfather. At trial, a child psychologist "presented extensive testimony to the jury on PTSD and the psychological effects of

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<sup>5</sup> Separately, Dante has raised as an issue the trial court's erroneous refusal to give a jury instruction on imperfect self-defense.

prolonged child abuse. He testified that PTSD can arise from an extreme stressor such as prolonged abuse. For battered children in particular, abuse can represent a profound kind of blow to how a person functions.” Id. at 500 (quotation marks omitted). The question before the Supreme Court of Washington was whether such testimony was admissible. The court found

PTSD is an anxiety-related disorder which occurs in response to traumatic events outside the normal range of human experience. As Dr. Olson testified at trial, child abuse is an extreme stressor that exceeds a child’s capacity to cope with it or integrate it into their personality, their awareness, their consciousness.

...

[F]or battered children, the effects of PTSD are amplified. Children are entirely dependent on the parent for financial and emotional support. They are extremely vulnerable and tend to place great trust in their parents. It is not as easy for a child as it is for an adult to leave a troubled home. Moreover, unlike the battered adult, a child has no outside context with which to compare the abusive reality. For these reasons, we conclude that the battered child syndrome is the functional and legal equivalent of the battered woman syndrome, and find that it is admissible . . . .

Janes, 850 P.2d at 501–03.<sup>6</sup> The court went on to explain the need for expert testimony on PTSD when it relates to children who have witnessed and suffered abuse:

“Without the aid of expert testimony on the psychology of battered children, the jury will be unable to appreciate the manner in which the abused child differs from the unabused child. Specifically, the jury will be uninformed as to the difference in the way battered children perceive things in their immediate surroundings and react to those perceptions. Expert testimony can help the jury understand the sense of powerlessness, fear, and anxiety which permeate the battered child’s world.

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<sup>6</sup> Mississippi law recognizes that “what has come to be known as the battered wife syndrome has important informational and explanatory power and is being accommodated by our law.” May v. State, 460 So. 2d 778, 785 (Miss. 1984).

**The expert testimony, therefore, will aid the jury in evaluating the manner in which a battered child perceives the imminence of danger and his or her tendency to use deadly force to repel that danger.”**

Janes, 850 P.2d at 503 (emphasis added) (quoting Steven R. Hicks, Admissibility of Expert Testimony on the Psychology of the Battered Child, 11 L. & Psychol. Rev. 103, 111 (1987)).

Other state courts concur that expert testimony on PTSD is particularly important when evidence shows that a child defendant has been abused. Such testimony can explain to the jury that battered children suffer from permanent brain damage, a learned helplessness, heightened sensitivity to impending violence, and most importantly, a heightened need for self-protection, all of which explains why abused children may commit acts of violence in situations that seem non-confrontational from the outside.<sup>7</sup> State v. Smullen, 844 A.2d 429, 445-50 (Md. 2004). Moreover, “[t]he helplessness of these children is exacerbated by the apparent lack of successful intervention by others, . . . and this makes children place the burden on themselves to deal with the parental violence.” State v. Miller, 513 S.E.2d 147, 160 n.8 (W. Va. 1998) (Starcher, J., concurring) (citing Shelly Post, Adolescent Parricide in Abusive Families, 51 Child Welfare No. 7, 445, 453 (1982)); see also In re (Anotnio) Nunez, 93 Cal. Rptr. 3d 242, 252 (Cal. Ct. App. 2009) (in case involving fourteen year-old defendant, psychiatrist testified that when “[v]iewed in the context of post-traumatic stress disorder, Antonio’s behavior is most accurately described as impulsive and

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<sup>7</sup> It has been well-documented that vulnerable offenders who act out of fear against their abusers often do so when the abusers are in less-defensible positions, thus increasing their chances of preventing further retaliatory harm. See, e.g., Kristi Baldwin, Note, Battered Child Syndrome as a Sword and a Shield, 29 Am. J. Crim. L. 59, 73 (Fall 2001) (“[M]ost abused children kill in non-confrontational situations.”); Paul A. Mones, When a Child Kills: Abused Children Who Kill Their Parents 14 (1993);



self-protective. . . . Antonio’s awareness of potential threats heightened, but his need to protect himself in response to threats likewise was heightened.”) (vacating sentence of life without parole).<sup>8</sup>

For these reasons, the trial court’s decision to deny Dante’s request for funds to hire an expert on PTSD violated his due process rights. Under Mississippi law, this Court looks at the following factors to determine whether a defendant’s trial was rendered fundamentally unfair by the denial of expert assistance: access to the State’s experts, opportunity to cross-examine the State’s experts, the lack of prejudice or incompetence by the State’s experts, the extent the State’s case depends on the State’s experts, and the risk of error in resolving the issue for which the expert is requested. Townsend v. State, 847 So. 2d 825, 829 (¶13) (Miss. 2003). The majority of those factors are inapplicable to this case because there was no State expert, and the lack of any State expert heightened the prejudice caused by the trial court’s abuse of discretion. Rather, the court-appointed expert advised defense counsel to pursue a separate psychologist with expertise on PTSD because she was unqualified to effectively explain the connection between Dante’s symptoms and his mental state at the time of the offense. See Evans, No. 09-KA-00854-COA (¶50–51) (Carlton, J., dissenting); see also Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (the right “to call witnesses in one’s own behalf have long been recognized as essential to due process”).

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<sup>8</sup> This Court has not requested further briefing on the recent United States Supreme Court case, Miller v. Alabama, Nos. 10-9646, 10-9647, 2012 WL 2368659 (U.S. June 25, 2012). However, this decision bears directly on the constitutional significance of a defendant’s child status, especially as it relates to two of Dante’s claims regarding his mandatory sentence to life imprisonment. The Miller decision emphasizes the “distinctive (and transitory) mental traits and environmental vulnerabilities” of children. Id. at 10. And the Court held that decisionmakers cannot ignore “an offender’s age and the wealth of characteristics and circumstances attendant to it,” including “the family and home environment that surrounds him—and from which he cannot usually extricate himself.” Id. at 14–15. The Court also banned mandatory life sentences for juveniles under the Eighth Amendment, which is the sentence Dante Evans received in this case. Id. at 27.

Similarly, the factors in Ake also show that fundamental fairness entitled Dante to the assistance of Dr. O'Brien. These factors are

- 1) the private interest that will be affected by the action of the State;
- 2) the governmental interest that will be affected if the safeguard is to be provided; and 3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Richardson v. State, 767 So. 2d 195, 199–200 (Miss. 2000) (citing Ake, 470 U.S. at 77). In Ake, 470 U.S. at 86–87, the United States Supreme Court held that, when an indigent defendant was entitled to the assistance of a psychiatrist, the denial of that assistance was a violation of the defendant's due process rights. The Court based its decision on a defendant's due process guarantee to fairly present his or her defense, id. at 76, and it ruled that the assistance of an expert necessary to an effective defense could not be limited solely because of a defendant's poverty, id. at 77, 83. See also Griffin v. Illinois, 351 U.S. 12 (1956).

Here, the "private interest in the accuracy of [the] criminal proceeding" that placed Dante's life and liberty at risk was "almost uniquely compelling." Ake, 470 U.S. at 78. As explained above, Dr. O'Brien was the only expert witness who could provide the jury with a relevant way of understanding the history of abuse by Dante's father on the rest of the family. The defense was not merely presenting a litany of Dante's tragic childhood; rather, its theory was specific – Dante's prior exposure to violence caused his mind to subjectively believe that he was in danger of great bodily harm or death. By contrast, the State's only interest weighing against the expert testimony was \$3000. Id. Moreover, the value of the expert testimony to Dante's defense was enormous as it went to the key issue of Dante's mental state, and there was no other evidence which could provide an adequate substitute. When the factors above are properly weighed, it is evident that Dante's ability

to present his defense was impermissibly limited. Evans, No. 09-KA-00854-COA (§52–53) (Carlton, J., dissenting).

In this case, an expert on post-traumatic stress disorder (PTSD) was necessary to the presentation of Dante Evans’s imperfect self-defense theory. Because Dr. O’Brien’s expertise was essential, the trial court’s ruling was an abuse of discretion, so egregious as to violate Dante’s rights to due process and fundamental fairness under the Sixth and Fourteenth Amendments to the United States Constitution, the Mississippi Constitution, and Mississippi law. Harrison, 635 So. 2d at 900–02.

**II. THIS COURT CAN AND SHOULD ADDRESS, ON THIS APPEAL, THE TRIAL COURT’S FAILURE TO GRANT FUNDS FOR AN EXPERT ON POST-TRAUMATIC STRESS DISORDER.**

This Court also asked the parties to address whether the first issue would be more appropriately addressed on a petition for post-conviction relief. Under Mississippi law, a trial court’s denial of funds for a necessary expert is generally addressed on direct appeal. See Harrison v. State, 635 So. 2d 894, 900–02 (Miss. 1994); see also Loden v. State, 971 So. 2d 548, 562–64 (§28–34) (Miss. 2007); King v. State, 960 So. 2d 413, 420–24 (§6–15) (Miss. 2007). As laid out in Issue I, supra, Dante provide concrete and substantiated reasons demonstrating his need for an expert on PTSD, and the trial court reviewed Dr. Smallwood’s psychological evaluation, highlighting Dante’s mental health history. On this record, this Court can and should conclude that the trial court’s denial of funds was error, warranting reversal.

In Howell v. State, 989 So. 2d 372, 389–91 (§57–63) (Miss. 2008), this Court considered a related question of whether trial counsel had been ineffective in failing to seek and obtain funding for various defense experts. The specific posture of that case was unique because, on direct appeal, an incorrect finding was made that the defendant was not indigent. Id. at 390 (§60). Thus, in that

case, the issue of providing funding for an indigent defendant to hire experts was not properly addressed on direct appeal. See Howell v. State, 860 So. 2d 704, 721 (¶40–43) (Miss. 2003). Here, however, there is no question regarding Dante’s indigency status, and the claim is properly before this Court. (See, e.g., C.P. 33, 134.)

Moreover, the scope of a petition for post-conviction relief under the Mississippi Uniform Post-Conviction Collateral Relief Act may not extend to Dante’s claim that the trial court’s denial of funds was in error. Section 99-39-21(1) of the Mississippi Code states that failure to raise a claim that was “capable of determination at trial and/or on direct appeal . . . shall constitute a waiver thereof and shall be procedurally barred.” See also Miss. Code § 99-39-21(2) (“The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue . . .”). In this case, trial counsel properly filed a motion for funds for an expert on PTSD. (C.P. 33.) The claim was raised before trial at a motions hearing. (Tr. 5–20.) Trial counsel renewed the claim in the motion for new trial (C.P. 100), and argued it again in front of the judge (Tr. 416, 423–24). Because the issue of the trial court’s erroneous denial was raised at trial, it is appropriate for this Court to address the issue at this stage and to grant Dante the requested relief.

## CONCLUSION

For the foregoing reasons, Dante Evans respectfully asks this Court to reverse his unconstitutional conviction and sentence, and grant a new trial.

Respectfully submitted,



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Dated: July 9, 2012

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## CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I served a copy of the attached pleading by First-Class

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