IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. M2000-00641-SC-DPE-CD
	)	
BYRON BLACK	)	**CAPITAL CASE**

RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE; NOTICE THAT DEFENDANT IS INCOMPETENT TO BE EXECUTED AND REQUEST FOR A HEARING; AND REQUEST FOR CERTIFICATE OF COMMUTATION

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I. Introduction.

Byron Black's current IQ measures 67. He has brain damage. He has been diagnosed with schizophrenia. In addition to these severe mental defects which render him incompetent to be executed, he suffers from a number of medical ailments. Because of his impairments, he has not been able to advocate for himself and has fallen victim to sub-standard health care.

Mr. Black was diagnosed with degenerative disc disease in 2009. Ex. 1, 11/6/2009 Radiology Report. He received no treatment.

In 2017, he reported his chronic right hip pain while being evaluated for elevated PSA. Ex. 2, 2/8/17, Urology Consultation. He was scheduled for a prostate biopsy.

On June 27, 2017, during surgery for his prostate cancer, the surgeon nicked his bladder. Ex. 3, 7/27/17 Clinical Summary. Mr. Black spent six weeks in the hospital as a result.

In March 2018, Mr. Black underwent "coronary arteriogram, which showed minimal, non-obstructive artery disease in the right coronary artery, and a severely depressed LV function with ejection fraction of about 25%." Ex. 4, 8/7/18 Cardiology Consultation. Mr. Black was diagnosed with, *inter alia*, cardiomyopathy and congestive heart failure. *Id.*

On December 20, 2018, Mr. Black was recommended for a total hip replacement. "X-rays for the right hip were reviewed and reveal severe right hip degenerative joint disease." Ex. 5, 12/20/18 Orthopedic Consultation. Four months later, on April 6, 2019, TDOC Medical,

requested permission for an off-site evaluation of Mr. Black for total hip replacement. Ex. 6, April 6, 2019 request. The appointment was scheduled for August 28, 2019. The evaluation revealed "Severe bilateral osteoarthritis with osseous remodeling of the femoral heads, RIGHT greater than LEFT." Ex. 7, 8/28/19 report. He has collapsed avascular necrosis[1] and secondary osteoarthritis. Despite the fact that Mr. Black can barely walk and is at risk for two broken hips, the doctor's recommendation was to manage him "conservatively" with a walker, "which may be provided for him in prison."[2] *Id.* The reason: "Prison is no place to live with, rehabilitate from, or receive follow-up care for joint replacement surgery." *Id.*

Three weeks later, the attorney general asked this Court to set an execution date. The motion should be denied.

II. Mr. Black is incompetent to be executed. *Madison v. Alabama*, 139 S.Ct. 718 (2019). This case should be remanded for a full and fair evidentiary hearing under Tenn. S. Ct. R. 12 (4)(A); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Coe v. State*, 17 S.W. 3d 191 (Tenn. 2000); and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

The Eighth Amendment to the United States Constitution precludes the execution of a prisoner "who has 'lost his sanity' after sentencing." *Madison*, 139 S. Ct. at 722 (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)). Put another way, *Ford* holds that the insane are categorically excluded from the death penalty under the Eighth

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[1] Untreated avascular necrosis causes bone collapse.

[2] To date Mr. Black moves from place to place by being pushed while seated in a rolling office chair. The prison has not provided a walker.

Amendment to the United States Constitution. *Madison*, 139 S.Ct. at 723. Because the insane are constitutionally excluded from the death penalty, the State of Tennessee is prohibited from executing an insane person. *Id.*; *see also Van Tran*, 6 S.W.3d at 265 ("[T]his Court has an affirmative constitutional duty to ensure that no incompetent prisoner is executed."); *Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 618 (6th Cir. 2006) (Cole, J., concurring) ("It is undisputed that the state cannot execute [the defendant] if he is incompetent.").

The rationale for the decision in *Ford*, and its progeny, is rooted in the common law and evolving standards of decency. "Surveying the common law and state statutes, the Court found a uniform practice against taking the life of [an insane] prisoner." *Madison*, 139 S.Ct. at 722. The *Madison* Court observes that the bar against the execution of the insane is "time-honored" because to do so "simply offends humanity." *Id.* at 722-23 (quoting *Ford*, 477 U.S. at 407, 409). Further, the Supreme Court recognizes the "natural abhorrence" of "civilized societies" to the execution of this category of defendants. *Madison*, 139 S.Ct. at 723. Moreover, there is no retributive purpose to executing the insane. *Id.*

Additional considerations support excluding the insane from execution. There are religious underpinnings to the prohibition against executing the insane. Commentators observed that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it[.]" *Ford*, 477 U.S. at 407 (quoting Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685)) (internal quotation marks omitted). Further, the goal of deterrence is not served by the execution of the insane. *Ford*, 477 U.S. at 407. "It is also

said that execution serves no purpose in these cases because madness is its own punishment: *furiosus solo furore punitur*." *Id.* at 407–08.

In the years since *Ford*, the states have struggled with defining the scope of the category of those individuals who are "insane" and therefore ineligible for execution. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court rejected the Fifth Circuit Court of Appeals' test, which asked whether the prisoner was aware that he was to be executed and why he was to be executed. *Id.* at 956. In *Panetti*, the Fifth Circuit Court of Appeals concluded that a prisoner could not present evidence that his mental illness "obstruct[ed] a rational understanding of the State's reason for his execution." *Id.* The Supreme Court held this standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 956-57.

In essence, the Supreme Court acknowledged in *Panetti* that a defendant may be able to parrot the words that would indicate that he is aware that he will be executed for a crime, but that does not end the inquiry.[3] The Eighth Amendment requires more. It requires that the defendant rationally understand what is about to happen *and why*. If a defendant's delusions prevent a rational understanding of his execution and the reason for it, then the constitution places a substantive prohibition on his execution, the Court held. "Gross delusions stemming

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[3] *See Kirkpatrick v. Bell*, 64 Fed. Appx 495 (6th Cir. 2003) (district court abused its discretion in denying stay of execution and finding defendant competent to waive his appeals based solely on the testimony of the defendant in the face of expert testimony that the defendant was incompetent.)

from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. Although the Court did not adopt a rule governing all competency determinations, it did conclude "[i]t is ... error to derive from *Ford* ... a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." *Id.*

In remanding the case, the Court stressed that the lower courts must conduct a searching and detailed evaluation of the evidence:

> The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent.

Panetti, 551 U.S. at 962. The Court directed the lower courts to look to *Roper v. Simmons*, 543 U.S. 551, 560-564 (2005) and *Atkins v. Virginia*, 536 U.S. 304, 311-314 (2002) as guides. *Roper* and *Atkins* rely extensively on the opinions and data presented by mental health and medical professionals.

Last term, in *Madison*, the Court re-affirmed the competency to be executed exclusion and clarified the scope of the category. The defendant in Madison suffers from a medical condition (dementia) and, as a result, has no memory of the offense for which is to be executed. Thus "[t]he first question presented is whether *Panetti* prohibits executing Madison merely because he cannot remember committing his crime. The second

question raised is whether *Panetti* permits executing Madison merely because he suffers from dementia, rather than psychotic delusions." *Madison*, 139 S. Ct. at 726.

The Court observes that the test for competency was clarified and adopted by the majority in *Panetti*, and that test "is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's rationale for [his] execution.'" *Madison*, 139 S. Ct. at 723 (quoting *Panetti*, 551 U.S. at 958–59). The Court concluded that memory loss due to dementia, by itself, does not meet this test. However, "a person suffering from dementia may be unable to rationally understand the reason for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S.Ct. at 726-27. The Court emphasized that the critical question is whether the defendant has a "rational understanding." *Id.* at 727.

But memory loss can play a role in the "rational understanding" analysis.

> If that loss combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the State is exacting death as punishment, then the *Panetti* standard will be satisfied. That may be so when a person has difficulty preserving any memories, so that even newly gained knowledge (about, say, the crime and punishment) will be quickly forgotten. Or it may be so when cognitive deficits prevent the acquisition of such knowledge at all, so that memory gaps go forever uncompensated. As *Panetti* indicated, neurologists, psychologists, and other experts can contribute to a court's understanding of issues of that kind. But *the sole inquiry for the court remains whether*

> *the prisoner can rationally understand the reasons for his death sentence.*

Madison, 139 S. Ct. at 727–28 (emphasis added) (internal citations omitted). The etiology of the defendant's lack of rational understanding is irrelevant to the analysis: "*Panetti* framed its test ... in a way utterly indifferent to a prisoner's specific mental illness. The *Panetti* standard concerns ... not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Madison*, 139 S. Ct. at 728. The Court held:

> [A] judge must therefore look beyond any given diagnosis to a downstream consequence. As *Ford* and *Panetti* recognized, a delusional disorder can be of such severity—can "so impair the prisoner's concept of reality"—that someone in its thrall will be unable "to come to grips with" the punishment's meaning. But delusions come in many shapes and sizes, and not all will interfere with the understanding that the Eighth Amendment requires. And much the same is true of dementia. That mental condition can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him. But dementia also has milder forms, which allow a person to preserve that understanding. Hence the need—for dementia as for delusions as for any other mental disorder—to attend to the particular circumstances of a case and make the precise judgment *Panetti* requires.

Madison, 139 S. Ct. at 729 (internal citations omitted).

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court created the procedure under which state and federal claims of competency to be executed are to be raised and litigated. This procedure was affirmed in

Coe, adopted in Tenn. S. Ct. R. 12, and modified by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). Under *Van Tran*, a defendant who is incompetent to be executed must raise the issue with this Court in response to a motion to set execution date. This Court, in turn, will remand the case to the criminal court for the prisoner to submit proof necessary to meet the required threshold showing. Once that showing is met, the criminal court will conduct a hearing.

Mr. Black gives notice that he is incompetent to be executed and categorically excluded from the death penalty under the United States and Tennessee constitutions. He respectfully requests that his case be remanded to the criminal court for a full and fair adjudication of his claim.

A. Current Testing Reveals Neurocognitive Damage

Byron Black was evaluated by Dr. Daniel Martell over a two day period in December, 2019. Dr. Martell has been unable to complete a written report but will do so upon the initiation of competency proceedings. Dr. Martell administered the following battery of intellectual and neuropsychological tests to Mr. Black:

- Behavioral Observations and Mental Status Examination
- Structured Neuropsychological Interview
- Rey's 15 Items
- Test of Memory Malingering
- ACS Word Choice Malingering Test
- Wechsler Adult Intelligence Scale-IV
- Wechsler Memory Scale-IV
- California Verbal Learning Test-II
- Wide Range Achievement Test-IV
- Trail Making Test, Parts A and B
- Boston Naming Test

- Tests of Verbal Fluency (F-A-S and Animal Naming Test)
- d2 Test of Attention
- Delis-Kaplan Executive Function System
  - Color-Word Interference Test
- Wisconsin Card Sort
- Halstead Categories Test
- Luria's Tests of Graphomotor Sequencing and Inhibition
- Luria's Tests of Motor Sequencing and Control
- Hooper Visual Organization Test
- Line Bi-Section Test
- Adaptive Functioning History and Clinical Interview

Dr. Martell administered numerous measures of effort and test validity including (1) the Rey 15 Item Malingering Test, (2) the Test of Memory Malingering, (3) Reliable Digit Span, (4) the Word Choice Test, and (5) the Forced-Choice Trial of the CVLT-II. Mr. Black "passed" all of the tests, indicating that he gave good effort and the rest results are valid.

On the Wechsler Adult Intelligence Scale-IV, Mr. Black obtained a reported score of 67, which is a significantly subaverage score that places him squarely in the range of Intellectual Disability.

Dr. Martell observed that Mr. Black exhibits a pattern of broad impairment in his abilities involving skills all three areas of Adaptive Functioning, including: 1) The Conceptual Domain (i.e., language, reading, writing, money, time, and number concepts); 2) the Social Domain (i.e., interpersonal skills, self-esteem, gullibility, social problem-solving); and 3) the Practical Domain (i.e., activities of daily living, use of community resources, money management, work skills, health and safety awareness).

Further, Dr. Martell's review of the record and his own clinical examination led him to conclude that Mr. Black's intellectual disability manifested within the developmental period.

Beyond his conclusion that Mr. Black is intellectually disabled, Dr. Martell also found a number of neurocognitive deficits, consistent with the previous neurorimaging findings of Dr. Gur. Ex. 8, Neuroimages. Mr. Black currently exhibits significant deficits in the following areas:

> (1) significant memory impairment at a level commensurate with his Intellectually Disabled IQ score;
> (2) extreme confabulation (abnormal intrusions of extraneous, irrelevant, and incorrect information into his recall);
> (3) severe impairment in his language functioning characterized by frank anomia (an inability to find words for things) and impaired sematic verbal fluency (e.g., the ability to name things in categories such as animals);
> (4) impaired visual organization processing; and
> (5) deficits in his frontal lobe/executive abilities including:
>
> (a) divided attention,
> (b) multitasking,
> (c) abstract problem-solving, and
> (d) evidence of multimodal perseveration (a pathological repetition of behavior without awareness, seen in both graphomotor and problem-solving abilities).

Mr. Black is currently intellectually disabled, brain-damaged, and medically disabled.

B. Current Testing is Consistent with Past Evaluations

1. Dr. Albert Globus

Dr. Albert Globus, evaluated Mr. Black in 2000. He concluded

> [T]he clinical history reveals evidence of early onset brain damage secondary to alcohol ingestion by his mother. It was sufficient to produce an I.Q. lower than all but two or three per cent of the population. His verbal ability, learning, disability, memory defects, and poor perception of reality have induced a mental state resembling delusional. It has rendered him so defective in understanding that he can not ably and reasonably assist his attorney in his defense.

Ex. 9, Globus Report.

2. Dr. Ruben Gur

Dr. Ruben Gur, a world-renowned neuropsychologist with expertise in delusional disorders, examined Mr. Black in 2001. He opined:

> Byron also demonstrates a symptom complex associated with serious psychiatric disorders. The symptoms include: paranoid and delusional beliefs, as well as negative symptoms of schizophrenia. These symptoms produce attentional problems as well as misinterpretations of environmental stimuli, such as courtroom proceedings. These psychiatric symptoms coupled with frontal, temporal, and limbic system impairment compound his inability to understand and appreciate reality. He is unable to distinguish between reality and his delusions and is unaware that he suffers from psychiatric illness.

Ex. 10, Declaration of Dr. Ruben Gur. Dr. Gur supervised the administration of a number of neuroimaging studies on Mr. Black and presented their finding. Dr. Gur noted several important indicators of

mental disease. For example, the MRI depicts large ventricles. "Large ventricles are a cardinal sign of schizophrenia, but appear in mental retardation and various forms of cerebral dystrophy or atrophy related disorders." Ex. 11, Gur Deposition, p. 51. Dr. Gur testified, "I have seen literally thousands of MRI's. I have not seen that size ventricle." *Id.*

Dr. Gur also ordered a study of Mr. Black's brain known as deformation based morphometry. This study also showed that Mr. Black has an abnormal brain. The other study performed using the data from the MRI is a Quantitative Analysis. This analysis caused Dr. Gur to conclude that Mr. Black's MRI is "severely abnormal" and that "because of the unusual size of the ventricles and loss of tissue in the – in the location of the loss of tissue which would have severe consequences for behavior. *Id.* at 60-61.

While the MRI studies the structure of the brain, a PET scan studies its function. Dr. Gur also examined the PET scan of Mr. Black's brain. Dr. Gur interpreted the results as "quite chaotic." He explained, "as you can see, this is not a normal brain. There are nearly as many regions with abnormal as with normal metabolism[.]" *Id.* at 72. Dr. Gur specifically noted the "abnormally low [corpus] callosal metabolism, and the effect of the large ventricles, and that is precisely what has been described in fetal alcohol syndrome." *Id.* at 73.

Finally, Dr. Gur performed a sophisticated analysis of the neuropsychological testing administered to Mr. Black to produce a behavioral image. "[T]he result of the behavioral image on Byron Black ... indicates substantial damage that seems to be focused in the orbital, frontal, temporal area." *Id.* at 76-7.

3. Dr. Daniel Grant

Dr. Daniel Grant, a board-certified neuropsychologist, evaluated Mr. Black and also concluded that he meets the criteria for intellectual disability.[4] Dr. Grant further opined that Mr. Black "has significant deficits in language skills, memory, verbal reasoning, problem solving skills and significant subaverage intellectual functioning." Ex. 12, Declaration of Dr. Daniel Grant.

Dr. Grant found the observations of trial counsel, Ross Alderman, consistent with his own. In a 2001 Declaration, Mr. Alderman recalled:

> During our interactions with Byron Black, Byron completely could not focus on the case. For instance, we'd talk to Byron telling him that we needed him to help us, but he told us not to worry about it and it was not a problem, because God would save him. Byron was convinced that some divine presence in court would release him from the proceedings or that some divine manifestation would liberate him. As I stated during my testimony at the competency hearing, I believe that Byron was delusional about what was going on.

Ex. 13, Declaration of Ross Alderman. Mr. Alderman stated "Byron couldn't understand how anything in the courtroom affected him, and he didn't understand the implications of the witnesses' testimony." *Id.* Mr. Alderman continued:

> As an example of how out of touch Byron was with what was going on in the trial is when after the jury went out to deliberate on the issue of sentence, Byron asked me, "Do I get to testify now." It was clear to me that Byron had not understood what had occurred in the proceedings. I believe

[4] The term at the time was mental retardation.

> that he had no clue about what had been going on for the past two weeks. He lacked the ability to process what had been occurring.

Id. Post-conviction counsel had the exact same experience with Mr. Black. They, and their experts, found that Mr. Black has no memory of the crime and required additional testing. They believed that Mr. Black suffered from organic or psychogenic amnesia which required additional testing and collection of data to determine the full impact of this mental illness. Ex. 14, Collective Exhibit from Post-conviction transcript. To this day, Mr. Black has no memory of the crime.

4. Dr. Patti Van Eys

Dr. Patti Van Eys, conducted a psychological evaluation of Mr. Black on March 28, 2001. Dr. Van Eys administered the WAIS-III to Mr. Black and he obtained a reported Full Scale IQ score of 69. Ex. 15, Report of Dr. Patti Van Eyes. Dr. Van Eys explained:

> Further, Mr. Black's Verbal Comprehension Index (67) is also in the Extremely Low range (1st %ile). The VIQ is most closely correlated with overall general intelligence, and, in Mr. Black's case, certainly reflects deficient verbal reasoning. The Non-Verbal or Performance IQ (PIQ) score falls in the Borderline range (5th %ile) and is most reflective of visual-motor problem solving, and is higher possibly due to rote visual problem solving in highly structured (concrete) tasks. The weakest part of Mr. Black's profile is his Working Memory Index (61) that falls in the Extremely Low range (.5 %ile) and reflects his clear deficit in mental flexibility. He has a basic deficit in holding information in short term memory, and an even more difficult time mentally manipulating more than three pieces of even simple information. Such a deficit,

> along with severely low verbal reasoning, would likely create a serious challenge in the ability to think through future actions and consequences. These shortcomings, combined with Mr. Black's observed and/or documented lack of judgment, insight, and his naive, psychologically defended style (e.g., with religiosity and denial) would predictably make it quite difficult to understand the true complexities of his current situation.

Id. at 5.

5. Dr. Stephen Greenspan

In 2008, Dr. Stephen Greenspan evaluated the previous testing and personally met with Mr. Black. Ex. 16, Greenspan Declaration. Dr. Greenspan holds a Ph.D. in Developmental Psychology from the University of Rochester, and was a Postdoctoral Fellow in Mental Retardation and Developmental Disabilities at the University of California at Los Angeles' Neuro-Psychiatric Institute. Dr. Greenspan has held academic appointments at the University of Nebraska and at George Peabody College of Vanderbilt University and is currently a Clinical Professor of Psychiatry at the University of Colorado Health Sciences Center, and Emeritus (retired) Professor of Educational Psychology at the University of Connecticut. He has written a book, "What is Mental Retardation?" published by the AAMR. In 2008, the AAMR recognized Dr. Greenspan's contributions to the field by granting him its highest honor, the Gunnar and Rosemary Dybwad Award for Humanitarianism. Ex. 16, Greenspan Declaration.

After reviewing the record and meeting with Mr. Black, Dr. Greenspan wrote: "In short, Mr. Black gave clear evidence of intellectual

limitations in the developmental period, and there is continuity rather than discontinuity linking his intellectual limitations today and his intellectual limitations as a child." *Id.* Dr. Greenspan evaluated Mr. Black's adaptive behaviors using "the most widely-used and respected adaptive behavior rating instrument, the Vineland-2." *Id.* p. 18. Dr. Greenspan explains the test and its methodology:

> This instrument is published by Pearson Assessment, the publisher of the most widely respected intelligence test, the Wechsler Scales, and is the publisher that adheres to the highest standards for test development.
>
> The Vineland-2 is filled out by an examiner after each interview with one or more informants. I conducted two such interviews, one with a boyhood friend, Rossi Turner, who knew Mr. Black until he left Nashville to go to school outside the state, and a joint interview with two sisters: Melba Black Corley (older sister) and Freda Black Whitney (younger sister). In the latter interview, I asked for consensus between the two sisters before scoring each item and generally such consensus was obtained. I should note that all three informants hold responsible professional jobs and appear to be people of average or above average intelligence. All three of them indicated they knew Mr. Black very well during the age period (17-6) being rated.
>
> The Vineland-2 labels its domains somewhat differently than does AAMR-10, but they are generally equivalent. The three domains on the Vineland-2 are: "Communication" (which taps basically what AAMR-10 calls "Practical Adaptive Skills"; "Daily Living Skills" (which taps what AAMR-10 calls "Practical Adaptive Skills") and "Socialization" (which taps what AAMR-10 calls "Social Adaptive Skills"). In addition,

> one sums across all of the items on the scale to obtain a Composite (overall) adaptive quotient.

Id. Dr. Greenspan received results on the Vineland that were congruent with, and confirming of, Dr. Grant's tests of adaptive behavior and Dr. Gur's evaluation of the neuropsychological testing, MRI, and PET Scan. *Id.* p. 17. It should be noted that Dr. Greenspan did give Mr. Black a test to determine malingering and the test results indicated that Mr. Black is not malingering. *Id.* Dr. Greenspan's results showed:

> The standard scores obtained on the Vineland-2 were as follows: On Communication (Conceptual Adaptive Skills), Mr. Black received a standard score of 75 on the Vineland based on interview with the sisters, while he obtained an identical score on the Vineland based on interview with Mr. Turner.
>
> On Daily Living (Practical Adaptive Skills), Mr. Black received a standard score of 76 on the Vineland based on interview with the sisters, while he obtained a standard score of 71 on the Vineland based on interview with Mr. Turner.
>
> On Socialization (Social Adaptive Skills), Mr. Black received a standard score of 63 on the Vineland based on interview with the sisters, while he obtained a standard score of 67 on the Vineland based on interview with Mr. Turner.
>
> On overall Composite Adaptive Behavior, Mr. Black received a standard score of 70 on the Vineland based on interview with the sisters, while he obtained an identical standard score of 70 on the Vineland based on interview with Mr. Turner.

Id. at pp. 18-19. These test scores clearly meet the diagnostic criteria for adaptive deficits.

C. Mr. Black is entitled to a full and fair hearing. He submits that the procedures created under *Van Tran* do not comport with procedural due process or the Eighth and Fourteenth Amendment and should be modified.

In *Panetti,* the Supreme Court made clear that states must provide due process in the adjudication of competency to be executed claims. Counsel for Mr. Black asks that all due process procedural protections be afforded to him during such a proceeding, including provisions that he and all relevant witnesses be given adequate time and opportunity to prepare, and to be heard. *Panetti,* 551 U.S. at 950-51. A recent examination of the truncated time frames envisioned by the Van Tran court suggests that the trial court must be given more leeway to comport with due process. *Van Tran,* 6 S.W.3d at 267-72. That is, as counsel reads it, the entire process from the moment of remand to the deadline for the trial court's final order is to take no more than thirty-five (35) days, and the experts will be given a total of ten (10) days from the date of their appointment to see and assess Mr. Black, and to draft and file their final report. *Id.* at 269. Respectfully, those tight time frames are unrealistic, and risk preventing experts from being able to complete helpful, intelligent, complete and scientifically valid reports. This rushed schedule also compromises the ability of the lawyers and the trial judge to engage in reasoned analysis and discourse. Counsel is not suggesting any particular time-frame, other than that the trial court be given authority to deviate from the *Van Tran* schedule.

III. Mr. Black is intellectually disabled and excluded from the death penalty. His execution would be illegal. This Court should deny the

motion to set execution date and remand the case to the Davidson County Criminal Court for a full and fair adjudication of his *Atkins v. Virginia* claim in accordance with its inherent authority.

The United States Supreme Court recognizes that:

> [Intellectually disabled] defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins v. Virginia, 536 U.S. 304, 305 (2002). Mr. Black is unquestionably intellectually disabled and suffers from neurocognitive impairment.

A. Unassailable medical evidence of intellectual disability.

The Eighth Amendment demands that a state court determination of intellectual disability "be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017) (quoting *Hall v. Florida*, 572 U.S. ___, 134 S.Ct. 1986 at 2000 (2014)). As detailed above, Mr. Black has been found to be intellectually disabled by six experts, including most recently by Dr. Daniel Martell who utilized the most current criteria for intellectual disability as published by the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2010 and by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), published in 2013.

To recap: His IQ is 67. He has significant deficits in adaptive functioning across all three domains. All experts agree that these deficits manifested prior to age 18 based on testing instruments and protocols which are generally accepted in the medical community.[5]

The Supreme Court's concerns that the intellectually disabled would have "a lesser ability to give their counsel assistance...and that their demeanor may create an unwarranted impression of lack of remorse for their crimes," clearly applied in Mr. Black's case, as described by his attorney, Ross Alderman. Ex. 13, Declaration of Ross Alderman. Beyond what has already been discussed, above, Mr. Alderman described Mr. Black's inappropriate affect during the trial. "Byron almost constantly

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[5] Numerous defendants with weaker cases have been adjudicated intellectually disabled. *Hall v. State*, 201 So.3d 628 (Fla. 2016) (defendant with scores as high as 79 found ID on remand from SCOTUS); *Pennsylvania v. Williams*, 61 A.3d 979 (Pa. 2013) (defendant found ID despite a high score of 81 on screening test); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007) (scores as high as 92 on screening tests that were found to not be sufficiently reliable to outweigh more recent results of Wechsler tests and defendant found to be ID); *Commonwealth v. DeJesus*, No. 350 1/1 (Pa. Dist. Ct. Aug 10, 2007) (defendant with juvenile scores as high as 109 found ID where juvenile scores discounted because of inconsistent scoring results, lack of standardization, obsolescence of the test, and the possibility that the psychologists who administered the tests were overburdened); *Rivera v. Dretke*, 2006 WL 870927 (S.D. Tex. Mar. 31, 2006), vacated in part by *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007) (defendant found ID despite high pre-18 scores, because there was not sufficient data available regarding the reliability of the tests).

wore a big child-like smile on his face, a smile which was often out of place, given the circumstances... Byron's affect was unusual. Also, when talking, he would get close in to my face, not in a threatening way, but in a socially inappropriate way." (*Id.*).

B. Byron Black's execution would be constitutionally illegal.

The Eighth Amendment to the United States Constitution excludes persons with intellectual disability from the death penalty. *Atkins*, 536 U.S. 304. The Fourteenth Amendment made Eighth Amendment protections mandatory on the states. When the United States Supreme Court decided that persons with the intellectual disability are ineligible for the death penalty, it stripped the power of states to carry out executions of these individuals. Period. "[T]he Constitution 'restrict [s] ... the State's power to take the life of' *any* intellectually disabled individual. *Moore*, 137 S. Ct. at 1048 (quoting *Atkins*, 536 U.S. at 321) (emphasis in original.) This is not a question of procedure. It is substantive law based on decades of death penalty jurisprudence.

When the Supreme Court reinstated the death penalty in 1976, it made clear that there are two fundamental prerequisites to the imposition of the ultimate punishment: eligibility and selection. *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 US 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976). A state statutory scheme must have in place a mechanism for determining who is eligible for the death penalty to be constitutional. If, and only if, a defendant is deemed eligible, the jury must conduct an individualized sentencing analysis to select those defendants for whom the death penalty should be reserved. The

eligibility question is categorical. The selection question is individualized. The Supreme Court has held that those persons who are ineligible for the death penalty are actually innocent of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992).

An analogy can be drawn to juvenile defendants who the court deemed ineligible for the death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005). If we learned today that Mr. Black's birth certificate was in error and he was actually 17 years, 11 months, and 29 days old at the time of the crime, instead of 20, no one would question the fact that he would be removed from death row. Persons under the age of 18 are excluded from the death penalty and the states are not free to ignore this prohibition. The same is true for persons with intellectual disability.

Given the uncontested proof of Mr. Black's intellectual disability, his execution would be illegal.

C. Mr. Black's previous *Atkins* hearing was fundamentally unfair under *Moore v. Texas, Hall v. Florida, Atkins v. Virginia, and Coleman v. State.*

Recognizing the need for reliability in capital proceedings, the fundamental interests at stake, and the difficulties attending the assessment of intellectual disability in borderline cases, nine years after *Atkins* this Court held in *Coleman v. State*, 341 S.W. 3d 221 (Tenn. 2011), that the interpretation and application of Tenn. Code Ann. § 39-13-203 (prohibiting the execution of the intellectually disabled) must be aligned with "clinical standards, criteria and practices customarily used to assess and diagnose intellectual disability." *Coleman*, 341 S.W.3d at 240, 247. Doing so ensured "more accurate and consistent" decisions in Atkins

cases. *Coleman*, 341 S.W.3d at 247. The *Coleman* court recognized the importance of reliance on current medical standards and the clinical judgment of experts in the field.

From pillar to post the Tennessee Court of Criminal Appeals opinion in Mr. Black's Atkins hearing was wrong, unintelligible, and at odds with clinical principles and practices.

Most glaringly, the Court of Criminal Appeals held

> [O]ur supreme court clarified in *Howell* that the demarcation of an I.Q. score of seventy in the statute is a "bright-line cutoff" and must be met. *Howell*, 151 S.W.3d at 456, 458–59. "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." *Id.* at 456.

Black v. State, No. M2004-01345-CCA-R3PD, 2005 WL 2662577 at *12 (Tenn. Crim. App. Oct. 19, 2005). The only individually administered tests of intelligence given to Mr. Black all fall within the intellectually disabled range when one considers the Standard Error of Measurement and/or the Flynn Effect.[6] The Court of Criminal Appeals held that, even

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[6] The CCA opinion references reported scores on group-administered screening tests which produced scores of 83 and 91. The science is clear that such group-administered intelligence tests are not reliable measures for diagnostic purposes. The AAIDD is clear on this point. Numerous courts have recognized this scientific reality. *Pennsylvania v. Williams*, 61 A.3d 979 (Pa. 2013) (defendant found ID despite a high score of 81 on screening test); *State v. Maestas*, --- P.3d ---, 2012 WL 3176383 (Utah 2012) (court disregarded screening tests because not reliable); *Porterfield v. State*, No. W2012-00753, 2013 WL 3193420 (Tenn. Crim. App. June 20, 2013) (affirming trial court's disregard of screening/group

though Mr. Black achieved a reported score of 69, his claim was barred by this Court's decision in *Howell*. *Black*. 2005 WL 2662577 at *14.

Six years later, this Court effectively overruled *Black*. In *Coleman* the Court held that the trial courts must consider the opinions of experts, take into consideration the importance of clinical judgment, use current medical standards (which are constantly evolving) and must use the most up to date science. The Court held that the lower courts had misinterpreted *Howell*. The Court further wrote:

> The AAIDD currently recognizes ten potential "challenges" to the reliability and validity of I.Q. test scores. AAIDD Manual, at 36–41. Among these challenges are the standard error of measurement, the Flynn Effect, and the practice effect. The Flynn Effect refers to the observed phenomenon that I.Q. test scores tend to increase over time. Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward. AAIDD Manual, at 37; see also *Coleman v. State*, 2010 WL 118696, at *16–18. The practice effect refers to increases in I.Q. test scores that result from a person's being retested using the same or a similar instrument. AAIDD Manual, at 38.
>
> Accordingly, if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular

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administered tests); *Hines v. Thaler*, 2011 WL 6780951 (5th Cir. Dec. 27, 2011) (state court properly discounted "brief group-administered" and "screening tools"); *Larry v. Branker*, 552 F.3d 356 (4th Cir. 2009) (state's expert's testimony that did not give weight to [Beta] screening tests credited in denial and upheld on appeal); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007) (high scores on screening tests not sufficiently reliable to outweigh more recent WAIS score).

> test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

Coleman, 341 S.W.3d at 242, n. 55.

Moreover, the Court in *Coleman* chastised the lower court for deciding "to distinguish between Mr. Coleman's mental illness and his intellectual disability as separate causes of his adaptive limitations." In other words the lower court had concluded that the adaptive limitations could also be attributable to Mr. Coleman's mental disease and therefore could not be used to support a finding of intellectual disability. This Court held:

> By concluding that Mr. Coleman's adaptive deficiencies were caused by his mental illness alone, the lower courts treated Mr. Coleman's mental illness and intellectual disabilities as separate dichotomous spheres rather than as interwoven causes.
>
> Distinguishing causally between intellectual disability and mental illness raises broad conceptual concerns in terms of the application of Tenn.Code Ann. § 39–13–203(a)(2). Causation and adaptive deficits present a complicated intersection. The American Psychiatric Association's, Diagnostic and Statistical Manual of Mental Disorders notes that "[a]daptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the

> mental disorders and general medical conditions that may coexist with [m]ental [r]etardation." DSM–IV–TR, at 42.

Coleman, 341 S.W.3d at 249–50. The CCA made this exact error in *Black*.

In essence, the CCA's opinion contained numerous errors and omissions which are plainly wrong under this Court's own jurisprudence as well as the Supreme Court's in *Atkins, Hall*, and *Moore*. These include: (1) the complete failure to address which I.Q. score(s) most accurately reflected Mr. Black's functional intelligence at or before age 18; (2) the failure or refusal to consider the Flynn Effect and/or the standard error of measurement either with regard to individual scores and in comparing all of Mr. Black's I.Q. scores; (3) the failure to address the date of onset of Mr. Black's brain damage; (4) the failure to recognize the effects of mental illness and organic brain damage on the deficits resulting from intellectual disability; (5) the insistence on a bright-line I.Q. score of 70, the treatment of I.Q. test scores as akin to actuarial decisions, and the mistaken notion that Mr. Black was required to show that there had actually been a reported score of 70 or below before age 18; (6) the improper focus of the adaptive deficit analysis on Mr. Black's strength's rather than his deficits or weaknesses, by definition the thrust of the inquiry; and (7) the repeated absence of definitive factual determinations supporting the CCA's subsidiary and ultimate conclusions that Mr. Black was not intellectually disabled.

D. This Court Has the authority to create a procedural vehicle for Mr. Black to adjudicate his *Atkins* claim, particularly

where the legislature has ignored this court's request for them to act.

This Court has twice decreed, "Tennessee has no business executing persons who are intellectually disabled." *Payne v. State*, 493 S.W.3d 478, 486 (Tenn. 2016); *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). This proposition remains true today. This Court must act, or, sanction the illegal execution of a man who is constitutionally ineligible for the death penalty. Mr. Black has been denied a full and fair adjudication of his claim because the lower courts applied the wrong constitutional standard under both state and federal law. When the lower courts made the same error in another death penalty case, the Court reversed and remanded the case for the lower court to apply the principles of *Coleman*. *Smith v. State*, 357 S.W.3d 322, 353-54 (2011) (remanding for a new hearing on intellectual disability applying the clinical standards adopted in Coleman). That defendant, Leonard Smith, is no longer on death row. Neither is Michael Coleman.

Indeed, of the men who received an erroneous application of the *Howell* decision in the years between *Howell* and *Coleman*, **only Byron Black is at risk for execution.**

This Court has the authority to create a procedural vehicle to right this unconscionable wrong. In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court was faced with a similar set of circumstances. There the Court observed that no statute existed to permit the adjudication of a claim of incompetence to be executed. Recognizing that "the Eighth Amendment to the United States Constitution *precludes execution* of a

prisoner who is incompetent[,]" *Van Tran*, 6 S.W.3d at 260 (emphasis added), this Court created a procedure for a defendant to present his claim. In *Van Tran*, this Court invoked its inherent power.

> Our conclusion that no existing statute provides a procedure for litigating the issue of competency to be executed does not end the inquiry, however. It has long been recognized and widely accepted that the Tennessee Supreme Court is the repository of the inherent power of the judiciary in this State. *Petition of Burson*, 909 S.W.2d 768, 772 (Tenn.1995) (citing cases). Indeed, Tenn.Code Ann. §§ 16–3–503 and –504 (1994) broadly confer upon this Court all discretionary and inherent powers existing at common law at the time of the adoption of the state constitution. *Id.* We have also recognized that this Court has not only the power, but the duty, to consider, adapt, and modify common law rules. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn.1999); *Cary v. Cary*, 937 S.W.2d 777, 781 (Tenn.1996) (citing cases). Finally, we have recently held in the context of a capital case that *Tennessee courts have inherent power to adopt appropriate rules of criminal procedure when an issue arises for which no procedure is otherwise specifically prescribed.* *State v. Reid*, 981 S.W.2d 166, 170 (Tenn.1998).

Van Tran, 6 S.W.3d at 264–65 (emphasis added.) The Court recognized that it had "an affirmative constitutional duty to ensure that no incompetent prisoner is executed." *Van Tran*, 6 S.W.3d 265.

Here too, this Court has an affirmative constitutional duty to ensure that no intellectually disabled prisoner is executed. This court has the inherent judicial authority, and the constitutional obligation, to

create a remedy for the full and fair adjudication of Mr. Black's *Atkins* claim.

It is right to do so.

E. Alternatively, the Court should deny the motion and decline to set an execution date which would be plainly illegal.

If this Court determines that it lacks the authority to create a procedure to adjudicate Mr. Black's *Atkins* claim, the only remaining constitutional option is to deny the State's motion to set an execution date until such time as the General Assembly creates such a procedure. Anything less is untenable.

IV. Execution of Mr. Black violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Tennessee Constitution, because he is seriously mentally ill.

This Court should create a categorical exemption from execution for the seriously mentally ill. An exemption is necessary, because a defendant's serious mental illness compromises the reliability imperative for a constitutionally just conviction and death sentence. In addition, because execution of the mentally ill violates contemporary standards of decency, an exemption would promote the interests of justice. Each of the objective factors set out by the Supreme Court as objective indicia of modern standards of decency weigh in favor of exemption: the national trend away from capital punishment entirely; widespread proposed legislative exemptions for the mentally ill; polling data of American's views; opinions expressed by relevant professional organizations; and the opinion of the international community. *Atkins v. Virginia*, 536 U.S. 304,

312 (2002) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1910); *Rummel v. Estelle*, 445 U.S. 263, 274–275 (1980)).

A. Defining terms: what is a "serious mental illness"?

The Diagnostic and Statistical Manual defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[7] "People with [severe mental illness] experience both a mental illness *and* a functional disability . . . and often have a long history of hospitalizations or intensive outpatient treatment due to severe psychological dysfunction."[8]

According to the American Psychological Association:

> [Serious Mental Illness, or SMI] refers to disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (*e.g.*, lasting at least a year); and that result in comparatively severe impairment in major areas of functioning, such as cognitive capabilities; disruption of normal developmental processes, especially in late adolescence; vocational capacity and social relationships. The [Diagnostic and Statistical Manual] diagnoses most associated with SMI include

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[7] Ex. 17, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.

[8] Ex. 18, J. Sanchez et. al, *Predicting Quality of Life in Adults With Severe Mental Illness: Extending the International Classification of Functioning, Disability, and Health* (2016) 61 Rehab. Psych. 19, 20 (citations omitted).

schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[9]

Similarly, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines "serious mental illness" as "someone over 18 having (within the past year) a diagnosable mental, behavior, or emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities."[10] The National Institute of Mental Health (NIMH)[11] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[12]

Mental illnesses that meet the diagnostic criterion for SMI are all generally associated in their acute state with hallucinations, delusions, disorganized thoughts, or significant disturbances in consciousness,

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[9] Ex. 19, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

[10] Ex. 20, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/find-help/disorders (last visited Dec. 22, 2019); *Mental Health and Substance Use Disorders.*

[11] Ex. 21, *Serious Mental Illness (SMI) Among U.S. Adults*, available at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited Dec. 22, 2019).

[12] Ex. 22, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited Dec. 22, 2019).

perception of the environment, accurate interpretation of the environment, and memory.[13]

B. An execution date should not be set, because Mr. Black is seriously mentally ill.

Dr. Albert Globus determined that Mr. Black "has suffered from a long standing organic psychosis." Ex. 9, Globus Declaration, ¶ 1. This psychosis so substantially impairs Mr. Black's judgment that, at the time of trial, "he was incompetent to rationally and effectively assist his attorneys." *Id.* Dr. Ruben Gur concluded, from his examination of PET and MRI scans, that Mr. Black's brain was more abnormal than the brain of a typical person with schizophrenia. Ex. 11, Gur Deposition, 53-56). Dr. Gur further concluded that Mr. Black is "unable to distinguish between reality and his delusions and is unaware that he suffers from psychiatric illness." Ex. 10, Gur Declaration, ¶ 15.

Mr. Alderman's observations of Mr. Black's failure to connect with reality, before and during trial, provide concrete examples of Mr. Black's serious mental illness. "Byron was convinced that some divine presence in court would release him from the proceedings or that some divine

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[13] *See* Ex. 23, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 24, § II.O5 (Anxiety Disorders); Ex. 25, § II.08 (Dissociative Disorders).

manifestation would liberate him....I believe Byron was delusional about what was going on." Ex. 13, Alderman Declaration, ¶ 3.

It is clear that Mr. Black, suffers from co-morbid conditions, he is both intellectually disabled and seriously mentally ill. He lacks the capacity to rationally perceive the world around him, both due to intellectual limitations, and due the distorting impact of delusions and psychosis.

C. Mr. Black's mental illness renders his conviction and death sentence unconstitutionally unreliable.

Reliability is the bedrock of any claim that the death penalty is constitutional. The Supreme Court has repeatedly recognized that any capital prosecution offends the Eighth Amendment if the judicial system cannot sufficiently insure reliability in the determination of the sentence. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Gardner v. Florida*, 430 U.S. 349 (1977)); *see also* *Middlebrooks v. State*, 840 S.W. 2d 317, 341-47 (Tenn. 1992) (holding that a capital sentencing scheme that fails to reliably narrow the class of death eligible defendants violates Article 1, §16 of the Tennessee Constitution) (citing *Woodson*; *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

For this reason, in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48

(2010), the Supreme Court identified two categories of defendants who it held could not reliably be sentenced to death: the intellectually disabled and juveniles. Because the Court's rationale resulting in those categorical exclusions applies with *at least* equal force to the seriously mentally ill, execution of individuals who are seriously mentally ill is likewise unconstitutional.

Individualized sentencing is the predicate for any constitutional imposition of the death penalty. In 1976, the Supreme Court held "the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304-05. In *Woodson*, the Court specified that the Eighth Amendment requires consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304; *accord* *Roberts v. Louisiana*, 428 U.S. 325, 329 (1976). Subsequently, the Court explicitly linked the consideration of mitigating evidence with the heightened need for reliability in capital cases in *Lockett v. Ohio*, 438 U.S. 586 (1978). *Lockett* held that a "risk" that mitigation may not be fully considered offends the constitution: "[P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605.

While insisting that individualized sentencing is the lynchpin of reliability in capital cases, the Supreme Court has recognized that some qualities are inherently difficult for jurors to appropriately weigh and consider. These facts are, by their very nature, "double edged." They should mitigate a defendant's moral culpability, but societal misconceptions about those factors create too significant a risk that they will be misused for a defendant with those qualities to be reliably sentenced to death. The *Atkins* Court determined that where a reliable assessment of constitutionally protected mitigation lies beyond the jury's ability, jurors cannot be asked to consider a death sentence.[14]

The Court has created categorical exclusions for qualities that inherently present a risk that juries will not adequately assess the defendant's moral culpability. The Court has done so, consistent with the dictates of *Woodson* and *Lockett*, because the jury's failure to properly consider mitigating evidence undermines the reliability of that jury's determination. If a particular quality presents too great a risk that the jury cannot properly comprehend and weigh that mitigation, the unreliability that is created means that the death penalty cannot be constitutionally applied. The risk that a jury will fail to appropriately consider such a quality undermines the reliability of the jury's determination, and the presence of such a factor requires a categorical ban.

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[14] *See*, Ex. 26, Scott E. Sunby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WILLIAM & MARY BILL OF RIGHTS JOURNAL, 21 (2014).

The Supreme Court has identified six factors that so undermine the reliability of a jury assessment of individualized characteristics that categorical exemption from the death penalty is required. In exempting the intellectually disabled and juveniles from capital punishment in *Atkins* and *Roper*, and juveniles from mandatory life sentences in *Simmons*, the Court established a framework for the evaluation of when a categorical ban is necessary:

1) When the defendant's individualized characteristics inherently impair his cooperation with his lawyer and impair the lawyer's ability to prepare a defense, *Atkins*, 536 U.S. at 320-21; *Graham*, 560 U.S. at 77;
2) When the individualized characteristics inherently make the defendant a poor witness, *Atkins*, 536 U.S. at 320-21;
3) When the individualized characteristic inherently distorts the defendant's decision making, *Graham*, 560 U.S. at 78 (highlighting the unreliability produced by a juvenile's "[d]ifficulty in weighing long-term consequences");
4) When the characteristic has a "double edge" and is often misperceived by jurors as aggravating, *Roper*, 543 U.S. at 573;
5) When there is a lack of scientific consensus as to the characteristic (though not as to its mitigating nature), *Atkins*, 536 U.S. at 308-09; and
6) When there is a risk that the brutality of the crime will unduly outweigh the mitigating characteristic. *Roper*, 543 U.S. at 573;

Each of these factors applies with at least equal force to the seriously mentally ill as it does to the intellectually disabled and to the young.

Moreover, those factors doubly apply to a man like Mr. Black, who is both intellectually disabled and seriously mentally ill.

Mental illness vitiates the reliability of any capital sentence thereby causing it to violate the Eighth Amendment. Mental illness and mentally ill people present jurors with the same daunting challenges as those the United States Supreme Court has already found to be too great for the Eighth Amendment to countenance. Substitution of the words "mentally ill" for "juveniles" in the following excerpt from *Graham* demonstrates how completely these factors apply equally to both:

> [T]he factor[s] that distinguish the *mentally ill* from [other] adults also put them at a significant disadvantage in criminal proceedings. The *mentally ill* mistrust [other] adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than [other] adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the [non-impaired] adult world . . . , all can lead to poor decisions by one charged *while mentally ill*. These factors are likely to impair the quality of a *mentally ill* defendant's representation.

Graham v. Florida, 560 U.S. 48, 78 (2010).

1. Mental illness impairs a defendant's ability to work with his counsel.

A mentally ill defendant is arguably less able to work with his counsel than a juvenile or intellectually impaired defendant. Cooperation with counsel is particularly at risk when the mental illness includes common symptoms of paranoia, psychosis, delusions, or deep depression.

Many mentally ill people resist the stigma of being called "mentally ill" or become paranoid when such a label is used against them. When that occurs, counsel's attempt to mitigate the defendant's culpability through presentation of his mental illness may actually engender additional distrust from the client. Mental illness may prevent even an otherwise cooperative client from providing meaningful assistance because his thought processes may be altered or disjointed; he may be unable to remember events accurately; and he may have difficulty with communicating. As with young and intellectually impaired defendants, the very characteristics that diminish a mentally ill defendant's culpability jeopardize his ability to assist counsel.

Mr. Alderman's description of Mr. Black's utter inability to assist counsel have been discussed, previously. Ex. 13, Alderman Declaration. Clearly, Mr. Black's ability work with counsel was not merely impaired, but functionally nonexistent.

2. Mental illness makes a defendant a poor witness.

Mentally ill clients are likely to make poor witnesses. Due to weakened narrative skills

> impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe "significantly fewer bits of information about the context of the story and the events that initiated it." ... [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how

these young men would have fared when they attempted to "tell their story in the forensic context."[15]

Mentally ill clients often minimize or deny their own symptoms – either out of shame, as a learned response to repeated societal aversion, or as a result of their mental condition.

If a defendant's mental illness manifests in outburst, inability to control movements, or my making inappropriate gestures or noises, the jurors may interpret such behavior as proof of a lack of remorse or as proof of dangerousness.[16] As Justice Kennedy observed in *Riggins v. Nevada*, 504 U.S. 127 (1992) (Kennedy, J., concurring), medicating a mentally ill defendant may actually make the situation worse: "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.* at 143-44.

One can only imagine how a jury perceived Mr. Black's inappropriate smiling and disconnection from his trial. To a layperson, it is highly likely that Mr. Black's odd behavior would appear to demonstrate a lack of remorse.

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[15] Ex. 27, Michele LaVigne & Gregory Van Rybroek, "*He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships*, UNIV. OF WISC. LAW SCHOOL, SERIES PAPER No. 1228 at 4.

[16] Ex. 28, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1563 & n.22 (1998) (reporting Capital Jury Project findings describing jurors' reactions to defendants who engaged in outbursts during trial).

3. Mental illness distorts a defendant's decision making.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court highlighted the unreliability created by youth, finding that a juvenile may have "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . all can lead to poor decisions. . . ." *Id.* at 78. Mental illness impairs decision making at least as much as youth – in many cases more so.

Capital jurisprudence is rife with examples of decisions impaired by mental illness. For example, in *Godinez v. Moran*, 509 U.S. 389 (1993), the capital defendant fired his counsel, pled guilty, and refused to present any mitigation evidence, stating that he wanted to die. *Id.* at 392. That defendant's mental illness rendered the capital sentencing completely unreliable – forcing the justice system to act, instead, as his method of suicide. As Justice Blackmun stated,

> Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf.

Id. at 416 (Blackmun, J., dissenting). A result more antithetical to *Woodson* and *Lockett* is hard to imagine.

Mr. Black made no decisions at trial, because he simply could not. As Mr. Alderman described, "Byron couldn't understand how anything in the courtroom affected him, and he didn't understand the implications of the witnesses' testimony." (Ex. 13, Alderman Declaration, ¶ 5). He wanted to testify after the jury had sentenced him to death. (*Id.* at ¶ 6).

4. **Mental illness is a double-edged mitigator.**

Factors that are constitutionally mitigating under *Lockett* but that may be improperly considered as proof of a client's dangerousness or inability to be rehabilitated or cured have been found to pose a constitutionally intolerable risk of an unreliable sentence. In *Atkins*, the Court noted that some mitigation has the perverse effect of "enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. *Roper*, likewise, focused on the potentially double-edged nature of mitigation, finding that "a defendant's youth may even be counted against him." *Roper*, 543 U.S. at 573.

The Capital Jury project has determined that, beyond all other aggravating factors, a jury's determination that a defendant might be dangerous in the future trumps all other considerations.[17] As the Supreme Court noted in *Skipper v. South Carolina*, 476 U.S. 1 (1986), a jury's belief that that a defendant will adapt to prison life is key to a successful penalty phase defense. *Id.* at 4-5.

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[17] Ex. 28, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998) (37.9% of jurors stated it would make them "much more likely" and 20% "slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 29, Marla Sandys, *Capital jurors, mental illness, and the unreliability principle: Can capital jurors comprehend and account for evidence of mental illness?* BEHAVIORAL SCIENCES & THE LAW (2018), available at https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2355 (last visited Dec. 23, 2019).

Due to the "fast-track" Mr. Black's trial was placed on, trial counsel simply did not develop proof of mental illness (or brain damage or mental retardation). Ex. 13, Alderman Declaration, ¶¶ 8-9. This likely made the sword single-edged, cutting only against Mr. Black, as the jury observed is odd and inappropriate behavior, without context or explanation.

5. While the scientific community agrees that mental illness lessens a defendant's culpability, experts often disagree or testify confusingly about mental illness.

Mental health experts' understanding of mental illness is far from complete. Though virtually all mental health clinicians and experts agree that serious mental illness mitigates a criminal defendant's moral culpability, those same clinicians and scientists admit limited understanding of etiology, progression of disease, and the mechanisms through which such mental illness mediates behavior. In *Roper*, the Supreme Court found the lack of uniform clinical and scientific understanding to be a reason for a categorical exemption:

> If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having anti-social personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty.

Roper, 543 U.S. at 573.

Evidence shows that juries are incapable of reliably sifting through competing psychiatric testimony. Juries frequently view defense experts as hired guns who offer up excuses, while not discounting the opinions of

prosecution experts.[18] Further, where juries have already rejected a defendant's mental health evidence in the form of an insanity or diminished capacity defense, there exists a distinct risk that the jury will be confused as to how to weigh mental illness (which it just rejected) as mitigation.

6. Brutality of a crime often unduly overwhelms the mitigating nature of a mental illness.

Mental illness frequently contributes the brutality of the crime, resulting in acts that appear particularly unnecessary, aberrant, sadistic, and frightening to the jury.[19] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

In upholding Mr. Black's sentence of death, this Court stressed how "brutal and senseless" the murders were, and how the "heinous, atrocious, and cruel" aggravating factor clearly applied. *Black*, 815 S.W.2d at 181-82. Clearly, Mr. Black's murders were senseless, and the only "rational" explanation for their commission is that Mr. Black was

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[18] Ex. 30, Scott E. Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV., 1109, 1126-30 (1997).

[19] Ex. 31, Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013) (summarizing multiple cases where severely mentally ill defendants have been sentenced to death).

utterly irrational, delusional, and completely psychotic at the time of commission.

Just as the Eighth Amendment prohibits the execution of the intellectually disabled and juvenile defendants because of the risk that their conditions will not be properly considered as mitigating their culpability, so too does the execution of the seriously mentally ill violate the Constitution. As this Court has held, "although the Eighth Amendment to the Federal Constitution and Article I, §16, are textually parallel, this does not foreclose an interpretation of the language of Article I, §16, more expansive than that of the similar federal provision." *State v. Black*, 815 S.W.2d 166, 188 (Tenn. 1991) (citing *California v. Greenwood*, 486 U.S. 35, 50 (1988); *California v. Ramos*, 463 U.S. 992, 1013–1014 (1983); *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988); *Miller v. State*, 584 S.W.2d 758, 760 (Tenn.1978)); *State v. Harris*, 844 S.W. 2d 601, 601 (Tenn. 1992) (same). Thus, even if this Court were to find that execution of the seriously mentally ill does not violate the federal constitution, it should find that it violates the state constitution.

Byron Black's sentence of death is unconstitutionally unreliable, due to his serious mental illness, and due to the co-morbid impact of serious mental illness and intellectual disability.

D. Execution of a mentally ill person violates contemporary standards of decency.

The Eighth Amendment to the United States Constitution states in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment to the United States Constitution states, in

relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Accord* *Robinson v. California*, 370 U.S. 662 (1962) (applying the Eighth Amendment to the individual States of the union).

Courts must look to the "evolving standards of decency that mark the progress of a maturing society" when tasked with determining whether a punishment is "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court conducts two separate Eighth-Amendment analyses: (1) whether the death penalty is grossly disproportionate to a certain class of offenders (here, persons with serious mental illness), *see* *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (rape of a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (non-triggerman); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); and (2) whether the class of offenders categorically lacks the "capacity to act with the degree of culpability associated with the death penalty," *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles).

When conducting a proportionality review, the Supreme Court evaluates a number of factors: (1) whether state legislative enactments indicate that a national consensus has emerged against the imposition of a particular punishment, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316; (2) whether trends in prosecution and sentencing indicate the practice is uncommon, *Atkins*, 536 U.S. at 316; (3) whether polling data shows the death penalty is disfavored, *Atkins*, 536 U.S. at 316 n.21; (4) whether there is a consensus among relevant professional and social

organizations, *Atkins*, 536 U.S. at 316 n.21; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); and (5) how the international community views the practice, *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830.

1. Proportionality is determined, in part, with reference to a national consensus, which supports a ban against executing seriously mentally ill individuals.

In evaluating whether a national consensus exists in the Eighth-Amendment context, the Supreme Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 331 (1989). The Court also looks to "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual sentencing practices[, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Also, in looking at whether a national consensus exists, the Court examines the opinions of relevant professional organizations, polling data, and international consensus. *See Atkins*, 536 U.S. at 316 n.21.

a. Evidence of National Consensus: 21 jurisdictions have abolished the death penalty outright.

The Supreme Court's analysis of the objective indicia of a national consensus with regard to exclusion of certain categories of offenders has included the states that prohibit the death penalty outright. *Roper*, 543 U.S. at 564. ("When *Atkins* was decided, 30 States prohibited the death penalty for the [intellectually disabled]. This number comprised 12 that

had abandoned the death penalty altogether and 18 that maintained it but excluded the [intellectually disabled] from its reach.").

Twenty-one states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and ten additional states have an actual or de facto (ten years since an execution) moratorium on executions.[20] A national consensus is emerging, as more than half of United States jurisdictions prohibit the death penalty in practice and 60% of Americans told Gallup they preferred life imprisonment over the death penalty as the better approach to punishing murder. *Id.*

Additionally, the Supreme Court looks to the consistency of the direction of change. *Atkins*, 536 U.S. at 314. Since 2010, nine states have taken affirmative stances against the death penalty; four states have passed legislation ending the death penalty (Connecticut, Illinois, Maryland, and New Hampshire), and six governors have imposed moratoriums on executions. (California, Colorado, Ohio, Oregon, Pennsylvania, and Washington).[21]

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[20] *See* Ex. 32, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

[21] Ex. 33, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

b. Evidence of National Consensus: Active death-penalty states are seeking to exclude persons with SMI from being eligible for the death penalty.

Since 2016, some of the most active death-penalty states have introduced legislation to exempt persons with serious mental illness from being eligible for the death penalty. These states include Arizona, Arkansas, Idaho, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia. In 2019 alone, nine state legislatures considered measures to ban the execution of individuals with SMI.[22]

On February 11, 2019, legislators in Tennessee introduced two bills to exclude persons with SMI from the death penalty. HB1455 and SB 1124. House Bill1455 was referred to the House Judiciary Committee on February 11 and assigned to the Criminal Justice Subcommittee on February 13. It was favorably reported out of subcommittee on March 13. SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[23]

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[22] *See* Ex. 32, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

[23] Ex. 34, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 35, *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 22, 2019).

c. Evidence of National Consensus: Of the 33 jurisdictions with the death penalty, 25 specifically address mental illness as a mitigating factor.

Although thirty-three jurisdictions (thirty-one states plus the federal government and the military) still maintain the death penalty, twenty-five jurisdictions—a full three-quarters of jurisdictions with the death penalty—specifically ask juries to consider mental or emotional disturbance or capacity as a mitigating factor. Ala. Code § 13A-5-51 (mental or emotional disturbance and capacity); Ariz. Rev. Stat. Ann. § 13-751(G) (capacity); Ark. Code Ann. § 5-4-605 ("mental disease or defect" and capacity); Cal. Penal Code § 190.3 ("mental disease or defect" and capacity); Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (capacity and "emotional state"); Fla. Stat. Ann. § 921.141(7) (mental or emotional disturbance and capacity); Ind. Code § 35-50-2-9(c) ("mental disease or defect" and capacity); Ky. Rev. Stat. Ann. § 532.025(2)(b) ("mental illness" and capacity); La. Code Crim. Proc. Ann. art. 905.5 ("mental disease or defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1)(c)(A) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (mental or emotional disturbance and

capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102(j) (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity). Prior to its legislative abolishment of the death penalty in 2012, Connecticut specifically prohibited the execution of persons with serious mentally illness. Conn. Gen. Stat. § 53a-46a(h)(2).

The fact that so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that defendants with serious mentally illness—individuals who are so emotionally disturbed or mentally incapacitated that they cannot be expected to responsibly conform to lawful conduct—should not receive the death penalty.

Even though these states have statutory mitigating factors that allow the jury to take into count a defendant's serious mental illness, a jury's unreliability in doing so mitigates in favor of an outright exclusion of the death penalty for persons with SMI.[24]

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[24] *See* Ex. 26, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 2014 Wm. & Mary Bill Rts. J., Vol. 23:487, 492, 497 ("*Roper* thus strongly reinforced *Atkins*'s recognition that if circumstances prevent a juror from being able to give proper consideration to

d. Evidence of National Consensus: Sentencing trends reveal a reluctance to impose the death penalty upon SMI defendants.

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed. *See e.g.*, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316. As discussed below, an analysis of the evolving standards of decency demonstrates that the frequency of new death sentences has decreased considerably over time for *all* defendants, not just the seriously mentally ill. Many jurisdictions that have the death penalty as an option do not impose it.[25] Numerous other jurisdictions have eliminated it altogether. In 2018, the Washington Supreme Court held that that the death penalty violates the state constitution, as it is contrary to the evolving standards of decency: "We recognize local, national, and international trends that disfavor capital punishment more broadly." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018). But, even in states where the death penalty continues to be a sentencing option, jurors are increasingly less likely to impose it, particularly against defendants who are seriously mentally

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constitutionally protected mitigation, the death penalty *categorically* cannot be imposed." (emphasis in original)).

[25]Ex. 36, Pew Research Center, California is one of 11 states that have the death penalty but haven't used it in more than a decade (Mar. 14, 1999) https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ (last visited Dec. 23, 2019).

ill.[26] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[27]

e. Evidence of National Consensus: Relevant professional organizations, polling data, and the international community support a ban on the death penalty for seriously mentally ill defendants.

In addition to legislation and trends in prosecution, the Supreme Court has cited other factors in identifying a national consensus, such as the opinions of relevant professional and social organizations, polling data, and views among the international community. *See e.g.*, Atkins, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830.

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for defendants with serious mental illness:[28]

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[26] Ex. 28, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 37, Michelle E. Barnett, *When mitigation evidence makes a difference: effects of psychological mitigating evidence on sentencing decisions in capital trials*, 22 Behavioral Sciences and the Law 751 (2004) ("Mitigating evidence such as the defendant was suffering severe delusions and hallucinations . . . yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.").

[27] *Id.*

[28] Ex. 38, American Psychological Association, *Associations concur on mental disability and death penalty policy*, Vol 38, No. 1, p. 14 (2007), https://www.apa.org/monitor/jan07/associations (noting the APA, the ABA, the American Psychiatric Association, and the National Alliance on

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[29]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[30]
- National Alliance on Mental Illness, *Death Penalty*.[31]
- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[32]

The American Bar Association also publically opposes executing or sentencing to death the defendants with serious mental illness.[33] In 2016, the ABA published a white paper that concluded:

> The death penalty is the ultimate punishment that should be reserved for the most blameworthy individuals who commit the worst crimes - and it does not serve any effective or

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Mental Illness' agreement that SMI offenders should not be subject to the death penalty) (last visited Dec. 22, 2019).

[29] Ex. 39.

[30] Ex. 40, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[31] Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

[32] Ex. 42, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Dec. 22, 2019).

[33] Ex. 43, American Bar Association, *ABA Recommendation 122A*, Serious Mental Illness Initiative (adopted Aug. 2006), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/ (last visited 12/19/2019).

> appropriate purpose when it is applied to individuals with severe mental illness. The Supreme Court has already recognized that there are two other categories of individuals who have similar functional impairments to people with severe mental illness that are inherently 'less culpable' to the point that it is unconstitutional to apply the death penalty in their cases. In light of this constitutional landscape, the growing consensus against this practice, and the fact that none of the current legal mechanisms afford adequate protection against the death penalty to those diagnosed with serious mental disorders or disabilities, it is time for the laws in U.S. capital jurisdictions to change.[34]

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness exemption from the death penalty by a 2 to 1 majority."[35] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM.[36] In 2019, the ABA filed an amicus brief in the Nevada Supreme Court arguing that imposition of the death penalty on people with severe

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[34]Ex.44, https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Dec. 22, 2019).

[35] Ex. 45, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness; *see also* Ex. 46, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[36]Ex.47, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

mental illness serves no legitimate penological purpose and asking the court to "categorically prohibit the execution of individuals who were suffering from severe mental illness at the time of their crimes."[37]

Turning to Tennessee, in 2018, the ABA published an analysis of the savings an exclusion for the mentally ill would likely generate for the state of Tennessee.[38] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like schizophrenia, can still be subject to the death penalty in Tennessee."[39] Mr. Cody noted that defendants with SMI differ from other defendants: "In 2007, an ABA study committee, of which I was a member, conducted a comprehensive assessment of Tennessee's death penalty laws and found that 'mental illness can affect every stage of a capital trial' and that 'when the judge, prosecutor and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.'"[40]

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[37] Ex. 48, ABA Amicus Brief in Nevada Supreme Court.

[38] Ex. 49, ABA, Potential Cost Savings of Severely Mentally Ill Exclusion from the Death Penalty: An Analysis of Tennessee Data, https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf

[39] Ex. 50, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[40] *Id.*

Other community organizations oppose the execution of persons with SMI. For example, in 2009, Murder Victims' Families for Human Rights published "Double Tragedies, Victims Speak Out Against the Death Penalty for People with Severe Mental Illness."[41] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[42]

Opinion pieces appear frequently opposing the death penalty for people with SMI:

- Frank R. Baumgartner and Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*' THE WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the death penalty actually targets those who have mental illnesses."), Ex. 53.
- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 54.
- Bob Taft and Joseph E. Kernan, *End the Death Penalty for Mentally Ill Criminals*, THE WASHINGTON POST, March 24, 2017 (written by two former governors (Ohio and Indiana)), Ex. 55.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 56.

Public opinion polls also support this consensus:

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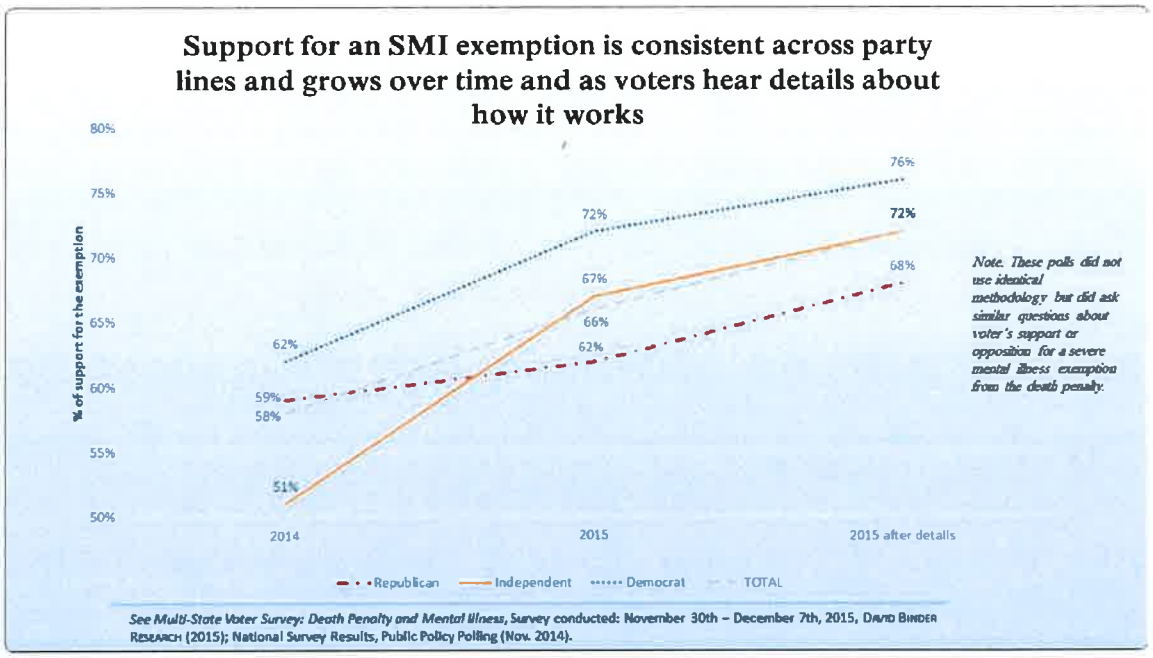
[41] Ex. 51, https://www.amnestyusa.org/double-tragedies/.

[42] Ex. 52.

- In November 2015, the American Bar Association conducted a multi-state survey of voters' opinions on the death penalty:



- The ABA's 2016 polling found that 66% of respondents oppose the death penalty for people with "mental illness." The rate of opposition rose to 72% when respondents learned about the details of how a "severe mental illness" exemption would work. *Id.*

- In 2014, Public Policy Polling found that 58% of respondents opposed the death penalty for "persons with mental illness"; with 28% in favor and 14% unsure.[43]
- A 2009 poll of Californians found 64% opposed the death penalty for the "severely mentally ill."[44]
- A 2007 North Carolina poll found that 52% of respondents were against imposing the death penalty on defendants who had a "severe mental illness or disability" at the time of the crime, with only 30% being in favor of the practice.[45]
- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[46] Opposition was similar to the rate of opposition of the death penalty for the "mentally retarded (82%)."

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[43] Ex. 57, Public Policy Polling, National Survey Results, https://drive.google.com/file/d/0B1LFfr8Iqz_7R3dCM2VJbTJiTjVYVDVodjVVSTNJbHgxZWlB/view.

[44] Ex. 58, Jennifer McNulty, *New poll by UCSC professor reveals declining support for the death penalty*, University of California Santa Cruz Newscenter, Sept. 1, 2009, http://news.ucsc.edu/2009/09/3168.html (last visited Dec. 22, 2019).

[45] Ex. 59, Rob Schofield, *NC Policy Watch Unveils Inaugural "Carolina Issues Poll:" Results Show that Voters are Supportive of Public, Humane Solutions in Mental Health and Affordable Housing* (Apr. 9, 2007), http://www.ncpolicywatch.com/2007/04/09/nc-policy-watch-unveils-inaugural-"carolina-issues-poll"/ (last visited Dec. 22, 2019).

[46] *See* Ex. 60, Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* https://news.gallup.com/poll/1606/death-penalty.aspx, p.12 (last visited Dec. 22, 2019).

Id. Notably, a higher percentage of respondents opposed the death penalty for the mentally ill (75%) than for juveniles (69%). *Id.*

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with capital punishment to abolish it for people who suffer to "from any form of mental disorder."[47] A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[48]

The European Union has also declared that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity

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[47] Ex. 61, *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999), *see Press Release*, https://www.un.org/press/en/1999/19990428.HRCN938.html ("The Commission urged all States that still maintained the death penalty . . . not to impose it on a person suffering from any form of mental disorder.").

[48] Ex. 62, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

and worth of the human person."[49] Generally, the EU opposes the death penalty for all crimes.[50]

f. Evidence of National Consensus: Mental Health Courts

Jurisdictions nationwide are adopting mental health courts that take a holistic approach to rehabilitated persons with mental illness who are in the criminal justice system. Nationwide, there are over 300 mental health courts in all fifty states.[51] At least one hundred of these courts serve felony offenders.[52] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing ... [in which participants] voluntarily participate in a judicially supervised treatment plan."[53] These special courts clearly reflect a consistency in the direction of change in the

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[49] Ex. 63, European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000).

[50] Ex. 64, October 10, 2019, World and European Day Against the Death Penalty, https://www.coe.int/en/web/human-rights-rule-of-law/day-against-death-penalty (last visited Dec. 22, 2019).

[51] Ex. 65, *Adult Mental Health Treatment Court Locator*, Substance Abuse & Mental Health Services Administration, https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults (last visited Dec. 22, 2019).

[52] *Id.*

[53] Ex. 66, *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), https://csgjusticecenter.org/wp-content/uploads/2012/12/mhc-primer.pdf (last visited Dec. 22, 2019).

growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded

E. Execution of the seriously mentally ill as a class of people is unconstitutional because mental illness diminishes personal responsibility.

The last "step" of the Eighth Amendment analysis requires a court to exercise its own independent judgment in determining whether the death penalty is a disproportionate response to the moral culpability of the defendant. *See e.g.,* *Atkins*, 536 U.S. at 312 (quoting *Coker v Georgia*, 433 U.S. 584, 597 (1977). To impose our society's gravest punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. Without such congruence, the punishment of death becomes "grossly disproportionate." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320.

In *Atkins*, the Court determined that the deficiencies of the intellectually disabled "diminish[ed] their personal culpability":

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

536 U.S. at 318.

Much like intellectual disability, serious mental illness is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulse, and evaluate information. As defendants with serious mental illness lack the requisite degree of moral culpability, the acceptable goals of capital punishment are negated, just as they are for juveniles and intellectually disabled individuals. Thus, this Court should find that severely mentally ill individuals are also categorically ineligible for the death penalty.

Although severely mentally individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to

understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

F. It is unconstitutional to impose the death penalty upon Byron Black, because his serious mental illness, alone, and in conjunction with his intellectual disability, diminished his personal culpability.

Mr. Black has no memory of the crime. To this day despite all evidence to the contrary he remembers that he was in the work house at the time of the murders. When records are shown him that (appear) to refute this belief, he accepts those records, but then, after approximately 15 minutes, returns to his narrative that he was in the work house.

His understanding, reasoning, and awareness of the outside world, are all profoundly distorted by his co-morbid conditions of serious mental illness and intellectual disability.

Conclusion:

This Court should hold that execution of severely mentally ill individuals violates the Eighth Amendment and Article I, §16 of the Tennessee Constitution, set out a procedure by which Mr. Black may vindicate his claim, and remand his case to the trial court for further proceedings where Mr. Black may establish the nature and severity of his mental illness and, thus, his exemption from execution.

V. The Death Penalty Is Racist.

A. This Court should declare the death penalty unconstitutional because it is racist.

Rooted in a racist past and currently racist in application, Tennessee's use of the death penalty violates the Eighth Amendment to

the United States Constitution and Article I, §16 of the Tennessee Constitution. Nothing could be more arbitrary under the Eighth Amendment than a reliance upon race in determining who should live and die, but despite decades of judicial oversight, the application of the Tennessee death penalty statutes remain racially disparate. Racism infects the process through implicit bias in prosecutorial discretion, through the bias (both sometimes overt and sometimes unknowing) in jury selection, through the ineffective assistance of defense counsel, and through bias in the jurors' perceptions and determinations. Because there is no way to root out this impermissible consideration of race, the death penalty is unconstitutional.

B. The history of the death penalty in Tennessee involves both judicial and extra-judicial executions.

Since its inception in 1796, the law in Tennessee has allowed for capital punishment.[54] "Until 1913, all individuals convicted of a capital offense were hanged. There are no official records of the number or names of those executed."[55] In 1916, Tennessee progressed to electrocution as a means to end human life. Electrocution remained the sole method of execution from 1916 until 1960. During this time, Tennessee executed 125 people. Of the 125, 85 were African-American including the 31

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[54] Ex. 67, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS,https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

[55] Ex. 68, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

African-American men executed for rape.[56] After decades of legal battles on the constitutionality of the death penalty and method of execution, Tennessee made lethal injection the method of execution starting January 1, 1999.[57]

Parallel to the official, state-sanctioned death penalty, there has been a darker history of capital punishment in Tennessee. There have been 237 reported extra-judicial lynchings in Tennessee—the birthplace of the Ku Klux Klan.[58] Of the 95 counties in Tennessee, 59 counties have reported lynchings. *Id.* The numbers of lynching per county range from one to twenty, with Shelby County holding the record for most lynchings. *Id.* In keeping with that history, Shelby County is also responsible for

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[56] In 1977, too late to save the 36 men Tennessee had already executed for the crime of rape, the United States Supreme Court found it unconstitutional to impose a sentence of death for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977). 455 people were executed for rape between 1930 and 1972. 89.1% of those men were black. Ex. 69, *Race, Rape, and the Death Penalty,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty

[57] Ex. 67, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

From 1960 to 2000 there was not a single execution in the state of Tennessee. *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[58] Ex. 70, *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/tennessee.

nearly 50% of the current number of people on death row. The individuals lynched in Memphis include Calvin McDowell, William Stewart, and Thomas Moss.[59] After opening the People's Grocery store in Memphis, TN, a thriving business, Misters McDowell, Stewart, and Moss were confronted and jailed by law enforcement officers along with over 100 other black men. *Id.* On March 9, 1892, masked men entered the jail and removed Mr. Moss, Mr. McDowell, and Mr. Stewart and hung them in an open field. *Id.* When the executioners asked Mr. Moss for his last words he stated, "Tell my people to go west. There is no justice for them here." *Id.*

C. Racially biased determinations violate the Eighth Amendment's prohibition on cruel and unusual punishment.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court addressed the discriminatory application of the death penalty. Concurring to the Court's per curiam holding that the death penalty violates the Eighth Amendment, Justice Douglas concluded that the capital statutes across the country were "pregnant with discrimination," *id.* at 257, and were counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment," *id.* at 255. Justice Douglas reasoned:

> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding

[59] Ex. 70, *Lynching in America*, EQUAL JUSTICE INITIATIVE, Calvin McDowell, William Stewart, and Thomas Moss (video).

> prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Furman v. Georgia, 408 U.S. 238, 255 (1972).

In his separate concurring opinion, Justice Stewart indicted the capital punishment system saying, "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310. The Court later found that the death penalty does not comport with the Eighth Amendment if "imposed under sentencing procedures that create a substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Racial disparity in the application of the death penalty is unconscionable. The Supreme Court has repeatedly held that consideration of race is completely inconsistent with the dictates of justice. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (declaring the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states"). Contrary to the mandates of the Supreme Court, the overt racism that led to the lynching of black citizens became ingrained in the justice system. This happened, in part, because for many years the courts viewed their duty

as limited to minimizing racist enforcement of the law. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman*, 408 U.S. at 257 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As Justice Black observed in *Callins v. Collins*, 510 U.S. 1141 (1994),

> [E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field . . . providing no indication that the problem of race in the administration of death will ever be addressed.

Id. at 1156 (Blackmun, J. dissenting from denial of certiorari) However, "the central purpose of the Fourteenth Amendment was to *eliminate* racial discrimination emanating from official sources in the states." *McLaughlin v. State of Florida*, 379 U.S. 184, 192 (1964) (emphasis added).

Managing the risk of racism inherent in the administration of the death penalty has proven untenable and unconstitutional. Just last year, the Supreme Court noted how "familiar and recurring" the evil of racism is:

> It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.
> ***

> [R]acial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Peña-Rodriquez v. Colorado, 137 S. Ct. 855, 867, 869 (2017).

While blacks make up approximately 12% of the population, they account for 42% of the national death row.[60] *Id.* These disparities are well known and well documented. The death penalty is intended for the worst of the worst, (*see Harmelin v. Michigan*, 501 U.S. 957, 966 (1991)), yet research continues to show that race, not crime, is the more likely indicator for who receives the death penalty.

The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles*, 356 U.S. 86 (1958). The nation has evolved. It is no longer willing to tolerate the racism that has plagued the Nation for centuries, not from prosecutors, (*Foster v. Chatman*, 136 S. Ct. 1737 (2016)), not from experts or defense counsel, (*Buck v. Davis*, 137 S. Ct. 759 (2017)), and not from juries, (*Pena-Rodriguez, 137 S. Ct. 855*). Where racism

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[60] Ex. 71, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

cannot be excised from the death-determination process, the death penalty itself is unconstitutional.

D. Implicit biases influence prosecutorial discretion in seeking death.

A defendant's journey through the legal system has but one conductor: the prosecutor. From the pretrial decisions to the final closing statement, prosecutors bring their own perspectives, strategies, and biases into each decision. The most critical of these decisions, however, is whether to seek the death penalty. Prosecutors make such decisions against the backdrop of their own worldview – including their implicit, unconscious biases. Studies have shown that racialized implicit biases cause associations between black citizens and violence, criminality, and aggression.[61] Whites are associated with purity and seen as victims.[62] Research shows that merely seeing a black face can trigger negative associations.[63] By the time a prosecutor has made a charging decision, she has been primed with both the race of the defendant and the victim. Similar to an implicit bias test, a prosecutor must then make choices about the charge, the strategy, plea negotiations, and, ultimately

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[61] Ex. 72, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, SEATTLE UNIV. L. REV., V. 35:795.

[62] *Id.*

[63] *Id.* at 799; Ex. 73, Lisa Trei, *'Black' features can sway in favor of death penalty, according to study*, Standford Report (2006); Ex. 74, Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes.* CORNELL LAW FACULTY PUBLICATION (2006).

whether to seek death. If prosecutors' implicit biases align with the rest of the country's – and there is no reason to believe that they are uniquely immune – these racial associations impact every decision prosecutors make.[64] Racial priming affects charging decisions, how prosecutors perceive jurors, how they assess witnesses, what evidence they perceive as exculpatory, etc. Even when not acting intentionally, a prosecutor's implicit bias becomes the lens through which she dispenses justice.

E. Prosecutors across the nation continue to violate *Batson*.

The history of the exclusion of blacks from jury service is long – and telling. In 1880, the Supreme Court held that statutes limiting jury service to whites are unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303 (1879). In the wake of *Strauder*, states removed the racial discrimination from their statutes, while initiating a series of facially constitutional practices aimed at achieving the same goal—preventing blacks from serving on juries. While some states began using seemingly neutral requirements such as intelligence, experience, or good moral character to keep black citizens out of the jury box, other states printed the names of black jurors on separate color paper so those names could

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[64] *Id.,* Ex. 75, Katherine Barnes, et al. *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 Arizona Law Review, 305 (2009). Ex. 76, Mike Dorning, *Plea Bargains Favor Whites in Death Penalty Cases, Study Says*, WASHINGTON POST, July 26, 2000.

be avoided during a putatively "random" drawing or, alternatively, utilized the jury commissioner as a proxy for the state's racism.[65]

Addressing these machinations, the Supreme Court held why accepting prosecutors' reasons for excluding African American jurors is problematic: prosecutors are infected with racism:

> If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. The general attitude of the jury commissioner is shown by the following extract from his testimony: 'I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.'

Norris v. State of Alabama, 294 U.S. 587, 598–99 (1935).

By the 1960s, the Court required courts to pull the jury venire from a "fair cross-section of the community." *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). Prosecutors, again, adjusted their practices to achieve the same goal.

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[65] Ex. 77, Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004).

In 1986, the Supreme Court declared any exclusion prospective jurors based on race unconstitutional. *Batson v. Kentucky,* 476 U.S.79 (1986).[66] However the Court's ruling proved difficult to enforce. In 2015, the New Yorker reported that in the approximately 30 years since *Batson*, courts have accepted the flimsiest excuses for striking black jurors and prosecutors have trained subordinates to strike black jurors without a judicial rebuke.[67] A 2010 report by the Equal Justice Initiative documented cases in which courts upheld prosecutors' dismissal of jurors because of allegedly race-neutral factors such as affiliation with a historically black college, a son in an interracial marriage, living in a black-majority neighborhood or that a juror "shucked and jived."[68]

Although there is no comprehensive data on the rate at which prosecutors strike black jurors nationally, regional studies clearly show racial bias in jury selection is far from a relic of the past:

- A study of criminal cases from 1983 and 1993 found that prosecutors in Philadelphia removed 52% of potential black jurors as compared to only 23% of nonblack jurors.[69]

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[66] Much of this section is drawn from Ex. 78, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[67] Ex. 79, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?* THE NEW YORKER, June 5, 2015.

[68] Ex. 80, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

[69] Ex. 81, ACLU, *Race and the Death Penalty.*

- Between 2003 and 2012, prosecutors in Caddo Parish, Louisiana — one of the most aggressive death penalty counties in the country — struck 46% of prospective black jurors with preemptory challenges, as compared to 15% of non-blacks.[70]
- Between 1994 and 2002, prosecutors in Jefferson Parish, Louisiana struck 55% of blacks, but just 16% of whites.[71]
- Although blacks make up 23% of the population in Louisiana, *80%* of criminal trials had no more than two black jurors, and it notably takes only 10 of 12 juror votes to convict in that state.[72]
- A 2011 study found that between 1990 and 2010, North Carolina state prosecutors struck about 53% of black people eligible for juries in criminal cases as compared to about 26% of white people.[73] The study's authors concluded that the chance of this occurring in a race-neutral process was less than 1 in 10 trillion.[74] Even after adjusting for excuses given by prosecutors that tend to correlate

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[70] Ex. 82, Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, Reprieve, August 2015.

[71] Ex. 79, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015.

[72]Ex. 80, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

[73]Ex. 83, Barbara O'Brian & Catherine M. Grosso, *Report on Jury Selection Study*, MICH. ST. UNIV. COLLEGE OF LAW FACULTY PUBLICATIONS, Dec. 15, 2011.

[74] *Id.*

with race, the 2-to-1 discrepancy remained.[75] The North Carolina legislature had previously passed a law stating that death penalty defendants who could demonstrate racial bias in jury selection could have their sentences changed to life without parole.[76] The legislature later repealed that law.[77]

- Recently, American Public Media's "In the Dark" podcast did painstaking research on the 26-year career of Mississippi District Attorney Doug Evans and found that during his career, Evans' office struck 50% of prospective black jurors, compared with just 11% of whites.[78]
- In the 32 years since *Batson*, the U.S Court of Appeals for the 5th Circuit — which includes Mississippi, Texas and Louisiana — has upheld a *Batson* challenge only twice, out of hundreds of challenges.[79]
- A survey of seven death penalty cases in Columbus, Georgia, going back to the 1970s found that prosecutors struck 41 of 44 prospective

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[75] *Id.*

[76] Ex. 84, North Carolina Senate Bill 461, The Racial Justice Act.

[77] Ex. 85, Matt Smith, *"Racial Justice Act" repealed in North Carolina*, CNN, June 21, 2013.

[78] Ex. 86, Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APMReports, June 12, 2018.

[79] Ex. 87, Ian Millhiser, *Something has gone wrong with Jury Selection in Mississippi, and the Fifth Circuit is to Blame.*, THINK PROGRESS, Apr. 5, 2018.

black jurors.[80] Six of the seven death penalty trials featured all-white juries.[81]

- In a 2010 study, "mock jurors" were given the same evidence from a fictional robbery case but then shown alternate security camera footage depicting either a light-skinned or dark-skinned suspect.[82] Jurors were more likely to evaluate ambiguous, race-neutral evidence against the dark-skinned suspect as incriminating and more likely to find the dark-skinned suspect guilty.[83]
- Between 2005 and 2009, prosecutors in Houston County, Alabama, struck 80% of black people from juries in death penalty cases.[84] The result was that half the juries were all white and the remainder had only a single black juror, even though the county is 27% black.[85]

Although these statistics make painfully clear that racism in jury selection is still rampant, it is very difficult for defendants to prove that a prosecutor's purportedly race-neutral reasons are pretext for racism in all but the most egregious cases. In recent years, the Supreme Court has encountered a few of these egregious cases. In 2016, the Supreme Court

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[80] Ex. 88, Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death penalty cases*, ATLANTA JOURNAL CONSTITUTION, Mar. 19, 2018.

[81] *Id.*

[82] Ex. 89, Justin D. Levinson, Danielle Young, *Different Shards of Bias: Skin Ton, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV., 307 (2010).

[83] *Id.*

[84] Ex. 90, Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NPR Nov. 2, 2015.

[85] *Id.*

held 7-1 that Georgia prosecutors violated *Batson* when they used peremptory strikes to remove all four African American potential jurors from Timothy Foster's capital jury. *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016). The trial court accepted the prosecutors' purportedly race-neutral reasons for the strikes and denied Foster's *Batson* challenge. *Id.* at 1742-43. Mr. Foster, a black man, was then convicted and sentenced to death for the sexual assault and murder of a white woman, and his postconviction litigation of the *Batson* claim was unsuccessful. *Id.* at 1742. Almost 20 years later, Foster obtained a copy of the prosecutors' jury selection file, and the evidence of racial discrimination contained in it was so stark that it led to almost unanimous consensus among the justices that the prosecutors' strikes "were motivated in substantial part by race."[86] *Id.* at 1743, 1755. It is noteworthy that it took 20 years for Foster to obtain evidence of the blatant racism of his prosecutors and that he had lost his *Batson* claims in many courts along the way.

In 2019, the Court encountered another egregious case, and seven justices held that a Mississippi prosecutor violated *Batson* when he struck 41 out of 42 potential black jurors throughout six different trials of Curtis Flowers. *Flowers v. Mississippi*, 139 S. Ct. 2229, 2251 (2019).[87] The Mississippi Supreme Court reversed three times (all for

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[86] Justice Roberts delivered the opinion of the Court. *Foster*, 136 S. Ct. at 1742. Only Justice Thomas dissented. *Id.* at 1761 (Thomas, J., dissenting).

[87] Justice Kavanaugh delivered the opinion of the Court, *Flowers*, 139 S. Ct. at 2234. Justice Thomas dissented, and Justice Gorsuch partially joined his dissent. 139 S. Ct. at 2252 (Thomas, J., dissenting).

prosecutorial misconduct, and one specifically for a *Batson* violation), and twice the jury could not reach a unanimous verdict. *Id.* at 2236-37. The Court described the prosecutor's pattern of racist use of peremptory strikes across his trials as follows:

> Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.
>
> The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

Id. at 2246. The Court held, "[i]n light of all of the circumstances here, the State's decision to strike five of the six black prospective jurors [at Flowers' sixth trial] is further evidence suggesting that the State was motivated in substantial part by discriminatory intent." *Id.*

Though the courts continue to attempt to root out racism in the selection of juries, the history outlined above makes clear that racist considerations often infect the jury selection process. Such prejudice is difficult for the courts to police – often masquerading as a socially acceptable trope or commonly held belief. Because the courts cannot effectively police the considerations applied to the selection of jurors, the

courts cannot eliminate racism from the process. Where a defendant's life is on the line, the risk that racism will infect the process renders the use of the death penalty unconstitutional.

F. Defense attorneys can also be racist and have implicit bias, which often deprives capital defendants of their Sixth Amendment right to effective counsel.

Although prosecutors are often blamed for racial disparities in the legal system, defense attorneys are not immune to the effects of racism and implicit bias. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court considered an ineffective assistance of counsel challenge to defense counsel's introduction of a medical expert's report counsel knew presented the view that the defendant's "race disproportionately predisposed him to violent conduct" during the penalty phase, in which "the principal point of dispute" was whether the defendant "was likely to act violently in the future." *Id.* at 775. The Court characterized the report of stating "in effect, that the color of Buck's skin made him more deserving of execution." *Id.* As to the deficient-performance prong of *Strickland*, the Court concluded that the introduction of this report "fell outside the bounds of competent representation." *Id.* As to *Strickland's* prejudice prong, the Court rejected the district court's conclusion that "'the introduction of any mention of race' during the penalty phase was '*de minimis*.'" *Id.* at 777 (quoting the district court opinion). Instead, the Court held that the expert's testimony was "potent evidence" on the penalty phase question of future dangerousness, as it

> appealed to a powerful racial stereotype—that of black men as "violence prone." In combination with the substance of the

> jury's inquiry, this created something of a perfect storm. Dr. Quijano's opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.

Id. at 776. Thus, the Court held, "Buck has demonstrated prejudice." *Id.* at 777. The Court held, no matter how egregious the crime, "[o]ur law punishes people for what they do, not who they are." *Id.* at 778. Using this guiding principle the Court found that use of race as a factor to determine the future dangerousness of a defendant, regardless of which party presents that evidence, is intolerable in our justice system. *Id.* at 780. As the Court explicitly found that defense counsel introduced the expert report (and live testimony) while aware of the expert's blatantly racist conclusions, counsel was clearly infected himself with overt racism or implicit bias.

In addition, even if not hampered by implicit bias or racism, issues of race put capital defense counsel is in an impossible, double bind. Given the clear and consistent role that race plays in sentencing, a lawyer who fails to inform a client that racism will affect the client's sentence could be said to have rendered ineffective assistance. *McCleskey v. Kemp*, 481 U.S 279, 321-22 (1987). However, a lawyer who tells a client that truth demolishes the client's confidence in the justice system. *Buck*, 137 S. Ct. at 778. In short, issues of race increase the likelihood that counsel will provide constitutionally inadequate assistance.

G. Juror bias vitiates the constitutionally-mandated, individualized sentencing determination.

The Constitution requires that capital sentencing be individualized to each defendant's "record, personal characteristics, and the circumstances of his crime." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In *Woodson*, the Court held that in capital cases, the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process." *Id.*; *accord Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983). Under the Eighth Amendment, "[w]hat is important at the [punishment] selection stage is an *individualized* determination of the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 897 (emphasis in the original).

An individualized sentencing determination does not countenance the jury's consideration of race. As the Supreme Court held in 2017,

> The unmistakable principle . . . is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *cf. Aldridge*

v. United States, 283 U.S. 308, 315 (1931); *Buck v. Davis, 137 S. Ct. 759,* 779 (2017).

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

Despite this constitutional requirement, death-qualified juries routinely consider race in making sentencing determinations.[88] Nearly 80% of executions are for the murder of white victims, despite blacks being as likely to be victims of murder.[89] Killers of black people rarely get death sentences.[90] White killers of black people get death sentences even less frequently.[91] And far and away, the person *most* likely to receive a death sentence is a black man who kills a white woman.[92] While white people make up less than half of the country's murder victims, a 2003 study by Amnesty International found that about 80 percent of the people on death row in the United States killed a white person.[93]

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[88] Ex. 91, David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, HANDBOOK OF PSYCH AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research indicating that a black defendant who kills a white victim has a significantly greater likelihood of receiving a sentence of death).

[89] Ex. 71, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

[90] Ex. 92, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 CRIM. L. & CRIMINOLOGY 733 (2017).

[91] *Id.*

[92] *Id.*

[93] Ex. 93, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases*, Amnesty International, Apr. 23, 2003.

The correlation between the race of the victim and the severity of punishment exists in jurisdictions across the country:[94]

- A 2012 study of Harris County, Texas, cases found that people who killed white victims were 2.5 times more likely to be sentenced to the death penalty than other killers.[95]
- In Delaware, according to a 2012 study, "black defendants who kill white victims are seven times as likely to receive the death penalty as are black defendants who kill black victims . . . Moreover, black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims."[96]
- A study of death penalty rates of black perpetrators/white victims versus white perpetrators/black victims through 1999 showed similar discrepancies. Notably, prosecutors are far less likely to seek the death penalty when the victim is black.[97]

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[94] Much of this section is drawn from Ex. 78, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[95] Ex. 94, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUSTON L. REV. (2008).

[96] Ex. 95, Sheri Lynn Johnson, John H. Blume, et al., *The Delaware Death Penalty: An Empirical Study (2012)*, CORNELL LAW FACULTY PUBLICATIONS, Paper 431.

[97] Ex. 96, John H. Blume, Theodore Eisenberg, et. al., *Explaining Death Row's Population and Racial Composition*, (2004), CORNELL LAW FACULTY PUBLICATIONS, Paper 231.

- A study of North Carolina murder cases from 1980 through 2007 found that murderers who kill white people are three times more likely to get the death penalty than murderers who kill black people.[98]
- A 2000 study commissioned by then-Florida Governor Jeb Bush found that the state had, as of that time, never executed a white person for killing a black person.[99]
- A 2004 study of Illinois, Georgia, Maryland and Florida estimated that "one quarter to one third of death sentenced defendants with white victims would have avoided the death penalty if their victims had been black."[100]
- According to a 2002 study commissioned by then-Governor Frank O'Bannon (D), Indiana had executed only one person for killing a nonwhite victim, and although 47% of homicides in the state involved nonwhite victims, just 16% of the state's death sentences did.[101]

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[98] Ex. 97, Michael L. Radelet & Glenn L. *Pierce, Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).

[99] Ex. 98, Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17 (2009).

[100] Ex. 99, David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Face and Perception*, 53 DE PAUL L. REV. 1411 (2004).

[101] Ex. 100, Indiana Public Defender Council, *Death Penalty Facts* http://www.in.gov/ipdc/public/pdfs/Death%20Penalty%20Factsheet.pdf (last updated 6/3/2019; last checked 12/26/2019).

- Studies in Maryland,[102] New Jersey,[103] Virginia,[104] Utah,[105] Ohio,[106] Florida[107] and the federal criminal justice system produced similar results.[108]
- A 2014 study looking at 33 years of data found that after adjusting for variables such as the number of victims and brutality of the crimes, jurors in Washington state were 4.5 times more likely to impose the death penalty on black defendants accused of aggravated murder than on white ones.[109]

How a defendant's race affects the jury's assessment of his moral responsibility is more difficult to parse. Psychologist Samuel Sommers

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[102]Ex. 101, Raymond Paternoster, Robert Rame, et. al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2004).

[103]Leigh Buchanan Bienen, et. al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988).

[104]Ex. 102, *Broken Justice: The Death Penalty in Virginia*, ACLU (2003).

[105]Ex. 103, Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, NTY, Feb. 24, 1995 at. B1.

[106] Ex 104, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (2016).

[107] Ex 105, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (2016).

[108]Ex. 106, Excerpt from *U.S. DOJ Survey of the Federal Death Penalty System*, 1988-2000, available at https://www.justice.gov/archives/dag/survey-federal-death-penalty-system.

[109]Ex. 107, Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014.*

found that "[r]esearch examining the influence of a defendant's race on individual juror judgments has produced inconsistent results that are difficult to reconcile."[110] Studies have found everything from no effect, to bias for defendants of the same race, to even bias against or harsher judgment of defendants of the same race.[111] However, African American capital defendants suffer an extreme attribution error that whites commit when whites interpret and judge the behavior of minority group members.[112] This is based, in part, on years of media portrayal of criminal defendants (particularly defendants of color) as "others" via predatory language like "roving packs," "thugs," and "terrorists," and the use of mug shots when reporting on suspects of color.[113]

Racist considerations infect jury rooms – often insidiously, but sometime overtly. Despite evidentiary rules that generally prevent discovery of juror considerations, the Supreme Court held that the need to ferret out juror racism trumps even long-standing evidentiary rules. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). For centuries, jury deliberations were a sacred space protected by the "no-impeachment

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[110]Ex. 108, Erik Ausion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 2018.

[111] *Id.*

[112] Ex 109, Rebecca Hetey and Jennifer Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, Assoc. for Psych. Science (2018).

[113] *Id.*; *see also* Ex. 110, Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 105).

rule." *Id.* at 861. Intended to promote "honest, candid, and robust" conversations, jurors were given the assurance that once their verdict was rendered, that verdict could not and would not be questioned based on the comments and conclusions they expressed while deliberating. *Id.* However, when faced with reports that a juror made racist statements during jury deliberations, the Court found that "racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule." *Id.* at 871. The *Peña* Court found that racism, is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868.

H. The inability to eliminate racism from the death penalty requires elimination of the death penalty.

Race continues to be a factor in death determinations. As the four dissenting *McCleskey* justices found "race casts a large shadow on the capital sentencing process." *McCleskey*, 481 U.S at 321-22. Nothing could be more arbitrary under the Eighth Amendment than a reliance upon race in determining who should live and die, be it the victim's, the defendant's, or a combination of the two. The systematic injury that continues to occur in the issuances of death sentences has been left unaddressed for long enough. The Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1 § 16 of the Tennessee Constitution are intended for such a time as this.

Any consideration of race, whether intentional, conscious, unconscious, systematic, individual, or implicit to impose a criminal

sanction "poisons public confidence" in the judicial process. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (citing *Davis v. Ayala,* 135 S. Ct. 2187 (2015)). "It thus injures not just the defendant, but 'the law as an institution . . . the community at large, and ... the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose v. Mitchell,* 443 U.S. 545, 556 (1979) (internal quotation marks omitted)).

As Justice Blackmun once wrote,

> The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the *Furman* promise. To the contrary, where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought." Justice Brennan explained:
>
> > Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought."

Callins v. Collins, 510 U.S. 1141, 1154–55 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *McCleskey v. Kemp*, 481

U.S. 279, 341(1987) (Brennan, J., dissenting) (internal citations omitted)).

As the Supreme Court found in *Buck*, reliance on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Davis v. Ayala,* 135 S. Ct. 2187, 2208 (2015)). It thus injures not just the defendant, but "the law as an institution . . . the community at large, and ... the democratic ideal reflected in the processes of our courts." *Rose v. Mitchell,* 443 U.S. 545, 556 (1979) (internal quotation marks omitted). The courts' continued acquiescence, the continuation of prosecutorial discriminatory policies (both explicit and implicit), and the history and social structures of the nation require this Court intervene to prevent the further erosion of public confidence in the legal system. This Court should find that the use of the death penalty violates evolving standards of decency of the Eighth Amendment and Article 1 § 16 of the Tennessee Constitution.

VI. Tennessee is out of step with the evolving standards of decency that have led most of the country to stop executing its citizens and which render Tennessee's death penalty unconstitutional.

As the United States Supreme Court has held, a court considering a challenge that a punishment violates the Eighth Amendment must look to the evolving standards of decency:

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed

> the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–101 (plurality opinion)).

Determination of the current standards of decency is not static, but instead courts must continually reassess the current standards of decency as new challenges to punishments are brought under Article I, §16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. The Supreme Court modeled the ongoing nature of this analysis in *Roper*, describing the change in the standards of decency in the 16 years between its holding that executing juveniles over 15 but under 18 was not unconstitutional in *Stanford v. Kentucky*, 492 U.S. 361 (1989), and its holding to the contrary in *Roper* and the similar changes in the 13 years between its holding that executing the intellectually disabled was not unconstitutional in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its holding to the contrary in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Roper*, 543 U.S. at 561. As the Court summed up its task in *Roper*: "Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Id.* at 564.

So too must this Court reconsider whether the current and growing national consensus against the death penalty compels the conclusion that the death penalty in Tennessee is now unconstitutional. Supreme Court precedent dictates the methodology for this analysis:

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of

> legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment . . . .

Id. Within the objective indicia of consensus, courts are to consider the current state of society's views by considering "the rejection of the . . . death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Id.* at 567 (the word "juvenile" omitted).

Here, these factors provide sufficient evidence that there is now a national consensus against the death penalty. Executions are now rare or non-existent in most of the nation. The majority of states—32 out of 50—have either abolished the death penalty or have not carried out an execution in at least ten years.[114] An additional six states have not had an execution in at least five years, for a total of 38 states with no executions in that time.[115] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor life in prison over a death sentence.[116] Perhaps most revealing about this

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[114] Ex. 111, *Indiana Marks 10 Years Without an Execution*, Death Penalty Information Center (DPIC), December 11, 2019, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[115] Ex. 112, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[116] Ex. 113, *Americans Now Support Life in Prison Over Death Penalty*, Gallup, November 25, 2019,

poll is the sea change in attitudes occurring in just the last five years. Where, in 2014, only 45% of the country favored a life sentence over death, that number has increased by 15% in only five years. Importantly, the poll also demonstrates that the shift toward favoring a life sentence is apparent in every single major subgroup:

> Since 2014, when Gallup last asked Americans to choose between life imprisonment with no parole and the death penalty, *all key subgroups show increased preferences for life imprisonment*. This includes increases of 19 points among Democrats, 16 pointes among independents, and 10 points among Republicans."[117]

Particularly significant to Tennessee, conservative Christians have also coalesced in an effort to abolish the death penalty. Conservatives Concerned About the Death Penalty was formed on a national level in 2013 to "question the alignment of capital punishment with conservative principles and values."[118] Tennessee has since formed its own chapter.[119] Both the national and Tennessee chapters are opposed to capital punishment for increasingly familiar reasons. Tennessee Conservatives Concerned About the Death Penalty cites the following concerns:

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https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx (last visited Dec. 24, 2019).

[117] *Id.* (emphasis added).

[118] Ex. 114, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[119] Ex. 115, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

- Innocence – Since 1973, more than 150 people have been freed from death row across the country after evidence of innocence revealed they had been wrongfully convicted.[120]
- Arbitrariness – "Just one percent of murders in the United States have resulted in a death sentence over the last decade. But are those individuals truly the 'worst of the worst' – or simply those with inadequate legal representation?"[121]
- Lack of deterrence –The death penalty does not prevent violent crime.[122]

Indeed, these same concerns are recognized in the recent year-end report by the Death Penalty Information Center, which noted that, "innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[123] Even more poignant, "Two prisoners were executed this year despite substantial doubts as to their guilt and [two more] came close to

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[120] Ex. 116, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019. Ex. 131, Samuel Gross, et. al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations.

[121] *Id.*

[122] *Id.*

[123] Ex. 117, *DPIC 2019 Year End Report: Death Penalty Erodes Further As New Hampshire Abolishes and California Imposes Moratorium*, Death Penalty Information Center, December 17, 2019, https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

execution despite compelling evidence of innocence."[124] As to the unconstitutional arbitrariness of capital punishment, the report concluded:

> The 22 executions this year belied the myth that the death penalty is reserved for the "worst of the worst." At least 19 of the 22 prisoners who were executed this year had one or more of the following impairments: significant evidence of mental illness (9); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (8); or chronic serious childhood trauma, neglect, and/or abuse (13). Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[125]

The United States Supreme Court has previously found such a rapid in the shift of attitudes regarding the imposition of the death penalty relevant to its Eighth Amendment analysis of the evolving standards of decency. For example, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court, in reversing its previous determination regarding the execution of the intellectually disabled, emphasized just how quickly national standards of decency had evolved towards finding such a practice to be unconstitutionally cruel and unusual:

> Much has changed since *Penry's* conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of

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[124] *Id.*

[125] *Id.*

> a consensus. 492 U.S. at 334. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon.

Atkins, 536 U.S. at 304-05.

While the standards of decency of the nation as a whole have evolved towards rejection of the death penalty, Tennessee has fallen out of step with the rest of the country – particularly in the last eighteen months, during which the State has executed six of its citizens at a rate not seen since before 1960.[126] Post-*Furman* and *Gregg*, Tennessee was

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[126]Ex. 118, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

one of the last states[127] to resume executions when it executed Robert Coe on April 19, 2000 – the state's first execution in forty years.[128] The State executed another five men between 2006 and 2009.[129] And, it should be stressed that one of those men, Sedley Alley, may well have been innocent of the murder for which he was put to death – an unconscionable reality.[130] The number of exonerations of individuals on death row – three

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[127] Of states that have performed executions post-*Furman*, only three states waited longer than Tennessee to resume: New Mexico (2001); Connecticut (2005); and South Dakota (2007). Ex. 119 – *Executions by State and Year*, Death Penalty Information Center https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Dec. 24, 2019). Of those three states, two have since abolished the death penalty all-together, New Mexico doing so in 2009 and Connecticut in 2012. Ex. 120, *States with no Recent Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[128] Ex. 118, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[129] Sedley Alley – June 28, 2006
Phillip Workman – May 9, 2007
Daryl Holton – September 12, 2007
Steve Henley – February 4, 2009
Cecil Johnson–December 2, 2009. *Id.*

[130] Ex. 121, *Did Tennessee Execute and Innocent Man?* Nashville Scene, May 2, 2019, https://www.nashvillescene.com/news/pith-in-the-wind/article/21067050/did-tennessee-execute-an-innocent-man (last visited Dec. 24, 2019).

innocent men have been freed from Tennessee's death row, alone[131] – is but one of the features of capital punishment that have led a clear majority of the country to decide that it doesn't represent our standards of decency and should be eliminated. Another, is the completely arbitrary way the death penalty is imposed. Indeed, whether based on race, poverty, or where the crime happens to take place, the imposition of the death penalty in the United States is not reserved for the worst of the worst but is, rather, completely and unconstitutionally arbitrary.

A. The imposition of the death penalty in the United States and in Tennessee, in particular, is more arbitrary than ever before.

When considering an explanation for why a majority of the American population has determined that capital punishment violates our society's standards of decency, one needs to look to the arbitrary way in which it is determined who gets sentenced to death and who does not. This exact concern led the United States Supreme Court to abolish the death penalty nearly fifty years ago in *Furman*, determining that, when capital punishment is imposed arbitrarily, it is unconstitutionally cruel and unusual:

> It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. There is evidence

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[131]Ex. 122, *Tennessee*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

> that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.

Furman v. Georgia, 408 U.S. 238, 242 (1972).

Just a few years after *Furman*, the Supreme Court approved supposed legislative corrections designed to eliminate arbitrariness in the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Yet, time and again, these purported fixes, adopted in some form or fashion by numerous states, have failed to actually result in the death penalty being any less arbitrary. In fact, its imposition in many cases is more arbitrary than ever. As a result, more and more states have ceased executions or abolished the practice all-together.[132]

There are several ways in which the death penalty is imposed arbitrarily. Among them, are the exact concerns – racial and economic disparity – addressed by *Furman*.

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[132] Ten states never had the death penalty post-*Gregg*. An additional eleven states have eliminated their death penalty since that time: Massachusetts (1984); Rhode Island (1984); New Jersey (2007); New York (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016) (state supreme court found unconstitutional); Washington (2018) (state supreme court found unconstitutional); and New Hampshire (2019). Ex. 123, ***States with and without the death penalty***, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

1. Racial disparity in the imposition of the death penalty has grown.

Racial disparity in the imposition of the death penalty has actually gotten significantly worse in the last ten years, both nationally and here in Tennessee. Whereas nationally, in the ten years post-*Gregg*, 46% of those sentenced to death were people of color, in the last ten years, that number reached a remarkable 60%.[133] In Tennessee, while African-Americans comprise only 17% of the state's population, 50% of the individuals on Tennessee's death row are African-American.[134] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

2. Geographic disparity in the imposition of the death penalty has grown

The most important factor for determining who is sentenced to death and who is not has nothing to do with the nature of the offense but, rather, where it is committed. Initially, and most obvious of course, is the fact that 21 states do not even have a death penalty. Moreover, as outlined above, an additional 11 have not executed anyone in the last ten

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[133] Ex. 124, *Death and Texas: Race Looms Ever Larger as Death Sentences Decline*, THE INTERCEPT, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-race-texas/ (last visited Dec. 24, 2019).

[134] Ex. 125, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

years. And in the last five years there have been no executions in almost 80% (38 of 50 states) of the country. But it is even more revealing to take note of the death penalty by county.

Eighty-four percent (84%) of the counties in the United States have not had an execution (of an individual sentenced to death in that county) in the past 50 years.[135] As the graph below shows, among the counties that have had an individual sentenced to death in that county executed, Harris County, Texas—Houston—outpaces the rest by an astonishing margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [136]

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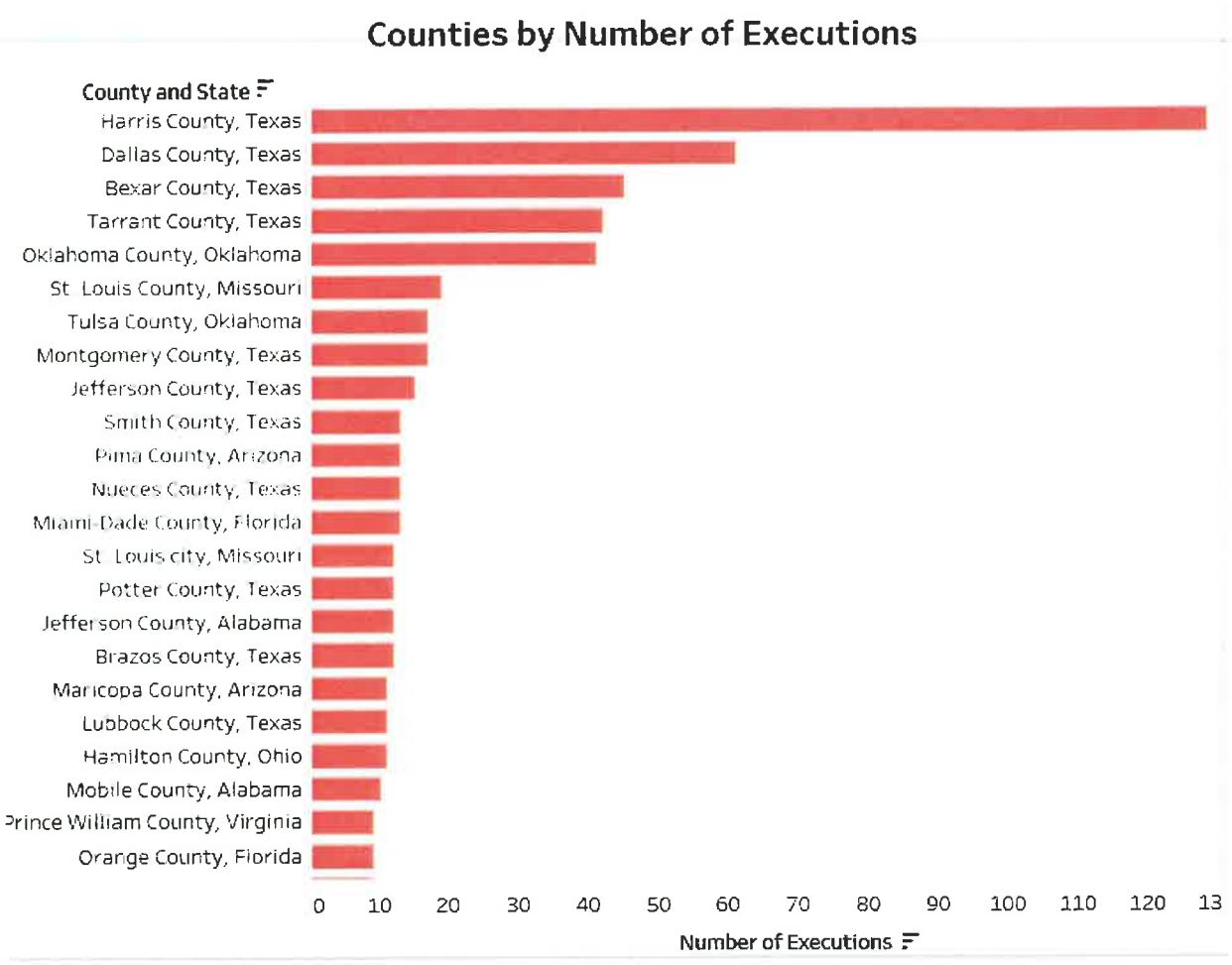
[135] Ex. 111, *Indiana Marks 10 Years Without An Execution*, Death Penalty Information Center, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[136] Ex. 126, *Executions by County*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).



When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[137]

In Tennessee, the geographic disparity is no less stark. Since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed

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[137] Ex. 127, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

sustained death sentences.[138] While Shelby County represents less than fourteen percent (14%) of Tennessee's population, almost half of the men on death row come from Shelby County.[139] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[140]

B. Tennessee's death penalty laws are unconstitutional, as standards of decency have evolved such that Tennesseans, Americans, and citizens of the world increasingly reject the cruel and arbitrary ways capital sentences are determined.

Forty-plus years of attempts to correct the unconstitutional arbitrariness of the death penalty have only resulted in ever-greater arbitrariness in determining who gets sentenced to death and who does not. Evolving standards of decency over that time have led a majority of the country to recognize that the arbitrariness in the imposition of the death penalty is unconstitutionally cruel and unusual. This recognition has led to the steadily-increasing rejection of the death penalty which is so clearly outlined by the statistics detailed throughout this section.

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[138] Ex. 128, *Tennessee's Death Penalty Lottery*, TENNESSEE JOURNAL OF LAW AND POLICY, Vol. 13, Summer, 2018, at 139-140, https://tennesseelawandpolicy.files.wordpress.com/2018/07/maclean-and-miller-tennessees-death-penalty-lottery1.pdf (last visited Dec. 24, 2019).

[139] Ex. 125, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[140] *Id.*

The progression towards abolishing capital punishment in its entirety is consistent with the previous evolutions which resulted in the abolition of the death penalty for the intellectually disabled and for juveniles. Just as the Supreme Court held that evolving standards of decency demanded a stop to executing these categories of individuals, this Court should now hold that the death penalty as a whole is unconstitutional in light of the evolving standards of decency documented here (and elsewhere).

C. The evolution in our society's standards of decency that led the Supreme Court to abolish capital punishment for juveniles and the intellectually disabled is occurring now with respect to the death penalty as a whole.

It wasn't until 2005 that the Supreme Court determined that our standards of decency had evolved to the point of concluding that it was unconstitutionally cruel and unusual to execute individuals who were juveniles at the time of their crime. *Roper v. Simmons*, 543 U.S. 551 (2005). And it was only three years before that the Court, also looking to our standards of decency, put a stop to executing the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). These realities are now so accepted by society that it is almost impossible to fathom a time when they were not. The discussion in *Roper* is instructive, as it demonstrates a clear parallel between the evolution of the standards of decency that led to the abolition of executing children and those that put a stop to executing the intellectually disabled. An identical parallel can now be seen between those evolutions and the one now evident supporting the abolition of the death penalty entirely. Indeed, reviewing how standards

of decency previously evolved is particularly instructive to the argument presented here – that Tennessee is simply behind the rest of the country in recognizing that current evolving standards of decency are not commensurate with the execution of individuals who were sentenced to death in such an arbitrary way.

The Supreme Court's discussion in *Roper* begins by pointing out that the Court had previously, in 1988, determined that "our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime." *Thompson v. Oklahoma*, 487 U.S. 815, 818-838 (1988). *Thompson*, however, did not prohibit the execution of those 16 or older at the time of their crime. One year later, in a 5-4 decision, the Supreme Court again held that the Eighth and Fourteenth Amendments did not prohibit the execution of juvenile offenders over 15 but under 18. *Stanford v. Kentucky*, 492 U.S. 361 (1989). *Roper* also points out the evolution occurring over the almost identical period of time between *Penry* in 1989 (where the Court held it was not unconstitutional to execute the intellectually disabled), and *Atkins* in 2002 (where the Court held that standards of decency had evolved to the point that executing the intellectually disabled was unconstitutional).

The *Roper* Court noted that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Roper*, 543 U.S. at 564. The Court then tracked the evolution of the national consensus against executing the intellectually disabled that led to its decision in *Atkins*, and conducted a similar review of the increasing

number of states that had prohibited the death penalty for juveniles. *Roper*, 543 U.S. at 564-65. What, perhaps, stands out most in this portion of the *Roper* discussion is the emphasis the Court placed on the fact that, even prior to the Court declaring the death penalty for juveniles unconstitutionally cruel and unusual, the state of Kentucky made this determination on its own and commuted the sentence of the very juvenile it had previously fought for and won the right to execute.

It is critical to note of the factors that were important to the Supreme Court in both *Roper* and *Atkins* in determining just where contemporary standards of decency stood:

Regarding *national consensus*, last month's Gallup poll revealed that 60% of the nation now prefer a life sentence over a death sentence.[141] As to *practice within the states*, there are now 21 states without the death penalty and, as noted at the outset of this section, a total of 38 states (very nearly 80% of the country) have not had an execution in the last five years.[142] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing

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[141] Ex. 129, *2019 Year-End Report*, Death Penalty Information Center (hereinafter "2019 DPIC report"), at 2 (report available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited Dec. 24, 2019)).

[142] Ex. 112, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

numbers of states sought to further limit the use of the death penalty.[143] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[144] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[145] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[146]

Perhaps most important is the *consistency in the trend towards abolition* – the type of evidence the *Atkins* Court referred to as "telling." 536 U.S. at 315. According to the Gallup poll conducted in October 2019, in only five years, the percent of individuals who favor of a life sentence over capital punishment rose 15%, from 45% in 2014 to 60% in 2019.[147] Moreover, this Gallup poll showed a wide demographic preference for life imprisonment over the death penalty, with majorities of men and women, whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[148] Equally

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[143] Ex. 129, 2019 DPIC Report, at 2.

[144] *Id.* at 3.

[145] *Id.* at 4.

[146] *Id.*

[147] *Id.* at 14; *see also* Ex. 113, Gallup Poll, https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment (last visited Dec. 27, 2019).

[148] Ex. 113, Gallup Poll at 1-2.

consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[149]

Tennessee was one of only seven states to perform an execution in 2019,[150] and joins only Texas in having any executions scheduled for 2020.[151] Although Ohio previously had executions scheduled, the Governor suspended them in the wake of a court decision comparing its execution process to waterboarding, suffocation and being chemically burned alive.[152] Otherwise, across the United States, 2019 saw the use of the death penalty remain near historic lows, as there were but 22 executions and less than 40 new death sentences imposed – the fifth straight year in a row with fewer than 30 executions and fewer than 50 new capital sentences.[153]

There are now entire regions of the country without the death penalty. With New Hampshire's abolition of the death penalty in May of this year, there is no death penalty in any New England state.[154]

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[149] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 123, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[150] Ex. 129, 2019 DPIC Report, at 6.

[151] Ex. 130, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[152] Ex. 129, DPIC Report, at 2.

[153] Ex. 129, 2019 DPIC Report, at 2.

[154] *Id.*

Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[155] Indeed, the geographic disparity for determining who is executed and who is not is more striking than ever as 91% of the executions in 2019 happened in the South and 41% in Texas alone.[156]

Four decades after *Furman* and *Gregg*, the cruel and unusual nature of the arbitrary imposition of the death penalty is plainly evident. Moreover, such arbitrary imposition does not satisfy our standards of decency. This much is clear from the ever-dwindling number of states—and counties—performing executions and the ever-increasing number of states abolishing the practice all-together. There is clearly a consistent, national trend towards abolition of the death penalty. As the reality of capital punishment is exposed – whether its racist and otherwise arbitrary imposition or the terrifying fact that scores of innocent people have been sentenced to death and some likely executed – a national consensus has formed declaring that capital punishment does satisfy our standards of decency.

D. This Court has the authority and should exercise its own independent judgment to conclude the death penalty as practiced in Tennessee is unconstitutional, deny the State's request for an execution date and, instead, issue a certificate of commutation.

It is disturbing that the very aspects that have led most of the country to reject the death penalty as arbitrary and thus, cruel and

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[155] *Id.* at 3.

[156] *Id.* at 6.

unusual, are ever-present in Tennessee, even as our Attorney General seeks to schedule executions in unprecedented numbers. This Court, however, has the authority – recognizing the realities of capital punishment that are leading the United States consistently towards total abolition – to deny the State's request for an execution date and, instead, commute a death sentence to one of life in prison. As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI § 1 of the Tennessee Constitution, *In Re Burson*, 909 S.W.2d 768, 772-73 (Tenn. 1995), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§ 16-3-503-04, to deny the Attorney General's motion to set an expedited execution date and instead vacate Mr. Black's death sentence and modify it to life. *See* *Ray v. State*, 67 S.W. 553, 558 (Tenn. 1902) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673, 685 (1882) (same).

Mr. Black respectfully requests that this Court look to the Washington Supreme Court's recent ruling that the death penalty in that state was unconstitutional. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The Court's holding was based on its conclusion, as urged here, that the "arbitrary and race based imposition of the death penalty cannot withstand the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 635 (quoting *Trop*, 356 U.S. at 101). The Washington court placed emphasis on the same considerations articulated by the Supreme Court in *Atkins* and *Roper*:

> When considering a challenge under article I, section 14, we look to contemporary standards and experience in other

> states. We recognize local, national, and international trends that disfavor capital punishment more broadly. When the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks "fundamental fairness" and thus violates article I, section 14.

Id. at 635-36 (citations omitted).

Decades of evidence have clearly demonstrated that the imposition of the death penalty is not for the worst of the worst but is, rather, unconstitutionally arbitrary. This objective truth has led to a clear national consensus favoring a life sentence over death. In this regard, Tennessee has simply fallen out of step with society's evolving standards of decency. Tennessee's death penalty law is unconstitutional.

VII. This Court should issue a certificate of commutation because Mr. Black is intellectually disabled, severely mentally ill, and physically infirm.

This Court to issue a certificate of commutation, given the extenuating circumstances presented here. The power to issue a certificate of commutation is conferred on this Court by statute which provides that a Governor may "commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted." Tenn. Code Ann. § 40-27-106.

This statute, which is unique to Tennessee, does not "restrict, expand, or in any way affect, in the legal sense, the authority of the Governor to exercise his constitutional power of commutation." *Workman*

v. State, 22 S.W.3d 807, 817 (Tenn. 2000) (Birch, J. dissenting.) Rather, "[i]t serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Id.*

When considering a request for a certificate of commutation, this Court considers facts in the record and any new, uncontroverted facts. *Workman,* 22 S.W.3d 808; see also *Bass v. State*, 231 S.W.2d 707 (Tenn.1950); *Anderson v. State*, 383 S.W.2d 763 (1964); *Green v. State*, 14 S.W. 489 (1890). If the Court determines that the case presents extenuating circumstances warranting the commutation of a death sentence to life imprisonment, then the Court issues the certificate of commutation for the Governor's consideration. *Workman*, 22 S.W.3d 808.

Although some have observed that the Court as a whole has not exercised its power to issue a certificate of commutation since the passage of the State Post-conviction Procedures Act, it is important to note that the legislature did not repeal Tenn. Code Ann. §40-27-106. The Court's authority remains intact and unfettered. Justice Birch entered a certificate of commutation on the record in his dissent in *Workman.*

> [I]n accordance with that duty described above, pursuant to and independent of the enabling statute cited herein, and after a careful consideration of the pertinent parts of the entire record, I do hereby certify to His Excellency, the Honorable Don Sundquist, Governor of the State of Tennessee, that there were extenuating circumstances attending this case and that the punishment of death ought to be commuted.

As described above, Mr. Mr. Black was deprived of a due process hearing on his *Atkins* claim. He is severely mentally ill. He is physically infirm. He has endured years of shoddy health care which have resulted in one completely degenerated hip and the other partially degenerated. Surgical malpractice from prostate cancer left him hospitalized for weeks. His case warrants a certificate of commutation.

For all the reasons outlined in this response, Mr. Hodges respectfully requests this Court deny the State's request for an execution date, exercise the Court's authority to issue the Certificate of Commutation, and remand the case to the trial court for further proceedings. Mr. Payne also invokes his right to a full and fair hearing regarding his competency to be executed under the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution.

VIII. Conclusion

The State's motion should be denied. Mr. Black's case should be remanded for a full and fair hearing on his claim of incompetence to be executed. Mr. Black should further be provided a due process hearing on his *Atkins* claim. This Court should declare that persons with significant mental illness are exempt from the death penalty. Moreover, this Court should recognize that the death penalty violates evolving standards of decency and is therefore unconstitutional.

Respectfully submitted this 30th day of December, 2019.

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing Response in Opposition to Request to Set Execution Date was served via email and United States Mail to opposing counsel, Amy Tarkington, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.

BY: _____
Kelley J. Henry