IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BYRON LEWIS BLACK, **Appellant,**	)	
vs.	)	**DAVIDSON COUNTY**
STATE OF TENNESSEE, **Appellee.**	)	**No. M2000-00641-SC-DPE-CD**

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT BYRON BLACK

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I. THE STATE MUST BE BOUND BY THE STIPULATIONS OF ITS LAWFUL REPRESENTATIVES. MR. BLACK IS INTELLECTUALLY DISABLED AND MAY NOT BE EXECUTED.

Byron Black is facing a dubious distinction: he may well be the only person ever executed in this country by a State that has also, through its elected and lawful representative, agreed that he is intellectually disabled and thus exempt from execution. The stipulated fact of his intellectual disability has been deemed -- through a combination of doctrines of previous adjudication, non-retroactivity, and a change in attorneys for the State -- not to be legally dispositive. For present purposes, that may or may not be a correct decision. *But see Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) ("[t]he importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities."). But the fact remains: the State agreed that he was intellectually disabled. Executing such a person, with such a procedural background, will be a lasting source of shame for this State and its citizens.

A. The State Should Be Bound By Its Prior Stipulations the Same Way That a Criminal Defendant Would Be.

Counsel for Mr. Black have effectively briefed issues relating to the significance of this stipulation for purposes of his current petition. The subsidiary issue of whether the State should be bound by its concessions is one of significant interest to TACDL. Simply put, defense attorneys every day labor under the pressure of knowing that any statement, agreement, or concession can and will be used to the detriment of their clients. When dealing with criminal defendants, the actions of the

attorney -- unless and until challenged under the highly deferential standards of *Strickland v. Washington*, 466 U.S. 668 (1984) -- are binding on the client.[1] Claims are lost by an attorney's failure to file a proper pretrial motion within a given time period. Tenn. R. Crim. P. 12(b)(2)(A), (B). A claim of unfairly prejudicial or otherwise inadmissible information is waived by defense counsel's failure to offer a contemporaneous objection. *State v. Jordan*, 325 S.W.3d 1, 55 (Tenn. 2010). Improper closing arguments are waived by the absence of an objection at the time rather than in a subsequent motion for new trial. *State v. Enix*, 653 S.W.3d 692, 700 (Tenn. 2022). Even when there is a contemporaneous objection to evidence, review may be limited if the objection did not cite the precise ground offered on appeal. *State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994). Promising issues can be waived through the failure to file a timely motion for new trial or failure to include an issue in the motion for new trial. *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004). On appeal, claims can be deemed waived when argued in insufficient detail or without appropriate citations and references. *State v. Bonds*, 502 S.W.3d 118, 144 (Tenn. Crim. App. 2016).

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[1] This is not to overlook that personal admissions made by a defendant (such as the admission of guilt in a plea colloquy) are also very difficult to take back. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (a defendant's "solemn declaration[] in open court" creates "a formidable barrier in any subsequent collateral proceeding" because these declarations "carry a strong presumption of verity").

All of this is true, of course, even if the client subsequently obtains a new attorney or even if the client could prove that he or she subjectively disagreed with the course of action of the attorney. The system is based on the principle, as the Supreme Court once said, that a lawyer "speaks for his or her client," and thus a stream of decisions can be made by the attorney: "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor v. Illinois*, 484 U.S. 400 (1988). The Court even observed that this doctrine should be enforced even though the defense attorney's decisions could carry "some risk he may wound his own client." *Id.* at 418. Just as defense counsel (and their clients) are held strictly to this principle, so too the State itself and its attorneys. To argue that "in the law, what is sauce for the goose is normally sauce for the gander," *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016), is not to be glib; it is, rather, to emphasize that fairness is the most fundamental basis of the legitimacy of our justice system.

B. Executing Mr. Black Under These Circumstances Erodes the Legitimacy of the Criminal Justice System as a Whole.

If the public cannot have confidence in the manner in which the death penalty is meted out, public respect for our entire criminal justice system will be eroded. For the death penalty to be a "working feature of our criminal justice system . . . society must acknowledge responsibility to tend to its fairness, its equity, and its morality." Louis D. Bilionis, *Legitimating Death*, 91 Mich. L. Rev. 1643, 1644-45 (1993). Support for the death penalty and belief in its legitimacy "has long been tied to issues

of whether it is applied arbitrarily and capriciously[.]" James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 Criminology & Pub. Pol'y 3, 5 (2005). "Because the death penalty is qualitatively and morally different from any other penalty, 'it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.' " *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring) (*quoting Smith v. Murray*, 477 U.S. 527, 545-546 (1986) (Stevens, J., dissenting)). Consequently, "a death sentence's legitimacy depends upon strict compliance with stringent procedural safeguards designed to ensure that the constitutionally vexing risks of arbitrariness, capriciousness, discrimination, unfairness, factual error, legal error, and moral error do not materialize." Bilionis, *Legitimating Death*, *supra*, at 1645 (*citing Furman v. Georgia*, 408 U.S. 238 (1972), and its immediate progeny).

Mr. Black's impending execution implicates the fairness of our entire system. It should deeply concern this Court that, even though the elected representative of the people of Davidson County, acting at that time as the only permissible representative of the State of Tennessee, agreed that Mr. Black is intellectually disabled, the State of Tennessee is poised to kill him. This raises an impermissible danger that Mr. Black will be arbitrarily and capriciously executed. In Mr. Black's case, procedure has been used not to safeguard him from wrongful execution, but to foreclose review of his eligibility to be executed under *Atkins v.*

Virginia, 536 U.S. 304 (2002). When, as here, "constitutional rules of criminal procedure are chosen for their administrative convenience, some mortgaging of the underlying constitutional values that inure to the individual's benefit usually occurs." Bilionis, *Legitimating Death*, *supra*, at 1654. The underlying constitutional values here are those articulated in *Atkins* and *Van Tran*, 66 S.W.3d at 811-12 -- that the Constitution forbids the execution of individuals with intellectually disabilities. The mortgaging of those principles in this case here will not be without consequence for the future.

II. MR. BLACK HAS MADE A PLAUSIBLE CLAIM UNDER THE EIGHTH AMENDMENT THAT IS RIPE AND SHOULD BE GIVEN CAREFUL CONSIDERATION.

In his pleadings, Mr. Black has argued that the Eighth Amendment prohibits execution of someone who is an "idiot." This prohibition is certainly related to but distinct from the prohibition on executing the intellectually disabled. It also is differently defined than any test which may arise out of the Eighth Amendment's focus on evolving standards of decency. *See, e.g.*, *Madison v. Alabama*, 586 U.S. 265 (2019).

Amicus need not repeat the analysis of the common law conducted by Mr. Black, which demonstrates, at the time of the Founding, executing someone with his level of intellectual function would have "been branded 'savage and inhuman.' " *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (*quoting* 4 W. Blackstone, *Commentaries* (1769)). Three points are appropriate. First, it is clear that such a claim is not untimely. While it is imaginable that "idiocy" could be so apparent at an earlier point in the

proceedings that it could be raised then, it is not fully ripe until an execution date is imminent. Indeed, it is quite possible that an individual's "idiocy" would either only become apparent or even only come into existence (due to mental diminishment over time or other physical injury or disease) long after the initial conviction. Second, such a claim provides an answer to an otherwise-unanswerable question: how can the Eighth Amendment protections be defined solely by reference to considerations developed centuries after the passage of the Eight Amendment, focusing on clinical definitions derived from entities such as the DSM-IV, including such specific criterion as a focus on adaptive deficits prior to age eighteen,[2] and including reference to scientific instruments such as IQ tests that were yet to be imagined? Clearly, the Founders could not have had these definitions in their heads. A focus on the scope of the common law prohibition *in addition to* modern developments provides a rational response to this conundrum.

Third, and most importantly, such a claim fits within a strongly-developed pattern, over the last decades, of consideration of the legal principles and practices that were accepted at the time of the Founding and thus directly incorporated into the Constitution, even when such

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[2] It is not clear, for example, that the age of eighteen was even a likely focus in the common-law. Blackstone, for example, identified the age of twenty-one as being more relevant to questions of personal capacity. 1 W. Blackstone, *Commentaries on the Laws of England* 463 (1768) ("So that full age in male or female, is twenty-one years ..., who till that time is an infant, and so styled in law").

principles conflict with or go beyond more modern types of analysis. This approach has been recognized and adopted by the Supreme Court in a wide variety of circumstances. Just to give a few examples: in *Crawford v. Washington*, 541 U.S. 36 (2004), in evaluating the Confrontation Clause, the Court rejected the modern focus on "indicia of reliability" to return to a bar on admission of testimonial hearsay absent a prior opportunity for cross-examination. In a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court looked to the common law to define the scope of the right to a jury trial in a criminal case, with results including the invalidation of the modern mandatory federal sentencing guideline regime. *See also United States v. Booker*, 543 U.S. 220, 226–27 (2005). In *Timbs v. Indiana*, 586 U.S. 146, 153 (2019), the Court found that the Eighth Amendment's prohibition on excessive fines, itself dating back to Magna Carta, was incorporated against the States. Most recently, in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the Court rejected a modern means-end scrutiny for regulations infringing on the Second Amendment right to bear arms, instead adopting a focus that looks primarily to the presence or absence at the time of the Founding of historical analogues for contemporary statutes. Finally, and most similarly to the present issue, in *United States v. Jones*, 565 U.S. 400 (2012), the Court addressed the test for determining whether a "search" occurred for Fourth Amendment purposes. It found that the modern reasonable-expectation-of-privacy test did not entirely replace the common-law test that focused on whether there had been a physical intrusion on private property. Justice Scalia

explained: the "reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 410 (*italics in original*).

Mr. Black's argument, as presented here, aligns with this approach: the scope of the Eighth Amendment's protections may have evolved and increased over time (a necessary consequence of the evolving standards of decency test), but they have not (and could not have) altered to allow practices that would have been barred at the time of the Founding. Though our courts' interpretation of "cruel and unusual punishment" has changed "as public opinion becomes enlightened by a humane justice," nothing in our precedents suggests that prisoners should have *fewer* protections than at common law. *Weems v. United States*, 217 U.S. 349, 378 (1910). Indeed, the Supreme Court has confirmed this to be true: "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection." *Ford*, 477 U.S. at 406 (*quoting Solem v. Helm*, 463 U.S. 277, 286 (1983)). *Amicus* thus urges this Court to consider the substance of Mr. Black's claim which takes seriously the circumstances of the formation of the Constitution.

Respectfully submitted,

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