IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
	)	
v.	)	No. M1988-00026-SC-DDT-DD
	)	
ABU ALI ABDUR'RAHMAN,	)	
	)	
Defendant.	)	

ABU ALI ABDUR'RAHMAN RESPONSE IN OPPOSITION TO STATE'S MOTION FOR EXPEDITED EXECUTION DATES AND REASONS WHY NO EXECUTION DATE SHOULD BE SET

On September 7, 2017,[1] the State's contractor, a for-profit pharmaceutical supplier, told the State of Tennessee that midazolam "does not elicit strong analgesic effects," and that inmates "may be able to feel pain from the administration of the second and third drugs" in a three-drug protocol. *See* Attachment 2. That is, the State is on notice that if they use midazolam in place of a true anesthetic in a three-drug protocol, a condemned inmate will suffer severe pain during execution.[2]

Despite this warning, on October 18, 2017, the State began the process of procuring midazolam for use in executions, ultimately purchasing midazolam that expires on June 1, 2018. On October 26, 2017, one of the State's drug-suppliers,[3]

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[1] *See,* Attachment 1, Chronology of Events Relevant to State's Motion to Expedite Execution Dates.
[2] Recently, "botched" executions in Arizona, Oklahoma, and Ohio also put the State of Tennessee on notice that midazolam is not an anesthetic, does not-render inmates insensate to pain, and is grossly inappropriate for use in lethal injection executions.
[3] It is not known whether this is the same supplier who had warned Tennessee that midazolam

emailed the Tennessee Department of Correction, and stated, "I will have my pharmacist write up a protocol." Attachment 3. On November 28, 2017, one of the drug suppliers sent another email that contained, "revisions to the protocol." Attachment 4.

On January 8, 2018, the State promulgated a new lethal injection protocol that retained the one-drug, pentobarbital protocol and added a midazolam-based, three-drug lethal injection protocol: Tennessee's Midazolam Option.[4] Apparently, this is the protocol drafted for the State of Tennessee by the for-profit supplier of drugs that are to be used in the proposed executions.

On January 11, 2018, the State moved this Honorable Court to resume executions. Five-days after requesting such executions, on January 16, 2018, and in response to a public records request, the State disclosed their amendment of the 2015 lethal injection protocol and the adoption of the Midazolam Option.[5] No formal announcement was made alerting the public to the new protocol. However, in the February 15, 2018 Motion to Set Execution Dates, the State, for the first time, announced its intention to execute inmates using the Midazolam Option, and not via the single-drug pentobarbital protocol.

The State purchased midazolam in October of 2017 that would only be effective until June 1, 2018. This purchase was made while executions were on hold

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would not work, or a different drug seller.

[4] That is, the State bought the midazolam first, and created a mechanism to use it, second. With both actions being preceded by a warning from their supplier that midazolam was not effective.

[5] This disclosure came in response to a public records request submitted by counsel for Abdur'Rahman, Johnson, Wright, and Zagorski. This request had been pending since November 6, 2017.

awaiting the United States Supreme Court's resolution of *Abdur'Rahman, et al. v. Parker, et al.*, Case No. 17-6068. The State knew that they would have very little time between a possibly favorable Supreme Court ruling, and the expiration of their midazolam. The State was aware that (1) applications for executive clemency will not be entertained until after execution dates are set, (2) this Court's practice has been to permit at least three months for the Governor to consider such applications, (3) this Court has traditionally scheduled executions many weeks or months apart, and (4) this Court's precedent demands a full and fair constitutional adjudication of substantively new execution protocols. Yet they purposefully kept their plans under wraps.

The State's decision to add the Midazolam Option to its lethal injection protocol (after purchasing it first, and despite being warned of its dangers), and to accept midazolam with a June 1, 2018 expiration date does not create an exigency warranting an unprecedented rush to execution.

The fact that the protocol that would be used to execute Mr. Abdur'Rahman was written, not by State actors, but by the supplier who profits from the sale of the protocol drugs,[6] is yet another reason not to set Mr. Abdur'Rahman's execution.

Mr. Abdur'Rahman should be given a full opportunity to litigate the constitutionality of the newly proposed lethal injection protocol without the extraordinary pressure of eight execution dates in a compressed, three-month

[6] In the State's response to public records requests, they have been less than illuminating about the process used to produce the current protocol. However, the emails that were produced are the only documents provided that detail any part of the drafting procedure. Thus, Mr. Abdur'Rahman relies on them as the best evidence of how the Midazolam Option came to be.

timeframe. Mr. Abdur'Rahman and all similarly situated inmates, should be given adequate time to present petitions for clemency to the Governor of the State of Tennessee. The State's Motion to Set Execution Dates should be denied.

I. Principles Of Stare Decisis And Established Precedent Require A Full And Fair Adjudication Of The Merits Of The Now-Pending Declaratory Judgment Action That Was Filed Expeditiously (27 Business Days) After The Tennessee Midazolam Option Was Disclosed To Counsel For Abdur'Rahman, Johnson, Wright, And Zagorski.

The State's request for relief is foreclosed by binding Tennessee precedent. This Court's precedent establishes that:

> The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. West, No. M1987-000130-SC-DPE-DD, Order p.3 (Tenn. Nov. 29, 2010). This Court has held true to the principles announced in *West*. *See e.g.*, *State v. Strouth*, No. E1997-00348-SC-DDT-DD, Order, p. 3 (Tenn. Apr. 8, 2014) ("Mr. Strouth is correct that currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate... Accordingly, the Court will set Mr. Strouth's execution for a future date that will allow plenty of time for resolution of the declaratory judgment action in the state courts.").

The State's motion fails to acknowledge the holding in *West*. Further, the State's motion does not provide a single case to give this Court a reason to depart

from the principles of *stare decisis*. "The power of this Court to overrule former decisions 'is very sparingly exercised and only when the reason is compelling.'" *In re Estate of McFarland*, 167 S.W.3d 299, 306 (Tenn. 2005) *quoting Edingbourgh v. Sears, Roebuck & Co.*, 206 Tenn. 660, 337 S.W.2d 13, 14 (1960). As this Court has held, "The sound principle of stare decisis requires us to uphold our prior precedents to promote consistency in the law and to promote confidence in this Court's decisions." *Cooper v. Logistics Insight Corp.*, 395 S.W.3d 632, 639 (Tenn. 2013). This Court does not deviate from precedent on the basis of speculative "uncertain[ty]." State's Motion To Set Execution Dates, p. 2.

II. The State's Professed Urgency To Schedule Executions Prior To June 1, 2018 Is A Manufactured And Avoidable Crisis That Does Not Justify Abridging Mr. Abdur'rahman's Right To Fully Challenge The Midazolam Option.

A. The State Manufactured A Crisis To Support Its Request For Executions Prior To June 1, 2018 To Prevent The Due Process Hearing Required By Court Precedent From Ever Taking Place.

Midazolam is the most controversial, dangerous drug ever to be used in a lethal injection protocol in the State of Tennessee. Of the seven states to use midazolam in a lethal injection, three have abandoned its use. The State of Arizona has agreed to never again use any benzodiazepine, including midazolam, or a paralytic in a lethal injection. *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 152 (D. Ariz. Dec. 19, 2016)(Attachment 5)(midazolam); *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-

01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017)(Attachment 6)(paralytic).

Midazolam— a sedative with no analgesic properties— is a completely different class of pharmaceutical than the barbiturates sodium thiopental and pentobarbital. Unlike sodium thiopental and pentobarbital, midazolam does not render the inmate unaware or insensate to severe pain. The Supreme Court has held: "It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the pancuronium bromide and pain from the administration of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). The Davidson County Chancery Court agreed with Chief Justice Roberts' opinion in *Baze* in the 2010 *West v. Ray* litigation. *See West v. Ray*, Case No. 10-1675-I, Order (Davidson County Chancery Court November 22, 2010). The Chancellor's opinion in the 2010 *West* litigation remains undisturbed. Similarly undisturbed is the opinion of the Davidson County Chancery Court in the 2005 *Abdur'Rahman v. Bredesen* litigation that pavulon (a paralytic similar to the one used in the new Midazolam Option) serves no purpose in an execution. *Abdur'Rahman v. Bredesen*, 181 S.W. 3d 292, 307 (Tenn. 2005) (noting that "the Chancellor correctly observed that the State failed to show a legitimate reason for the use of Pavulon in the lethal injection protocol[.]")

When Tennessee last used a three-drug protocol, it was found to be unconstitutional unless the State implemented sufficient checks to ensure that the

inmate would be unable to experience suffocation and pain. Those necessary checks are absent from Tennessee's Midazolam Option, perhaps because the protocol was drafted by the State's for-profit drug supplier.

The State knew, or reasonably should have known, when they chose to change their lethal injection protocol and add a Midazolam Option, that its new protocol would be challenged in court. They also knew that the challenge would have merit because they were warned by their for-profit drug supplier that midazolam does not work like sodium thiopental or pentobarbital. In a September 7, 2017, email, the supplier wrote "Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially." Attachment 2. The State knew that counsel for Abdur'Rahman, *et al.*, submit requests for public records regarding execution drugs (among other information) on a routine basis. *See* Attachment 7, Chronology of Public Records Requests During Past Six Months. Despite producing public records on November 6, 2017, TDOC did not provide any records regarding a change in the lethal injection protocol to include a Midazolam Option or regarding TDOC's attempts to procure midazolam until January 16, 2018. *See* Attachments 1, 7.

On October 18, 2017, TDOC was told that the midazolam it was purchasing expired on June 1, 2018. Attachment 8, Email. TDOC moved forward with the purchase of midazolam they knew would expire before any challenge to its use could be litigated in court. Emails, W-9's, invoices and photographs of the drugs

purchased demonstrate that the State knew well in advance of January 8, 2018, that it intended to use Tennessee's Midazolam Option to execute Mr. Abdur'Rahman. Yet, despite public records requests made throughout that time, the State failed to notify undersigned counsel of any intent to implement a new lethal injection protocol.

The State's decision to withhold this information from defense counsel appears intentional and calculated to gain a litigation advantage. The State seeks to avoid a trial on the merits of any challenge to Tennessee's Midazolam Option. To do so, they seek to cut off Mr. Abdur'Rahman's access to the courts by executing him before he has a chance to present his proof.

On January 18, 2018, just two days after learning of Tennessee's Midazolam Option, Mr. Abdur'Rahman told this Court that he intended to challenge the new protocol but required time to consult with experts; Mr. Abdur'Rahman additionally stated he would file a challenge on or before February 20, 2018 – a deadline Mr. Abdur'Rahman met. The State delayed until February 15, 2018, to tell this Court that its midazolam supply expires on June 1, 2018.

Importantly, and fatal to their request for expedited execution dates, the State does not say that they will be unable to obtain the drugs necessary to carry out executions after June 1, 2018. Rather, the State alleges that their ability to do so is "uncertain." State's Motion to Set Execution Dates, p. 2. Such vague and unsupported allegations are not enough to overturn Tennessee precedent, particularly where the State could have informed Mr. Abdur'Rahman months

earlier that it intended to adopt a new lethal injection protocol that adds a Midazolam Option. Under the circumstances, Mr. Abdur'Rahman has acted with extreme diligence, expediency, and transparency. The same cannot be said for the State. *See* Attachment 1.

B. The State's Vague And Unsupported Representation To The Court About Its Efforts To Obtain Pentobarbital Is Inconsistent With The Proof In The Record, Their Own Representations To The United States Supreme Court, Their Representations To The Public, And The Fact That Executions Using Pentobarbital Continue To Be Carried Out.[7]

In its motion, the State tells the Court: "The Department's supply of pentobarbital expired while the *West* proceeding was pending." State's Motion to Set Execution Dates, p. 2. This cannot be true. TDOC's numerous responses to Tennessee Public Records Act requests make clear that TDOC never received any pentobarbital (compounded or otherwise) from its supplier(s) and never had any in its possession, thus there was none to expire. The reason TDOC never had pentobarbital is because the 2015 lethal injection protocol, current Protocol A, uses compounded pentobarbital. According to the USP,[8] high-risk sterile compounds, which compounded pentobarbital is, have a beyond use date of 24 hours at controlled room temperature or three days refrigerated. *See West, et al. v. Schofield, et al.,* Case No. M2015-01952-COA-R3-CV, Technical Record, Trial Exhibits 5, 6. Testimony from State agents during the previous *West* litigation established that

[7] Although this Court does not resolve factual disputes, and Mr. Abdur'Rahman is not requesting that the Court do so, the following facts are asserted in response to the State's representation regarding pentobarbital. The truth will ultimately be determined in the pending Chancery Court proceedings.

[8] The United States Pharmacopeia sets the world industry standards to "ensure the quality, safety, and benefit of medicines and foods." http://www.usp.org/about (last checked March 1, 2018).

the TDOC had a signed contract with a pharmacist who assured that s/he could obtain the active pharmaceutical ingredient necessary to compound pentobarbital and that the compounder was ready, willing, and able to manufacture and distribute compounded pentobarbital to TDOC upon the setting of an execution date. *See, e.g., West, et al. v. Schofield, et al.,* Case No. M2015-01952-COA-R3-CV, Technical Record, Transcript, Volume III, pp. 823-824; *Id.*, Trial Exhibit 54. On March 2, 2017, Debra Inglis, TDOC legal counsel, told reporters that TDOC was able to obtain the drugs necessary for an execution "as needed." Boucher, *Lethal injections stalled*, The Tennessean, March 3, 2017, p. A3; 2017 WLNR 6714205.

Counsel for Abdur'Rahman, Johnson, Wright and Zagorski have consistently requested public records from TDOC. Attachments 1, 7. TDOC has not produced a document indicating that the compounder has withdrawn from the contract with TDOC. TDOC has not produced a document establishing that they are unable to obtain compounded pentobarbital. On November 13, 2017, the State continued to defend the compounded pentobarbital protocol in the United States Supreme Court. *Abdur'Rahman, et al. v. Parker, et al.*, No. 17-6068, Brief in Opposition. That the State did so indicates that they were confident in their ability to obtain pentobarbital as recently as November 13, 2017.

Public records productions by TDOC, which the State represents are full and accurate as of January 10, 2018, provide no evidence that TDOC is unable to obtain

compounded pentobarbital.[9] In fact, documents produced on January 16, 2018, contain a contract signed December 4, 2017, with an individual who agreed to compound drugs for lethal injections in Tennessee. Attachment 9, Pharmacy Services Agreement, Article 1, §1.2.

The State's new protocol, which retained pentobarbital and added a Midazolam Option, is dated January 8, 2018. Texas was prepared to carry out an execution using pentobarbital on February 22, 2018, but the defendant in that case was granted executive clemency hours before the execution was carried out. Georgia is set to carry out an execution using pentobarbital on March 15, 2018. Thus, the State's bald assertion that their ability to obtain pentobarbital is uncertain does not justify their request to schedule Mr. Abdur'Rahman's execution prior to June 1, 2018, and to choose the Midazolam Option, without ever giving Mr. Abdur'Rahman an opportunity for the due process hearing this Court's precedent demands.

C. The State's Argument That The Pharmaceutical Companies Are Acting At The Behest Of Death Penalty Opponents Is A Baseless Conspiracy Theory.

Multi-billion dollar pharmaceutical companies do not act at the behest of small, non-profit death penalty abolitionist groups. These businesses act at the behest of their stockholders and pursuant to their business model. These private businesses do not have a stake or a position on how or whether Mr. Abdur'Rahman lives or dies. Mr. Abdur'Rahman has no control over these Fortune 500 companies. Nor does Mr. Abdur'Rahman have control over the actions of small, non-profits.

[9]Despite requests to the contrary, when TDOC finally answers public records requests they only do so as of the date of the letter requesting the records. A February 2, 2018 public records request remains unanswered.

The truth is that the pharmaceutical companies have always objected to their drugs being misused in lethal injections. When states began to use branded drugs in lethal injections, those companies simply enforced their contracts, as any business would.

The fact that the business concerns of multi-billion dollar companies collide with the State's interest in misusing those companies' drugs is not the fault of Mr. Abdur'Rahman. The actions of individuals on either side of the death penalty debate are irrelevant to Mr. Abdur'Rahman's right to due process and the rule of law. Such actions do not provide a reason to cast aside *stare decisis* and set execution dates before Mr. Abdur'Rahman has an opportunity to fully and fairly litigate his case against the new lethal injection protocol.

III. Tennessee Courts Are To Be Concerned With Due Process And The Rule Of Law.

The February 22, 2018 botched non-execution of Doyle Hamm in Alabama[10] demonstrates why it is essential to fully and fairly litigate challenges to risky protocols such as the Tennessee Midazolam Option in a courtroom environment without the extreme pressure of compressed execution schedules. The constitutionality of the Midazolam Option must be adjudicated in a forum that is free from the immense time pressure the State seeks to impose.

The cases cited by the State in their motion arise in a stay-posture where the defendants faced a higher burden than the one governing Mr. Abdur'Rahman's

[10]https://www.reuters.com/article/us-alabama-execution/alabamas-aborted-execution-was-botched-and-bloody-lawyer-idUSKCN1G90Y2 (last checked March 1, 2018).

pending lawsuit in Chancery Court. Moreover, the cases cited by the State do not change the fact that this Court has always held that lethal injection challenges must be fairly adjudicated on their own, unique facts in Tennessee.[11] Fair adjudication means a trial with a full record addressing the merits. "The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision." *State v. West*, No. M1987-000130-SC-DPE-DD, Order p.3 (Tenn. Nov. 29, 2010). The State's motion implicitly admits that there is no time to meet the requirement of a fully developed record if eight executions are to be conducted by June 1, 2018. The State's motion fails on the basis of precedent alone.

Indeed, this Court's precedent establishes that Mr. Abdur'Rahman is entitled to sufficient notice and time to challenge the Tennessee Midaazolam Option that this State's courts have never reviewed. This Court previously acknowledged that Mr. Abdur'Rahman has a "legitimate. . . right to and need for notice" regarding significant changes in lethal injection protocols. *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015) (interlocutory appeal holding challenge to electrocution unripe but guaranteeing sufficient notice and time to challenge any change to the protocol).

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[11] Mr. Abdur'Rahman's lawsuit cannot be dismissed by reference to cases decided in other jurisdictions in the context of appeals from the preliminary injunction proceedings respecting protocols which are not identical to the Tennessee Midazolam Option. Tennessee courts decide what is constitutional in Tennessee after a full and fair hearing. Further, the State overstates the Supreme Court's holding in *Glossip v. Gross*, 135 S.Ct. 2726 (2015). *Glossip* did not hold that the any lethal injection protocol using midazolam is constitutional. Rather, in the context of an appeal from the denial of a preliminary injunction in a federal court action, it was found that the lower court did not commit clear error. *Id.*, at 2740-41.

IV. Scheduling Execution Dates On An Expedited Basis Unduly Burdens And/Or Denies Abu Ali Abdur'Rahman Fair Access To Meaningful Clemency Proceedings.

Mr. Abdur'Rahman has a statutory and constitutional right to seek executive clemency. As the United States Supreme Court has observed

> Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made. *See* M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* 282-356 (1992).

Herrera v. Collins, 506 U.S. 390, 415 (1993). The Court reaffirmed the importance of clemency in *Harbison v. Bell*, 556 U.S. 180, 192 (2009)("As this Court has recognized, however, '[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.' *Herrera v. Collins*, 506 U.S. 390, 411–412, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (footnote omitted).").

In the modern era, the State of Tennessee has executed six men.[12] Two men and one woman facing imminent execution have received executive clemency.[13] Thus, in this state, fully one-third of defendants who completed the standard three-

[12] Robert Coe, Sedley Alley, Philip Workman, Daryl Holton, Stephen Henley, Cecil Johnson.
[13] Michael Boyd, Edward Harbison, Gaile Owens.

tier process and who were facing execution were found to be worthy of a life sentence.

A request for executive clemency in a capital case will not be considered by the executive branch until all litigation is exhausted. An effective case for clemency cannot be cobbled together in a matter of days. Moreover, expediting eight executions before June 1, 2018, prevents a careful, thorough and meaningful consideration of Mr. Abdur'Rahman's clemency request. Forcing Mr. Abdur'Rahman to seek clemency while at the same time litigating the Tennessee Midazolam Option under an extremely compressed timeline alongside seven other inmates is the equivalent of denying all inmates a legitimate opportunity to pursue clemency. Such a compressed timeframe is also extremely disrespectful to Governor Haslam, who would be expected to make eight life or death decisions in mere weeks.[14] This is a separate and untenable injustice that would result if expedited execution dates are set.

Defendant Abu Ali Abdur'Rahman (formerly James Lee Jones, Jr.) hereby responds to the State's motion to set an execution date in his case. For the reasons below, Mr. Abdur'Rahman objects to the motion and maintains that an execution date should not be set.

V. According To The Plain Language Of The Judgment Imposing A Death Sentence On Mr. Abdur'rahman, The Death Sentence Cannot Be Executed At This Time.

[14] Governor Haslam's two predecessors were asked to make only one-more clemency determination (nine), during the sixteen-years they held office.

The judgment under which Mr. Abdur'Rahman was sentenced to death, a true copy of which is attached as Attachment 10, provides that his death sentence "shall be served consecutively to ... the defendant's federal sentence No. CR 57-72-R." Mr. Abdur'Rahman's "federal sentence No. CR 57-72-R" refers to his life sentence in *United States v. James Lee Jones, Jr.*, No. 57-72-R, United States District Court, Eastern District of Virginia – Richmond Division. A true copy of the federal judgment imposing that sentence, filed on September 11, 1972, is attached as Attachment 11.(This copy was introduced into evidence in Mr. Abdur'Rahman's federal habeas proceedings.) From the time Mr. Abdur'Rahman's death sentence was imposed in 1987, he has been continuously incarcerated by the Tennessee Department of Correction, and he has not served out his federal sentence. In connection with his federal case, a federal detainer warrant was lodged with the Tennessee Department of Correction as of July 20, 1987, out of the U.S. Marshall's office in Nashville, for parole violation. This detainer warrant appears in TOMIS and is still outstanding. *See* Attachment 12 (email from Bryce Coatney, staff attorney for the Tennessee Department of Correction). Accordingly, pursuant to the plain language of the judgment imposing Mr. Abdur'Rahman's death sentence, his death sentence cannot be executed at this time.

VI. Mr. Abdur'Rahman's Post-Conviction Case Has Been Reopened, And There Is A Proven Likelihood He Will Succeed On The Merits In The Reopened Case Within The Meaning Of Tenn. S. Ct. R. 12.3(A) And (E).

On June 24, 2016, Mr. Abdur'Rahman filed in the Criminal Court for Davidson County a "Motion to Reopen Post-Conviction Petition," a copy of which is

attached as Attachment 13 (the *June 2016 Motion*). On September 23, 2016, Mr. Abdur'Rahman filed in the same case a "Petition for Writ of Habeas Corpus and Supplement to Motion to Reopen Post-Conviction Case," a copy of which is attached as Attachment 14 (the *September 2016 Motion*). In these petitions, the contents of which are incorporated herein by reference, Mr. Abdur'Rahman is presenting essentially two claims:

> Claim 1: Mr. Abdur'Rahman is entitled to relief under the recently decided case of *Foster v. Chapman*, 578 U.S. ____, 136 S. Ct. 1737 (2016), which for the first time retroactively applied in a state post-conviction case the new analysis under *Snyder v. Louisiana*, 552 U.S. 472 (2008), for determining a *Batson* claim of racial discrimination in jury selection. *See* Attachment 13.
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> Claim 2: Based on newly developed and previously unavailable evidence concerning the operation of Tennessee's capital sentencing system over the past four decades since its inception in 1977, the system operates in an arbitrary and capricious manner in violation of the federal and state constitutions and contrary to the principles of *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. Additionally, the sharply declining use of the death penalty, to the point of non-existence in the vast majority of Tennessee's judicial districts, evidences an evolving standard of decency that renders capital punishment in Tennessee (and especially in Davidson County) unconstitutional. *See* Attachment 14.

On October 5, 2016, the Criminal Court for Davidson County, Division V (Judge Monte D. Watkins) entered an "Order Granting 'Motion to Reopen Post-Conviction Petition' In Part and Denying In Part," a copy of which is attached as Attachment 6 (the *Order Reopening Post-Conviction*). The Criminal Court reopened Mr. Abdur'Rahman's post-conviction case on Claim 1 but not on Claim 2.[15]

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[15] While the Criminal Court dismissed the *June 2016 Motion* and the *September 2016 Petition* with respect to Claim 2 by citing principles arguably applicable to motions to reopen post-conviction cases, the Court did not discuss Claim 2 in the context of Mr. Abdur'Rahman's habeas corpus petition that was included in the *September 2016 Petition.*

Mr. Abdur'Rahman has proceeded diligently in his reopened case, having filed his original motion seventeen months ago. The reopened post-conviction case is still pending. The Criminal Court has not yet scheduled an evidentiary hearing on Claim 1. Because his reopened case has not proceeded to final judgment, Mr. Abdur'Rahman has not yet had an opportunity to appeal the denial of his Claim 2.

For these reasons, there is a proven likelihood that Mr. Abdur'Rahman will succeed on the merits of each of his claims; and at the very least Mr. Abdur'Rahman should be given time to fully litigate these claims at the trial and appellate court levels, and therefore the State's motion to set an execution date should be denied.[16]

Additionally, the demonstrated arbitrariness of Tennessee's capital punishment system, described below, and the demonstrated evolved standard of decency in Tennessee, also described below, provide independent grounds for denying the State's motion to set execution dates, whatever the status of Mr. Abdur'Rahman's partially reopened post-conviction case.

Claim 1: ***Batson/Foster***

The Criminal Court stated that it would hold an evidentiary hearing on the *Foster/Batson* claim "to determine whether Petitioner is entitled to relief under *Foster* based upon the prosecution's discriminatory practices during jury selection. Petitioner previously raised a challenge to the prosecution's use of peremptory

[16] We note that the Rule 12 standard is "likelihood of success" and *not* the more stringent standard of "reasonable likelihood of success." Tenn. S. Ct. R. 12.3(A) and (E). The Court removed the term "reasonable" from the formulation of the standard contained in the draft amendments to Rule 12 that were publicized for comment.

strikes against African-American jurors on direct appeal [citing *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990)]. However, Petitioner now raises this challenge again because Petitioner has now obtained a copy of the prosecution's trial file which includes notes from the jury selection process." Attachment 15 *Order Reopening Post-Conviction*, at 2.

The basic facts supporting Mr. Abdur'Rahman's *Batson/Foster* claim are stated in the *June 2016 Motion* (Attachment 13). The evidence supporting the claim consists primarily of the prosecution's trial file, which includes notes from the jury selection process, coupled with the prosecutor's actions and statements to the court during jury selection.[17] The prosecution's trial file was not available to Mr. Abdur'Rahman when his *Batson* claim was originally presented and previously determined in his direct appeal. As explained in the *June 2016 Motion*, this evidence demonstrates that the prosecutor, Mr. John Zimmermann, harbored a racist outlook and used race to strike jurors.

Recently, Davidson County District Attorney General Glenn Funk produced additional relevant evidence in the form of a letter, attached as Attachment 16, that he sent to the District Attorneys Conference documenting racist comments Mr. Zimmermann made at a CLE presentation during the annual meeting of the District Attorneys Conference in late 2015. Mr. Zimmermann, who has a notorious

[17] Mr. Abdur'Rahman also intends to introduce evidence concerning the educational background and professional accomplishments of Juror Robert Thomas, an African-American whom Mr. Zimmermann struck from the panel on grounds that he "appeared" uneducated and ignorant. Mr. Abdur'Rahman also reserves the right to introduce other evidence and to vigorously cross examine Mr. Zimmermann at the evidentiary hearing to further prove his *Foster/Batson* claim.

reputation and a lengthy history of reprimands and sanctions for unethical conduct,[18] openly advocated to his peers that, as described by Assistant D.A. Roger Moore, "jury selection could (and apparently should) be conducted based on racial motivations/stereotyping." Although Mr. Zimmermann's CLE presentation occurred years after Mr. Abdur'Rahman's trial, it clearly displays his character and racist mindset. As stated in the email attachments to Mr. Funk's letter, sent to him by members of his office who attended Mr. Zimmermann's presentation, "Public scrutiny of prosecutors may be at an all-time high and any suggestion that the goal of Tennessee prosecutors is to subvert the holding in Batson would be a disservice to the vast majority of us whose goal is to do the right thing the right way." If in today's race-conscious world, when prosecutors are under public scrutiny, Mr. Zimmermann was willing to describe and advocate for racist practices in a CLE presentation to fellow prosecutors, then it is fair to infer that Mr. Zimmermann was willing to use race in jury selection at the time of Mr. Abdur'Rahman's trial.

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[18] In Mr. Abdur'Rahman's direct appeal, this Court found that Mr. Zimmermann's conduct during the trial "bordered on deception" and was "improper." *State v. Jones*, 789 S.W.2d 545, 551-2 (Tenn. 1990). In federal habeas, although many of Mr. Abdur'Rahman's prosecutorial misconduct claims were procedurally defaulted because of the ineffectiveness of his post-conviction counsel, Judge Campbell found that Mr. Zimmermann committed *Brady* violations. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1089-90 (M.D. Tenn. 1998). In *In re Zimmerman*, 1986 W.L 8586 (Tenn. Crim. App. 1986), Mr. Zimmermann was held in contempt of court for violating failing to disclose evidence to the defense prior to trial, describing Mr. Zimmermann's actions as an "abuse of, or unlawful interference with, the process or proceedings of the court. In *Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989), Mr. Zimmermann was sanctioned for making inappropriate comments to the press in violation of the disciplinary rules. In *State v. Middlebrooks*, 995 S.W.2d 550 (Tenn. 1999), a death penalty case, Mr. Zimmermann was reprimanded for making various improper closing arguments to the jury at sentencing. In *Garrett v. State*, 2001 Tenn.Crim.App. LEXIS 206 (2001), the court reversed a murder conviction because of Mr. Zimmermann's suppression of *Brady* material and his deceptive statements to the defense lawyer. In *State v. Vukelich*, 2001 Tenn.Crim.App. LEXIS 734 (Sept. 11, 2001), Mr. Zimmermann was "strongly admonished" by the trial court for defying the court's rulings concerning inadmissible evidence.

For these reasons, there is a proven likelihood of success on the merits of Mr. Abdur'Rahman's *Foster/Batson* claim in his reopened post-conviction case, which justifies a delay in the setting of an execution date in Mr. Abdur'Rahman's case pursuant to Tenn. S. Ct. R. 12.3(A) and (E).

Claim 2: Unconstitutionally Arbitrary Capital Sentencing System; Evolving Standard Of Decency.

Mr. Abdur'Rahman's Claim 2 embodies two related claims discussed at some length in the *September 2016 Petition* (Attachment 14): (i) Tennessee's capital sentencing system operates in an unconstitutionally arbitrary and capricious manner; and, (ii) as evidenced by the sharp decline in new death sentences over the past sixteen years, capital punishment is contrary to Tennessee's evolved standard of decency. These claims, relating to how Tennessee's capital punishment sentencing system has actually operated since its inception 40 years ago, are based on an extensive survey, conducted over the past three-plus years by attorney H.E. Miller, Jr., of all Tennessee first-degree murder cases since the inception of Tennessee's current capital sentencing system in 1977. Mr. Miller's preliminary report of his survey accompanied the *September 2016 Petition.* Since then, Mr. Miller has continued to update his survey, and his most recent report, which will be filed with the Criminal Court to supplement the record supporting Claim 2, is attached as Attachment 17. Mr. Miller's survey process is described in his report. An elaboration of Mr. Abdur'Rahman's *September 2016 Petition*, which analyzes the data from Mr. Miller's survey, is contained in an article written by Mr. MacLean and Mr. Miller titled *Tennessee's Death Penalty Lottery* that has been accepted for

publication in the upcoming issue of the *Tennessee Journal of Law and Policy*. A copy of this article, which also will be filed with the Criminal Court to supplement the record supporting Claim 2, is attached as Attachment 18.

Mr. Abdur'Rahman's *September 2016 Petition* is the first time any party, in any case, has presented these claims supported by this comprehensive evidence of the operation of Tennessee's capital sentencing over the past four decades.[19] Before now, the evidence has not been available. Because trial judges breach Rule 12's reporting requirements in at least 46% of adult murder cases, there has not previously been a reliable centralized collection of statewide data on first degree murder cases.[20] Furthermore, this kind of statistically based evidence necessarily accumulates and develops over time, and it continues to accumulate and develop through the present. Until now, no party has been in a position to statistically review the 40-year history of Tennessee's capital sentencing system; and until now, no court has been in a position to properly adjudicate these claims. Until now, Mr. Abdur'Rahman's arbitrariness and evolving standard of decency claims were not ripe for judicial review.

As discussed at some length in the *September 2016 Petition* and elaborated upon in *Tennessee's Death Penalty Lottery*, the premise underlying the Supreme Court's Eighth Amendment death penalty jurisprudence, established in *Furman v.*

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[19] These claims are tantamount to an "as applied" constitutional challenge, in that the constitutional violation appears from the way Tennessee's capital punishment sentencing system has in fact operated over time. These claims are based on the same kind of constitutional analysis employed by the U.S. Supreme Court in *Furman* and its progeny.

[20] Mr. Miller's Report (Attachment 17) and the article *Tennessee's Death Penalty Lottery* (Attachment 18) discuss the astounding Rule 12 noncompliance rate. *See* Attachment 18 at 26-31.

Georgia, 408 U.S. 238 (1972), is that the death penalty must be analyzed in the context of how the entire capital sentencing system operates. (Significantly, none of the opinions in *Furman* discusses the facts or merits of the individual cases that were under review.) *Furman's* bedrock principle is that, under the Eighth Amendment, a capital punishment sentencing system must not operate in an arbitrary or capricious manner, and its operation must comport with "evolving standards of decency." Each of the Justices in the *Furman* majority cited statistical evidence to support their conclusions that discretionary capital punishment systems are unconstitutionally arbitrary. In light of this framework, Mr. Miller's most salient findings from his survey of Tennessee's first degree murder cases include:

- Over the past 40 years, Tennessee has convicted more than 2,500 defendants of first degree murder. Among those 2,500+ defendants, only 86 defendants (3.4%) received sustained death sentences, and only 6 defendants (or 1 out of 400) were executed.

- Over the past 40 years, while death sentences have been imposed on a total of 192 defendants, only 86 of those defendants (or 45%) ended up with sustained death sentences. In other words, cases resulting in death sentences at trial have experienced a 55% reversal rate, indicating deep flaws in the system.

- Over the past 40 years, the death sentences of more than 23% of capital defendants have been vacated on grounds of ineffective assistance of counsel, further indicating serious problems with the administration of the system especially in light of the stringent standards for proving both "deficient performance" and "prejudice" under the *Strickland* test for ineffective assistance of counsel claims.

- Over the past 40 years, at least 339 defendants were convicted of multiple counts of first degree murder (*i.e.*, involving multiple murder victims), many involving extraordinarily egregious crimes, but only 33 of those defendants (10%) received sustained death sentences, while the remaining 306 defendants (90%) received life or life without parole sentences. Of the seventeen defendants found guilty of mass murder (four or more victims), only two mass-murder defendants (12%) received sustained death sentences;

the other fifteen mass-murder defendants (88%) were sentenced to life or life without parole.

- Whereas during the four-year period 1989 to 1993 Tennessee imposed 37 new death sentences at the rate of 9.25 cases per year, during the most recent four-year period of 2013 to 2017, Tennessee imposed only one new death sentence at the rate of 0.25 per year. This represents a 97% decline in the rate of new death sentences.

- Moreover, Tennessee has not imposed any new death sentences since June 2014 (more than 3½ years ago); and no death sentences have been imposed in Davidson County, or in the entire Middle Grand Division of the State, since February 2001 (17 years ago).

- Over the past 40 years, no death sentences were imposed in 47 of the State's 95 counties, and many of those death sentences were vacated or reversed. Only 28 of Tennessee's counties have imposed sustained death sentences. Over the past sixteen-plus years, sustained death sentences were imposed in only eight counties; and over the past five-plus years, death sentences were imposed only in Shelby County.

These findings, along with the other findings in Mr. Miller's report, prompt several questions required by *Furman's* systemic analysis of the constitutionality of any capital punishment system. Given that Tennessee is imposing death sentences on only 3.4% of first degree murderers, and only 10% of multi-murderers; and given that the State so far has executed only one out of 400 of those convicted, how is our system selecting the very few from the very many for imposing the ultimate penalty? Is Tennessee consistently and reliably sentencing to death only the "worst of the bad"? What arbitrary factors may infect the system? Given the sharp decline in new death sentences, has Tennessee's evolved standard of decency reached the point where the death penalty has become a dead letter in close to all of the counties in the state, rendering capital punishment unconstitutional?

From the statistical data, it cannot be reasonably disputed that Tennessee's capital sentencing system operates arbitrarily and capriciously. We have pointed out a number of factors that contribute to the arbitrariness of the system, including: geographical disparity, infrequency of application, timing and natural deaths, error rates, quality of defense representation, prosecutorial discretion and misconduct, defendants' impairments, race, and judicial disparity. [21]

Two penological interests have been proposed as justifications for capital punishment: deterrence and retribution. It is debatable whether any capital punishment system has ever served these interests. But when we analyze the historical data, no one can reasonably argue that our current capital punishment system serves either of these interests. No valid doctrinal foundation to support this system exists.

Mr. Miller's survey necessarily leads to the following conclusion:

> When over the past 40 years we have executed fewer than one out of every 400 defendants (less than ¼ of 1%) convicted of first degree murder; when we sentence 90% of multiple murderers to life or life without parole and only 10% to death; when the majority of capital cases are reversed or vacated because of trial error; when the courts have found that in over 23% of capital cases, defense counsel's performance was constitutionally deficient; when the number of death row defendants who die of natural causes is four times greater than the number Tennessee actually executed; when we have not seen a new capital case in Tennessee since mid-2014; when we haven't seen any death sentences in the Grand Middle Division since early 2001 – then, it must also be said that the death penalty is an "unusual" and unfair punishment. The statistics make clear that Tennessee's system is at least as arbitrary and capricious as the systems declared unconstitutional in *Furman* – and that is without accounting for the exorbitant delays and costs inherent in Tennessee's system, which far exceed the delays and costs inherent in the pre-*Furman* era.

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[21] *See* Attachment 18, *Tennessee's Death Penalty Lottery*, at 32-71.

> The lack of proportionality and rationality in our selection of the few whom we decide to kill is breathtakingly indifferent to fairness, without justification by any legitimate penological purpose. The death penalty system as it has operated in Tennessee over the past 40 years, and especially over the past ten years, is but a cruel lottery, entrenching the very problems that *Furman* sought to eradicate.

Attachment 18, *Tennessee's Death Penalty Lottery*, at 78-79.

Mr. Abdur'Rahman brings his arbitrariness and evolving standard of decency claims under both the United States Constitution (the Eighth and Fourteenth Amendments) and the Tennessee Constitution (Article I, §§ 8, 13 and 16). While the discussion of these claims mostly revolves around the protection against cruel and unusual punishment afforded by the Eighth Amendment, the Tennessee Constitution ought to provide greater protection against excessive or cruel punishments, for at least three reasons.

First, Tennessee's Declaration of Rights includes two separate provisions prohibiting excessive or unreasonable punishments: the Cruel and Unusual Punishments Clause of Art. I, § 16; and the "Unnecessary Rigor" Clause of Art. I, § 13. Thus, the Tennessee Constitution explicitly provides greater protections for inmates than the Eighth Amendment.

Second, the arbitrary and capricious operation of Tennessee's death penalty system implicates due process under the Law of the Land Clause of Art. I, § 8. *Furman* was decided under the Eighth Amendment Cruel and Unusual Punishments Clause, not under the Due Process Clause.

And third, this Court has long recognized that, "as the final arbiter of the Tennessee Constitution, [it] is always free to expand the minimum level of protection mandated by the federal constitution." *State v. Ferguson*, 2 S.W.3d 912, 916 (Tenn. 1999). *See also*, *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992) ("U.S. Supreme Court interpretations of the due process clauses of the U.S. Constitution only establish a minimum level of protection, and this Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection"); *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988) (same); *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 785-86 (Tenn. 1980) (proclaiming that due process is an "advancing standard"); *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979) ("[A]s to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution." (emphasis added)).

As pointed out above, and as reflected in the *Order Reopening Post-Conviction* (Attachment 15), the Davidson County Criminal Court denied Mr. Abdur'Rahman's motion to reopen his post-conviction case to address his arbitrariness and evolving standard of decency claims; but because the Criminal Court reopened the post-conviction case on the *Foster/Batson* claim, the Criminal Court's Order is not final and is still subject to appeal. In light of the evidence

presented to the Criminal Court, and the updated evidence presented in Attachments 17 and 18 hereto, there should be a likelihood of success on the merits of Mr. Abdur'Rahman's arbitrariness and evolving standard of decency claims within the meaning of Tenn. S. Ct. R. 12.3(A) and (E), either on a request for the Criminal Court to reconsider the claims,[22] or on appeal. For these reasons, this Court should not set an execution date until these claims can be fully addressed by the courts below and, potentially, by this Court.

VII. This Court Should Deny The State's Motion To Set An Execution Date For Mr. Abdur'Rahman Where His Execution Would Violate The Tennessee And United States Constitutions And The Decisions Of This Court As It Is The Product Of A Racially Discriminatory Prosecution, And The Sentence Of Death Is Disproportionate To His Offense.

This Court should deny the State's motion to set an execution date for Abu-Ali Abdur'Rahman, an African American, and exercise its supervisory authority to conduct renewed review of his death sentence. Further review would lead inexorably to the conclusion that Mr. Abdur'Rahman's death sentence is the result of a discriminatory prosecution and is disproportionate under the rubric adopted by this Court subsequent to its decision in Mr. Abdur'Rahman's direct appeal. An execution undertaken without such review, would violate the United States and Tennessee Constitutions, and would be contrary to the decisions of this Court.

A. Mr. Abdur'Rahman's Sentence Is The Result Of Discriminatory Capital Prosecutions By The Davidson County District Attorney General's Office.

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[22] It should be noted that, although the Criminal Court referred to the *September 2016 Petition,* the *Order Reopening Post-Conviction* substantively addressed only the arbitrariness arguments presented in the *June 2016 Motion* without any reference to or analysis of Mr. Miller's report or survey results which are based on evidence not previously available or presented to any court.

In its review of Mr. Abdur'Rahman's sentence, this Court ruled that, "[t]he sentence of death was not imposed in an arbitrary fashion and is not excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the defendant." *State v. Jones*, 789 S.W.2d 545, 553 (Tenn. 1990)." The Court did not consider whether Mr. Abdur'Rahman's death sentence was the result of arbitrary or improper action by the District Attorney, even though the Rule 12 forms filed with the Court, that were the basis of this Court's review, plainly indicate *de facto* discrimination.

Mr. Abdur'Rahman was sentenced to death in Davidson County in 1987, seven years after the adoption of Tennessee's current death-penalty statute. The Rule 12 forms filed with this Court indicated that in the first 12 years of the statute's operation, from 1977 to 1989, the Davidson County District Attorney's office only sought the death penalty against African-American defendants.

- In May 1978, James Looney was the first capital prosecution in Davidson County under the modern death penalty statute. The jury sentenced him to life. Mr. Looney is African-American. Attachment 19 (Looney R. 12).
- In June 1979 the Davidson County District Attorney's Office sought death against Terry Howard and Raymond Jackson. The jury sentenced them to life. Both Mr. Howard and Mr. Jackson are African-American. Attachment 20, 21 (Howard & Jackson R. 12's).

- In 1981, the Davidson County District Attorney's Office sought and obtained a death sentence against Cecil Johnson in connection with a triple homicide. Johnson was African-American.
- In November 1983 the Davidson County District Attorney's Office sought death against Douglas Bell, a 55 year-old Army veteran with no criminal history and cerebral dysfunction and psychiatric disorders, for shooting a police officer in the midst of a domestic dispute. The jury sentenced him to life. Mr. Bell is African-American. Attachment 22 (Bell R. 12).
- In July 1985 the Davidson County District Attorney's Office sought death against Mr. Wright. Mr. Wright is African-American.
- In July 1987, the Davidson County District Attorney's Office sought death against Mr. Abdur'Rahman (formerly known as James Lee Jones, Jr.). for a robbery felony murder. The jury imposed a death sentence. Mr. Abdur'Rahman is African-American. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990). Attachment 23 (Jones R. 12).
- In January 1989, the Davidson County District Attorney's Office sought death against Byron Black. The jury imposed a death sentence. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991). Mr. Black is African-American.

Over the same 12 years, the Rule 12 reports reflect that the Davidson County District Attorney sought only life sentences in first degree murder prosecutions against White defendants. This was true despite several cases involving both aggravated facts and defendants with serious felony records

- Ralph Frantzreb, a former prison guard at the Tennessee Prison for Women, tortured a transsexual woman by pressing a hot iron against her breasts and pouring soap in her mouth while beating and kicking her to death over a six-hour period. He broke seven ribs, her back, and her sternum. After she was dead, he cut off her head, feet, and hands before dumping her body in the Cumberland River. On appeal, while upholding the jury's verdict, the Court of Criminal Appeals declared that Mr. Frantzreb was "a cruel, vicious, mean, and dangerous man." *State v. Frantzreb*, No. C.C.A. 89-136-III, 1990 WL 8074, at *2 (Tenn. Crim. App. Feb. 6, 1990). Mr. Frantzreb is White. Attachment 24 (Frantzreb R. 12).
- Willie Ensley committed aggravated rape upon a woman before stabbing her to death and dumping her naked body by Percy Priest Lake. After upholding the jury's finding that Ensley was guilty of first degree murder and aggravated rape, the Court of Criminal Appeals held that consecutive sentences were proper, in part, because, "[w]hen Brenda Cotton refused to have sexual intercourse with the defendant, he stabbed her and, while she was still alive, he raped her. Upon realizing he could be convicted of rape, the defendant chose to silence his victim by inflicting a second stab wound to her chest." *State v. Ensley*, No. 86-65-III, 1987 WL 8904, at *2 (Tenn. Crim. App. Apr. 7, 1987). Mr. Ensley is White. Attachment 25 (Ensley R. 12).
- Larry Sheffield strangled, stabbed, and slashed the throat of a wheelchair-bound man, while stealing his car. Mr. Sheffield is White. Attachment 26

(Sheffield R. 12). The Court of Criminal Appeals, after approving of the jury verdict, noted that consecutive sentencing was appropriate, because, not only was Sheffield on parole at the time of the murder, but "there was extreme aggravation in this case. . . . [T]he defendant committed the crime to keep the victim from reporting the robbery to the police. The victim was crippled and helpless. The defendant first attempted to choke the victim to death, and when the victim did not die, the defendant proceeded to stab him numerous times." *State v. Sheffield* No. 85-362-III, 1987 WL 6084, at *5 (Tenn. Crim. App. Feb. 6, 1987)

In each of the above cases, multiple aggravating factors that would have justified the death penalty were clearly present; yet in all three cases the defendants were allowed to proceed to trial without facing the threat of execution. It was not until September 1989 that the Davidson County District Attorney's Office sought death against a White defendant. *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

It is significant to note that John Zimmerman prosecuted both Abu-Ali Abdur-Rahman and Charles Wright, who are both African American. Mr. Zimmerman's racial animus is now documented in the newly disclosed letter from District Attorney General Glenn Funk. Attachment 16, Glenn Funk letter to D.A.'s Conference.

Though this Court has avoided "inappropriate invasions into the independent prosecutorial function," *State v. Clayton*, 535 S.W.3d 829, 852 (Tenn. 2017), neither can it set an execution date based on a conviction that is the product of racially

disparate capital sentencing. "[T]his is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 580 U.S. __, 137 S. Ct. 759, 778 (2017).

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. 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.

Buck v. Davis, 580 U.S. __, 137 S. Ct. 759, 778 (2017)

In 1987, Mr. Abdur'Rahman's case was only the third death sentence to come before this Court from Davidson County. At that time, the Rule 12 forms were the basis for this Court's proportionality review mandated by the statute. *See State v. Adkins*, 725 S.W.2d 660, 663 (Tenn. 1987) ("Our proportionality review of death penalty cases since Tennessee Supreme Court Rule 12 [] was promulgated in 1978 has been predicated largely on [Rule 12] reports and has never been limited to the cases that have come before us on appeal."). Thus, the Court reviewed Mr. Abdur'Rahman's conviction and sentence in comparison to *all* first-degree murder convictions. *Compare State v. Bland*, 958 S.W.2d 651 (1997) (establishing the comparative pool for proportionality review as only other cases where a capital sentencing hearing was held).

This means that when the Court reviewed Mr. Abdur'Rahman's sentence, it had amongst its records the Rule 12 forms for the six other African-American defendants against whom the Davidson County District Attorney sought death and the eight White defendants who were not prosecuted capitally. In fact, the Court

should have had 27 Rule 12 reports from Davidson County amongst its records, which collectively indicated that the defendants in 19 of the 27 cases – 70% – where the Davidson County District Attorney sought and obtained a first-degree murder convictions were African-American in a county where less than 20% of the population was African-American. Something was rotten in the state of Davidson, but this Court either failed to recognize or to redress the discriminatory capital prosecution.

This Court cannot fail again. Where Mr. Abdur'Rahman's sentence was a product of a pattern of discriminatory capital prosecution in Davidson County throughout the 1980's, this Court should deny the State's motion, conduct a renewed proportionality analysis, and grant Mr. Abdur'Rahman sentencing relief.

VIII. Conclusion

This Court should deny the motion to expedite execution date to allow the litigation and conclusion of Davidson County Chancery Court proceedings in *Abdur'Rahman et al. v. Parker*, No. 18-183-II. This Court should also deny the motion to set execution date and either reform the death sentence to a life sentence, or otherwise grant Donnie Johnson a new trial and sentencing proceeding.

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 (Tenn. 1995)), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§16-3-503 & 504, *See Burson*, 909 S.W.2d at 772-773, to deny the Attorney General's motion to

set an expedited execution date and instead vacate Mr. Abdur'Rahman's death sentence and modify it to life. *See Ray v. State*, 67 S.W.553 (1901) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673 (1882) (modifying death sentence to life). This Court also has the statutory authority to recommend that the Governor commute Mr. Abdur'Rahman's sentence by issuing a certificate of commutation under Tenn. Code Ann. §40-27-106,[23] order a new sentencing hearing, or recall the post-conviction mandate and grant post-conviction relief.

Respectfully submitted,

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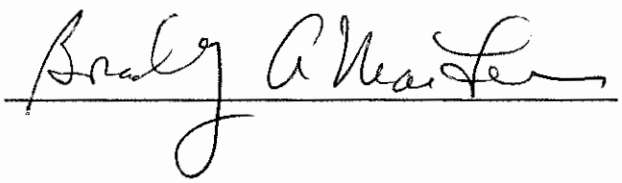
BY: 

[23] *See Green v. State*, 14 S.W. 489 (Tenn. 1889)(recommending commutation),

DESIGNATION OF ATTORNEY OF RECORD

Pursuant to Tenn. S. Ct. R. 12.3(B), Defendant Abdur'Rahman designates the following person as attorney of record upon whom service shall be made:

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Fax: N/A (not available)

Defendant Abdur'Rahman requests that service also be made on co-counsel:

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Supervisory Asst. Federal Public Defender
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Both Mr. MacLean and Ms. Henry prefer to be notified of orders or opinions of the Court by means of email.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2018, a correct copy of the foregoing was served by hand-delivery on:

JENNIFER L. SMITH
Associate Solicitor General
P.O. Box 20207
Nashville, TN 37202
Jennifer.smith@ag.tn.gov

BRADLEY A. MACLEAN

ATTACHMENTS

Attachment 1:	Chronology of Events relevant to State's Motion to Expedite Execution dates
Attachment 2:	September 7, 2017 email between State's drug supplier and the State of Tennessee
Attachment 3:	October 26, 2017 email between State's drug supplier and The Tennessee Department of Correction
Attachment 4:	November 28, 2017 email to Tennessee Department of Correction from one of the drug suppliers with "revisions to the protocol" attached.
Attachment 5:	*First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 152 (D. Ariz. Dec. 19, 2016)
Attachment 6:	*First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017)
Attachment 7:	Chronology of Public Records Requests During Past Six Months
Attachment 8:	October 18, 2017 Email between TDOC and drug supplier
Attachment 9:	Pharmacy Services Agreement
Attachment 10:	Judgment imposing death sentence
Attachment 11:	Federal judgment
Attachment 12:	Bryce Coatney email regarding federal detainer
Attachment 13:	June 2016 Motion
Attachment 14:	September 2016 Petition
Attachment 15:	Order Reopening Post-Conviction Case
Attachment 16:	D.A. Glenn Funk letter to D.A.'s Conference re Zimmermann
Attachment 17:	Miller Report

Attachment 18: *Tennessee's Death Penalty Lottery*

Attachment 19: Rule 12 Report of James Looney

Attachment 20: Rule 12 Report of Terry Howard

Attachment 21: Rule 12 Report of Raymond Jackson

Attachment 22: Rule 12 Report of Douglas Bell

Attachment 23: Rule 12 Report of James Lee Jones (Abu Ali Abdur'Rahman)

Attachment 24: Rule 12 Report of Ralph Frantzreb

Attachment 25: Rule 12 Report of Willie Ensley

Attachment 26: Rule 12 Report of Larry Sheffield

Attachment 1

CHRONOLOGY OF EVENTS RELEVANT TO STATE'S MOTION TO EXPEDITE EXECUTION DATES

Date	Event
9/7/2017	Drug Supplier Emails TDOC stating ""Here is my concern with midazolam, being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium Chloride especially."
9/12/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
10/18/2017	Drug Supplier emails TDOC a list of drugs that they have provided, indicating a June 1, 2018 expiration date, and inquiring about TDOC DEA license.
10/26/2017	Drug Supplier emails first invoice for midazolam.
10/26/2017	Drug Supplier emails TDOC "I will have my pharmacist write up a protocol."
11/1/2017	Drug Supplier emails second invoice for midazolam and signed W-9
11/06/2017	Response to 9/12/2017 TPRA request received. Despite request that response be current as of date of response, TDOC produces documents only up to September 7, 2017. "As has become your practice, you ask for records as of the date of your request, as well as the date of my response. In responding to your request I must request records from multiple sources, and necessarily must include a cut-off date in such requests. Accordingly, I will respond as of the date of your request only. As you are aware, the TPRA does not require that I do more."
11/06/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
11/07/2017	TDOC sends email to drug supplier which asks "Any more product come in?"
11/08/2017	TDOC sends copy of Deberry Special Needs DEA license to Drug Supplier.
11/04/2017	Drug Supplier sends photos of the drugs to TDOC.
11/27/2017	Drug Supplier emails third invoice for midazolam.
11/28/2017	Drug Supplier sends email with attachments "Edited Protocol.pdf" and "TN Agreement –Executed.pdf."
12/4/2017	Pharmacy service agreement signed by Tony Parker; date agreement signed by Drug Supplier is unknown because of redaction.
12/5/2017	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
12/14/2017	Drug Supplier emails fourth invoice for midazolam.
12/21/2017	TDOC legal counsel sends letter to counsel for *Abdur'Rahman, et al.* stating that TDOC will respond to TPRA requests from 11/6/2017 and 12/5/2017 by 01/15/2018.
12/28/2017	Drug Supplier emails fifth invoice for midazolam.
01/08/2018	Petition for Writ of Certiorari in *Abdur'Rahman v. Parker*, No. 17-6068 is denied.

CHRONOLOGY OF EVENTS RELEVANT TO STATE'S MOTION TO EXPEDITE EXECUTION DATES

Date	Event
01/08/2018	TDOC adopts new lethal injection protocol adding the Midazolam Option
1/10/2018	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
1/11/2018	State Attorney General files Notice with the Tennessee Supreme Court regarding the denial of certiorari in *Abdur'Rahman*. No mention of problems with drug supply; no mention of new protocol. Service is by mail. The motions were filed late in the day Thursday. The following Friday state offices and many businesses in Nashville are closed due to inclement weather. The next business day is Tuesday, January 16, 2018 due to Martin Luther King Day.
1/16/2018	Response to 11/06/2017 and 12/05/2017 TPRA requests is received. Despite request that response be current as of date of response, TDOC produces documents only up to December 4, 2017, plus the new protocol containing the Midazolam Option. This is the first notice to any person working on behalf of Tennessee Death Row Inmates that TN had adopted a new lethal injection protocol.
01/18/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski each file notice with the Tennessee Supreme Court of their intent to challenge the new Midazolam Option in Chancery Court and state that such Complaint will be filed in thirty days.
01/18/2018	Tennessee Supreme Court sets August 9, 2018 execution date for Billy Ray Irick.
02/02/2018	Response to 01/10/2018 TPRA request is received. Despite request that response be current as of date of response, TDOC produces documents only up to January 3, 2018. This heavily redacted response did not provide any additional relevant information.
02/02/2018	TPRA Request sent to TDOC by counsel for *Abdur'Rahman, et al.*
02/15/2018	State Attorney General files Motion asking Tennessee Supreme Court to set expedited execution dates for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski. Motion indicates that the State intends to use the Midazolam Option to execute the named inmates.
02/15/2018	Counsel for Abdur'Rahman, Johnson, Hall, Miller, Sutton, Wright, West, and Zagorski file notice with Tennessee Supreme Court that they intend to respond to State's motion for expedited execution dates within 14 days and that they will file Complaint in Chancery Court on February 20, 2018.
02/20/2018	Abdur'Rahman, Johnson, Hall, Irick, Miller, Sutton, Wright, West, and Zagorski and others file 16 count, 92 page complaint in Davidson County Chancery Court challenging the Midazolam Option.

Attachment 2

The places that it is readily available from do they have disclaimer requirements like what [redacted] hit us with on the Pento?

[redacted]

From: [redacted]
Sent: Thursday, September 07, 2017 12:58 PM
To: [redacted]
Subject: RE: Updtae

***** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected e-mail - STS-Security. *****

Hello [redacted]

That stuff is readily available along with potassium chloride. I reviewed several protocols from states that currently use that method. Most have a 3 drug protocol including a paralytic and potassium chloride. Here is my concern with Midazolam. Being a benzodiazepine, it does not elicit strong analgesic effects. The subjects may be able to feel pain from the administration of the second and third drugs. Potassium chloride especially. It may not be a huge concern but can open the door to some scrutiny on your end. Consider the use of an alternative like Ketamine or use in conjunction with an opioid. Availability of the paralytic agent is spotty. Pancuronium, Rocuronium, and Vecuronium are currently unavailable. Succinylcholine is available in limited quantity. I'm currently checking other sources. I'll let you know shortly.

Regards,

<image004.jpg>

Attachment 3

[redacted]

From: [redacted]
Sent: Thursday, October 26, 2017 4:16 PM
To: [redacted]
Subject: Re: Additonal Info

Can you shoot me a W9 so I can get that to fiscal?

Sent from my iPhone

On Oct 26, 2017, at 3:30 PM, [redacted] wrote:

***** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. *****

[redacted]

I will have my pharmacist write up a protocol. All drugs are required to be stored in a secured location at room temperature (between 15 and 30 degrees celcius).

Attached is the current invoice along with our Pharmacy Services Agreement. Please review the agreement and let me know if you have any concerns or questions. We will also need the address along with a copy of the current DEA and pharmacy/state license for the facility where we will be shipping the medication to.

There is another shipment arriving tomorrow with 8 Midazolam and 4 Vecuronium sets on board. I will get you the particulars when it arrives. Thanks Kelly. Let me know if I can be of further assistance.

Regards,

[redacted]

From: [redacted]
Sent: Thursday, October 26, 2017 1:43 PM

Attachment 4

[redacted]

From: [redacted]
Sent: Tuesday, November 28, 2017 12:48 PM
To: [redacted]
Subject:
Attachments: Edited Protocol.pdf; TN Agreement - Executed.pdf

***** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. *****

[redacted]

Attached is the executed agreement and revisions to the protocol. Only one change was noted. Where the potassium chloride is concerned, in order to reach the required dose you need 120ml. Using 50cc syringes would only allow for 100ml necessitating the need for a third syringe with 20ml. You can eliminate the third syringe by using two 60cc syringes in place of the 50cc. One thing to note is that each 10mg Vecuronium vial will need to be reconstituted with 10ml of bacteriostatic water before use, which we will provide. Did you all want us to provide you with the syringes and needles?

[redacted]

Regards,

Attachment 5

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Federal Public Defender, District of Arizona
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Counsel for the Coalition and Condemned Plaintiffs

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(Firm State Bar No. 14000)
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Counsel for Defendants
[additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.; Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James O'Neil, Warden, ASPC–Eyman; Greg Fizer, Warden, ASPC–Florence; and Does 1-10, Unknown ADC Personnel, in their official capacities as Agents of ADC,

Defendants.

Case No. 2:14-cv-01447-NVW-JFM

STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER FOR DISMISSAL OF CLAIM ONE

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, "Plaintiffs,"), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections ("ADC"); James O'Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence (collectively, "Defendants"), hereby stipulate and agree as follows:

WHEREAS, Claim One of Plaintiffs' Second Amendment Complaint ("Claim One") challenges ADC's intended use of lethal injection drug Protocol C that consists of midazolam, which belongs to a class of drugs called benzodiazepines, followed by a paralytic (vecuronium bromide, rocuronium bromide, or pancuronium bromide), and potassium chloride under the Eighth Amendment;

WHEREAS, Defendants contend that ADC's previous supplier of midazolam no longer provides the drug for use in lethal injection executions and that ADC's supply of midazolam expired on May 31, 2016;

WHEREAS, ADC has removed Protocol C, the three-drug combination beginning with midazolam that Plaintiffs' challenge in Claim One, from Department Order 710;

WHEREAS, Defendants hereby represent, covenant, and agree, and Plaintiffs and Defendants (collectively, the "parties") intend, that ADC will never again use midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection execution;

WHEREAS, Plaintiffs contend that they have incurred in excess of $2,080,000 in attorneys' fees and costs in litigating this action;

WHEREAS, the parties agree that, because of the above-described circumstances, resolution of Claim One—without further litigation, without any admission of liability, and without any final adjudication of any issue of fact or law—is appropriate and will avoid prolonged and complicated litigation between the parties;

WHEREAS, the parties intend this stipulated settlement agreement to be enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future prisoners sentenced to death in the State of Arizona ("Condemned Prisoner Beneficiaries"), who are express and intended third-party beneficiaries of this stipulated settlement agreement and who are entitled to all rights and benefits provided to Plaintiffs herein, and who, upon any showing that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in an execution protocol, may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend this stipulated settlement agreement to bind Defendants, ADC, and any of Defendants' successors in their official capacities as representatives of ADC, who, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, will be deemed to have been automatically substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend and agree that, upon any breach of this stipulated settlement agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and (b) an order shall issue permanently enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol;

WHEREAS, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the parties agree that Defendants, ADC, and/or any of Defendants' successors in their official capacities as representatives of ADC waive all objections to this Court's reopening of this proceeding, including on the basis of timing, ripeness, mootness, or the standing of the moving parties;

WHEREAS, in the event that this stipulated settlement agreement is breached through ADC's use or intent to use a benzodiazepine in an execution or in an execution

protocol, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted for reasons related to the moving parties' standing or the Court's jurisdiction, Defendants consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol.

IT IS THEREFORE STIPULATED AND AGREED that:

(1) Claim One of Plaintiffs' Second Amended Complaint is dismissed, without prejudice.

(2) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in an execution protocol, Claim One shall be reinstated and reopened pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties granted herein, an injunction shall issue in this action or in a separate action for breach of the parties' stipulated settlement agreement permanently enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or in an execution protocol.

(3) Plaintiffs agree not to seek their attorneys' fees and costs incurred in litigating Claim One unless Defendants or ADC breach this stipulated settlement agreement, in which case Plaintiffs shall be entitled to seek an award of their reasonable attorneys' fees and costs incurred in litigating Claim One, in an amount to be determined by the Court, either in this action or in a separate action for breach of the parties' stipulated settlement agreement. In that circumstance, Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce this stipulated settlement agreement.

Dated: December 19, 2016

Sidley Austin LLP

s/ *Mark E. Haddad*
Mark E. Haddad
Attorneys for Plaintiffs Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott

Dated: December 19, 2016

Office of the Arizona Attorney General

s/ *Jeffrey L. Sparks*
Jeffrey L. Sparks
David Weinzweig
Lacey Stover Gard
John Pressley Todd

Attorneys for Defendants

I, Mark Haddad, hereby attest that counsel for Defendants, Jeffrey L. Sparks, authorized the use of his signature on, and concurred in the filing of, this document, on December 19, 2016.

s/ *Mark E. Haddad*
Mark E. Haddad

* * *

ORDER

IT IS SO ORDERED.

DATED this ___ day of _____, 2016.

Neil V. Wake
United States District Judge

Attachment 6

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Counsel for Defendants
[additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.; Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James O'Neil, Warden, ASPC–Eyman; Greg Fizer, Warden, ASPC–Florence; and Does 1-10, Unknown ADC Personnel, in their official capacities as Agents of ADC,

Defendants.

Case No. 2:14-cv-01447-NVW-JFM

STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER FOR DISMISSAL OF CLAIMS SIX AND SEVEN

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, "Plaintiffs"), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections ("ADC"); James O'Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence (collectively, "Defendants"), hereby stipulate and agree as follows:

WHEREAS, on December 22, 2016, this Court entered an Order for Dismissal of Claim One (ECF No. 155) based on the December 19, 2016 Stipulated Settlement Agreement (ECF No. 152) between Plaintiffs and Defendants (collectively, the "parties");

WHEREAS, Claim Six and Claim Seven of Plaintiffs' Second Amended Complaint ("SAC") (ECF No. 94) and Plaintiffs' Supplemental Complaint (ECF No. 163) challenge the ADC's reservations of excessive discretion in its execution procedures, and Defendants' past and proposed future exercises of that discretion, including through "last-minute deviations from critical aspects of its announced execution process," May 18, 2016, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss SAC at 13 (ECF No. 117), as violative of the Eighth and Fourteenth Amendments;

WHEREAS, Defendants intend to resolve the deficiencies Plaintiffs allege through their permanent repudiation of certain provisions contained in past versions of the ADC's execution procedures, as set forth herein, and through the adoption of a new set of execution procedures reflecting those changes;

WHEREAS, Defendants' execution procedures have, in the past, stated that "[t]his Department Order outlines internal procedures and does not create any legally enforceable rights or obligations," *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, at p.1 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC will remove from the ADC's current execution procedures the sentence—"[t]his Department Order outlines internal procedures and does not create any legally enforceable rights or obligations"—and that Defendants and the

ADC will never again include such language or substantially similar language in any future version of the ADC's execution procedures (together, "Covenant No. 1");

WHEREAS, Defendants' execution procedures have, in the past, granted the Director of the ADC (the "ADC Director") the discretion to change any of the timeframes set forth in the execution procedures based on the ADC Director's determination that there has been an "unexpected or otherwise unforeseen contingency," *e.g.* Ariz. Dep't of Corr., Dep't Order 710 ¶ 1.1.2.3 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director shall henceforth have the authority to change timeframes relating to the execution process only when those timeframes correspond to minor or routine contingencies not central to the execution process; that timeframes that *are* central to the execution process include, but are not limited to, those relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself; and that Defendants and the ADC will never again include provisions in any version of the ADC's execution procedures that purport to expand the ADC Director's discretion to deviate from timeframes set forth in the execution procedures beyond those relating to minor or routine contingencies not central to the execution process (together, "Covenant No. 2");

WHEREAS, Defendants' execution procedures have, in the past, granted the ADC Director the discretion to change the quantities or types of chemicals to be used in an execution at any time that he determines such a change to be necessary, even after a warrant of execution has been sought, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.6 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director shall henceforth have the authority to change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought only if the Director, the ADC, Defendants, and/or their counsel, (1) notify the

condemned prisoner and his/her counsel of the intended change, (2) withdraw the existing warrant of execution, and (3) apply for a new warrant of execution; and that Defendants and the ADC will never again include provisions in any version of the ADC's execution procedures that permit the ADC Director or the ADC to change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without also withdrawing and applying through counsel for a new warrant of execution (together, "Covenant No. 3");

WHEREAS, Defendants' execution procedures, in the past, have not expressly limited the ADC Director's discretion regarding the use of quantities and types of chemicals to only those quantities and types of chemicals set forth in the ADC's execution procedures;

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director's discretion to choose the quantities and types of chemicals for an execution shall be limited to the quantities and types of chemicals set forth expressly in the then-current execution procedures; that the quantities or types of chemicals that may be used in an execution may be modified only through the formal publication of an amended set of execution procedures; and that any future version of execution procedures will expressly reflect this limitation of discretion (together, "Covenant No. 4");

WHEREAS, Defendants' execution procedures, in the past, have required that, if any compounded chemical is to be used in an execution, the ADC shall obtain it from only a "certified or licensed" compounding pharmacist or compounding pharmacy, but the ADC's most recent version of its execution procedures has removed that limitation in lieu of a requirement that the ADC provide a "qualitative analysis of any compounded or non-compounded chemical to be used in the execution . . . within ten calendar days after the state seeks a Warrant of Execution," *compare* Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 (Oct. 23, 2015), *with* Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC shall provide, upon request and within ten (10) calendar days after the State of Arizona seeks a warrant of execution, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemical; that ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is to be carried out; that, if the chemical's expiration or beyond-use date states only a month and year (*e.g.*, "May 2017"), ADC will not use that chemical after the last day of the month specified; and that all future versions of the ADC's execution procedures shall include these requirements (together, "Covenant No. 5");

WHEREAS, Defendants' execution procedures have, in the past, permitted the use of a three-drug lethal-injection protocol using: (1) a barbiturate or a benzodiazepine as the first drug, (2) a paralytic such as vecuronium bromide, pancuronium bromide, or rocuronium bromide (collectively, "Paralytic") as the second drug, and (3) potassium chloride as the third drug; *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 at Chart C (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC will never again use a Paralytic in an execution; and that Defendants and the ADC consequently will remove their current three-drug lethal-injection protocol from the current and any future version of the ADC's execution procedures (together, "Covenant No. 6");

WHEREAS, Defendants' execution procedures have, in the past, provided for prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.1 (Jan. 11, 2017);

WHEREAS, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC shall remove from the ADC's execution procedures

any provision that purports to permit prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution, and that Defendants and the ADC will never again include any such provision or any substantially similar provision in any future version of the ADC's execution procedures (together, "Covenant No. 7");

WHEREAS, the parties agree that the version of Department Order 710 published on June 13, 2017 fully satisfies Covenant Nos. 1 through 7;

WHEREAS, Plaintiffs contend that they have incurred in excess of $2,350,000 in attorneys' fees and costs in litigating this action since its inception, and have incurred in excess of $280,000 in attorneys' fees and costs in litigating this action since this Court's December 22, 2016, Order dismissing Claim One without prejudice (ECF No. 155);

WHEREAS, the parties agree that, because of the above-described circumstances, resolution of Claim Six and Claim Seven—without further litigation, without any admission of liability, and without any final adjudication of any issue of fact or law—is appropriate and will avoid prolonged and complicated litigation between the parties;

WHEREAS, the parties intend this Stipulated Settlement Agreement to be enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future prisoners sentenced to death in the State of Arizona ("Condemned Prisoner Beneficiaries"), who are express and intended third-party beneficiaries of this Stipulated Settlement Agreement and who are entitled to all rights and benefits provided to Plaintiffs herein, and who, upon any showing that any of the Defendants, any of the Defendants' successors in their official capacities as representatives of the ADC ("Defendants' Successors"), or the ADC has violated or intends to violate any of Covenant Nos. 1 through 7 may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend this Stipulated Settlement Agreement to bind Defendants, the ADC, and Defendants' Successors, who, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of

the Federal Rules of Civil Procedure, will be deemed to have been automatically substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

WHEREAS, the parties intend and agree that, upon any breach of this Stipulated Settlement Agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and (b) an order shall immediately issue permanently enjoining the ADC from violating Covenant Nos. 1-7;

WHEREAS, in the event that any Plaintiff or Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the parties agree that the Defendants, the ADC, and Defendants' Successors waive all objections to this Court's reopening of this proceeding, including on the basis of timing, ripeness, mootness, or the standing of the moving parties;

WHEREAS, in the event that this Stipulated Settlement Agreement is breached through an actual or intended violation of any of Covenant Nos. 1 through 7 by Defendants, Defendants' Successors, or the ADC, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted for reasons related to the moving parties' standing or the Court's jurisdiction, Defendants, Defendants' Successors, and the ADC consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins Defendants, Defendants' Successors, and the ADC from engaging in any conduct that violates any of Covenant Nos. 1 through 7.

IT IS THEREFORE STIPULATED AND AGREED that:

(1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and Supplemental Complaint are dismissed, without prejudice.

(2) The parties do not hereby intend to settle, and Plaintiffs instead expressly

reserve their right to appeal, other claims that were dismissed by the Court's May 18, 2016, Order, including Claims 3, 4, and 5, which challenge various aspects of the ADC's execution procedures on First Amendment grounds.

(3) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that any of the Defendants, any of the Defendants' Successors, or the ADC intend to engage in or have actually engaged in any of the following conduct (together, the "Prohibited Conduct"):

(a) adopt language in any future version of the ADC's execution procedures that purports to disclaim the creation of rights or obligations;

(b) grant the ADC and/or the ADC Director the discretion to deviate from timeframes set forth in the ADC's execution procedures regarding issues that are central to the execution process, which include but are not limited to those relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself;

(c) change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without first notifying the condemned prisoner and his/her counsel of the intended change, withdrawing the existing warrant of execution, and applying for a new warrant of execution;

(d) select for use in an execution any quantity or type of chemical that is not expressly permitted by the then-current, published execution procedures;

(e) fail to provide upon request, within ten (10) calendar days after the State of Arizona seeks a warrant of execution, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemicals;

(f) use or select for use in an execution any chemicals that have an expiration or beyond-use date that is before the date that an execution is to be

carried out; or use or select for use in an execution any chemicals that have an expiration or beyond-use date listed only as a month and year that is before the month in which the execution is to be carried out;

(g) adopt or use any lethal-injection protocol that uses a paralytic (including but not limited to vecuronium bromide, pancuronium bromide, and rocuronium bromide); or

(h) adopt any provision in any future version of the ADC's execution procedures that purports to permit prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution; then

Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties granted herein, an injunction shall immediately issue in this action or in a separate action for breach of this Stipulated Settlement Agreement permanently enjoining Defendants, Defendants' Successors, and the ADC from engaging in any of the Prohibited Conduct.

(4) Plaintiffs agree not to seek their attorneys' fees and costs incurred in litigating Claims Six and Seven unless Defendants, Defendants' Successors, or the ADC breach this Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to an award, either in this action or in a separate action for breach of this Stipulated Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating this action from its inception through the effective date of this Stipulated Settlement Agreement, as determined by the Court after briefing by the parties. In that circumstance,

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Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce this Stipulated Settlement Agreement.

IT IS SO STIPULATED.

Dated: June 21, 2017

Sidley Austin LLP

s/ Mark E. Haddad
Mark E. Haddad

Attorneys for Plaintiffs

Dated: June 21, 2017

Office of the Arizona Attorney General

s/ Jeffrey L. Sparks
Jeffrey L. Sparks

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I electronically filed the foregoing **Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven** by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Barbara Cunningham
Barbara Cunningham
Legal Secretary

Attachment 7

Chronology of Public Records Requests

Request Date	Response Date	Timeframe of Documents Actually Produced
September 12, 2017	November 6, 2017	February 15, 2017- September 7, 2017
November 6, 2017 & December 5, 2017	January 16, 2018	October 17, 2017- December 4, 2018
January 10, 2018	February 2, 2018	October 26, 2017 - January 3, 2018
February 2, 2018	No Response Received	

Attachment 8

[redacted]

From: [redacted]
Sent: Wednesday, October 18, 2017 11:01 AM
To: [redacted]
Subject: Re: Question

I believe we do I will double check on it.

Sent from my iPhone

On Oct 18, 2017, at 10:47 AM, [redacted] wrote:

> Good morning [redacted]
>
> Below is a list of what has been received from our suppliers
>
> Midazolam – 1000mg, Lot: [redacted] EXP: 1June2018
>
> Vecuronium – 200mg, Lot: [redacted] EXP: 12/18
>
> Potassium Chloride – 2000mEq, Lot: [redacted] EXP: 1May2018
>
> I'm working on revising the BAA and agreement. I should have it to you by the end of the day. Do you all have a DEA license?
>
> Regards,
>
> [redacted]
>
>

From: [redacted]
Sent: Wednesday, October 18, 2017 8:33 AM
To: [redacted]
Subject: RE: Question

I got some info re: the test .... Let me know if there is a good time to call and fill you in. thx

Attachment 9

PHARMACY SERVICES AGREEMENT

This PHARMACY SERVICES AGREEMENT ("Agreement") is being made and entered into by and between [redacted] ("Pharmacy") and _____ ("Department") on this 21 day November, 2017, and is being made for the purposes and the consideration herein expressed.

WITNESSETH:

WHEREAS, Pharmacy is [redacted] that provides controlled substance and compounded preparations to practitioners for office use; and

WHEREAS, Department is a State of Tennessee governmental agency that is responsible for carrying out sentences of death by means of lethal injection; and

WHEREAS, Department desires to engage Pharmacy to provide Department with certain controlled substances and/or compounded preparations for lethal injection administration by the Department to those individuals sentenced to death; and

WHEREAS, Pharmacy and Department have agreed to enter into this Agreement setting forth the terms under which Pharmacy will provide certain controlled substances and/or compounded preparations to Department for use in lethal injection.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, Pharmacy and Department hereby agree as follows:

Article 1
SERVICES

1.1 Controlled substance. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested controlled substance. Quantities of the controlled substance shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the controlled substance and is reasonable considering the intended use of the controlled substance and the nature of the services offered by the Department. For controlled substance, Pharmacy shall dispense all drugs in accordance with applicable licensing regulations adopted by the [redacted] and the United States Food and Drug Administration that pertain to pharmacies dispensing controlled substance.

1.2 Compounding Preparations. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested compounded preparation. Quantities of the compounded preparation shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the compounded preparation and is reasonable considering the intended use of the compounded preparation and the nature of the services offered by the Department. For compounded preparations, Pharmacy shall compound all drugs in a clean sterile environment in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In addition, Pharmacy shall compound all drugs in accordance with applicable licensing regulations adopted

by the [redacted] that pertain to pharmacies compounding sterile preparations.

1.3 Limitation on Services. Pharmacy shall only provide controlled substance and compounding preparations that it can prepare to ensure compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In the event Department requests a controlled substance or compounded preparation which Pharmacy is not able to fill, Pharmacy shall notify Department.

1.4 Recalls. In the event that Pharmacy determines that a recall for any controlled substance or compounded preparation provided hereunder is warranted Pharmacy shall immediately notify Department of the medication and/or preparations subject to the recall. Pharmacy shall instruct Department as how to dispose of the medication or preparation, or may elect to retrieve the medication or preparation from Department. Pharmacy shall further instruct Department of any measures that need to be taken with respect to the recalled medication or preparation.

Article 2
OBLIGATIONS OF DEPARTMENT

2.1 Written Requests. All requests for controlled substances and compounded preparations must be in writing and sent to Pharmacy via electronic mail or facsimile. The following shall appear on all requests:

A. Date of request;
B. FOR COMPOUNDED PREPARATIONS ONLY: Name, address, and phone number of the practitioner requesting the preparation;
C. Name, strength, and quantity of the medication or preparation ordered; and
D. Whether the request needs to be filled on a STAT basis.

2.2 Use of Controlled Substance and Compounded Preparations. Department agrees and acknowledges that all controlled substance and compounded preparations provided by Pharmacy may only be used by Department in carrying out a sentence of death by lethal injection and may not be dispensed or sold to any other person or entity. Department assumes full responsibility for administering any controlled substance or compounded preparations.

2.3 Recordkeeping. Department agrees to maintain records of the lot number and beyond-use date of a controlled substance or compounded preparation to be administered or administered by Department that was prepared by Pharmacy. Department agrees to maintain inventory control and other recordkeeping as may be required by applicable federal and state laws and regulations.

Article 3
TERM AND TERMINATION

3.1 Term. The Effective Date of this Agreement shall be the date first specified above. The term of this Agreement shall be for a period of one (1) year unless sooner terminated by either party pursuant to the terms and provisions hereof. If this Agreement is not terminated by either party prior to the anniversary date of this Agreement or any renewal term, this Agreement shall automatically renew for an additional one (1) year term.

3.2 Termination.

A. Either party to this Agreement may terminate this Agreement, with or without cause, by providing the other party sixty (60) days prior written notice of said termination.

B. Pharmacy may immediately terminate this Agreement in the event of any of the following:

1. Department ceases to provide professional services for any reason.

2. Department's professional license is revoked, terminated, or suspended.

3. Department declares bankruptcy.

4. Department fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

C. Department may immediately terminate this Agreement in the event of any of the following:

1. Pharmacy's professional license is revoked, terminated, or suspended.

2. Pharmacy is excluded or debarred from participation in the Medicare and/or Medicaid programs for any reason.

3. Pharmacy declares bankruptcy.

4. Pharmacy fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

Article 4
REPRESENTATION

4.1 Representation by TN Attorney General. The Tennessee Attorney General's Office will represent or provide representation to Pharmacy in any civil lawsuit filed against Pharmacy for its acts or omissions arising out of and within the scope and course of this agreement except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain. Any civil judgment leveled against Pharmacy arising out it's acts or omissions pursuant to this agreement will be reimbursed by the State in accordance with the terms of T.C.A. § 9-8-112. The Attorney General's Office will advocate before the Board of Claims for full payment of any judgment against Pharmacy arising out of a civil lawsuit in which the Attorney General's Office represents or provides representation to Pharmacy.

Article 5
Miscellaneous

5.1 Amendment. This Agreement may be amended only by mutual agreement and reduced to writing and signed by both parties hereto.

5.2 Payment. Pharmacy agrees to submit invoices within thirty (30) days after rendering services and/or providing controlled substances or compounded preparations to: TDOC Fiscal Director, Rachel Jackson Building, 6th Floor, 320 6th Avenue North, Nashville, Tennessee, 37243. Department agrees to pay an annual fee to Pharmacy in the amount of $5,000.00 (five thousand dollars).

5.3 Captions. Any caption or heading contained in this Agreement is for convenience only and shall not be construed as either broadening or limiting the content of this Agreement.

5.4 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter herein.

5.5 Controlling Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The parties hereto expressly agree that this Agreement is executed and shall be performed in Davidson County, Tennessee, and venue of all disputes, claims and lawsuits arising hereunder shall lie in Davidson County, Tennessee.

5.6 Severability. The sections, paragraphs and individual provisions contained in this Agreement shall be considered severable from the remainder of this Agreement and in the event that any section, paragraph or other provision should be determined to be unenforceable as written for any reason, such determination shall not adversely affect the remainder of the sections, paragraphs or other provisions of this Agreement. It is agreed further, that in the event any section, paragraph or other provision is determined to be unenforceable, the parties shall use their best efforts to reach agreement on an amendment to the Agreement to supersede such severed section, paragraph or provision.

5.7 Notice. Any notices under this Agreement shall be hand-delivered or mailed by certified mail, return receipt requested to the parties at the addresses set forth on the signature page of this Agreement, or such other addresses as the parties may designate to the other in writing from time to time.

5.8 Agreement Subject to State and Federal Law. The parties recognize that this Agreement, at all times, is subject to applicable state, local and federal laws including, but not limited to, the Social Security Act and the rules, regulations and policies adopted thereunder and adopted by the [redacted] as well as the public health and safety provisions of state laws and regulations. The parties further recognize that this Agreement shall be subject to amendments of such laws and regulations, and to new legislation. Any such provisions of law that invalidate, or otherwise are inconsistent with the terms of this Agreement, or that would cause one or both of the parties to be in violation of the laws, shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of applicable laws and regulations.

5.9 Compliance With All Applicable Laws. The parties hereto hereby acknowledge and agree that each party shall comply with all applicable rules regulations, laws and statutes including, but not limited to, any rules and regulations adopted in accordance with and the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The parties hereby specifically agree to comply with all privacy and security rules, regulations and provisions of HIPAA and to execute any required agreements required by all HIPAA Security Regulations and HIPAA Privacy Regulations whether presently in existence or adopted in the future, and which are mutually agreed upon by the parties. In addition, in the event the legal counsel of either party, in its reasonable opinion, determines that this Agreement or any material provision of this Agreement violates any federal or state law, rule or regulation, the parties shall negotiate in good faith to amend this Agreement or the relevant provision thereof to remedy such violation in a manner that will not be inconsistent with the intent of the parties or such provision. If the parties cannot reach an agreement on such amendment, however, then either party may terminate this Agreement immediately. This section shall survive the termination of this Agreement.

5.10 Referral Policy. Nothing contained in this Agreement shall require, directly or indirectly, explicitly or implicitly, either party to refer or direct any patients to the other party.

5.11 Assignment. This Agreement is not assignable without the other party's prior written consent.

5.12 Independent Contractor Status. In performing their responsibilities pursuant to this Agreement, it is understood and agreed that Pharmacy and its pharmacists and other professionals are at all times acting as independent contractors and that the parties to this Agreement are not partners, joint-venturers, or employees of one another.

5.13 Non-Waiver. No waiver by one of the parties hereto of any failure by the other party to keep or perform any provision, covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other provision, covenant or condition.

5.14 Counterparts/Execution. This document may be executed in multiple counterparts, each of which when taken together shall constitute but one and the same instrument. In addition, this Agreement may be executed by facsimile or electronic signature, which shall constitute an original signature.

5.15 No Third-Party Beneficiaries. No provision of this Agreement is intended to benefit any third party, nor shall any person or entity not a party to this Agreement have any right to seek to enforce or recover any right or remedy with respect hereto.

5.16 Confidentiality. Both parties agree to keep this Agreement and its contents confidential and not disclose this Agreement or its contents to any third party, other than its attorneys, accountants, or other engaged third parties, unless required by law, without the written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto caused their authorized representatives to execute this Agreement as of the date first set forth above.

[redacted]

By: [redacted]

Name: [redacted]

Title: [redacted]

Date: [redacted]

Address: [redacted]

By: Tony Parker

Name: Tony Parker

Title: TDOC Commissioner

Date: 12/4/17

Address: 320 6th Ave. North, 6th Floor
Nashville, TN 37243

Attachment 10

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE 117262

DIVISION 5th

STATE OF TENNESSEE
vs.
James Lee Jones, Jr.
Defendant

Case # 87W417 Count 1 88

Indicted Charge Murder 1st degree

DATE OF BIRTH Oct. 15, 1950
RACE B. SEX M SSN 203-42-7462

Convicted Offense Murder 1st degree

JUDGMENT
(Strike all except applicable portions)

Come the District Attorney General for the State and the defendant with counsel of record, the Honorable Lionel Barrett & Sumpter Camp for entry of judgment.

On the 15th day of July, 1987, the defendant having ~~(pled guilty)~~ or (been found guilty) (by jury verdict) ~~or (bench trial) or (entered a plea of nolo contendere) (is)~~ (of) the offense of Murder 1st degree committed on (date) Feb. 17, 1986 the defendant is convicted of Murder 1st degree which (is) ~~(were)~~ a felony.

After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 35, all of which are incorporated by reference herein, the Court's findings and rulings are:

1. The defendant shall pay a fine of $ 0
2. The sentence imposed is: ~~(life imprisonment) or (___ years) or (___ months) and/or (___ days).~~ Death Penalty
3. The place of confinement is the ~~(local jail) or (local workhouse) or (regional workhouse (if available))~~ or (Department of Correction).
4. ~~The defendant is (a standard offender, Range I) or (a mitigated offender, Range I) or (a persistent offender, Range II) or (sentenced for an especially aggravated offense, Range II) or (a persistent offender and is sentenced for an especially aggravated offense, Range II).~~
5. The offense (is) ~~or (is not)~~ a Class X Felony.
6. This sentence shall be served ~~(concurrently with) or~~ (consecutively to) sentences in the following (cases) ~~and/or (counts)~~ the defendant's federal sentence No. CR 57-72-R
7. Restitution is ordered as follows: 0
8. The defendant shall be continuously confined in the ~~(local jail) or (local workhouse) or (regional workhouse (if available))~~ or (Department of Correction).

***** OR *****

~~The defendant shall be continuously confined in the (local jail) or (local workhouse) for a period of ___ (years, months or days), followed by probation for a period of ___ (years, months or days). The conditions of probation are enumerated in the attached supplemental order.~~

***** OR *****

~~The defendant shall be periodically confined in the (local jail) or (local workhouse) as follows: (specify total time in periodic confinement and days or parts of days the defendant is to be confined) ___, followed by probation for a period of ___ (years, months or days). The conditions of probation are enumerated in the attached supplemental order.~~

***** OR *****

~~The defendant is granted immediate probation for a period of ___ (years, months or days). The conditions of probation are enumerated in the attached supplemental order.~~

9. ~~The percentage of this sentence which must be served in the (jail) or (workhouse) or (regional workhouse) before the defendant is eligible for Release Classification Status is ___.~~
10. ~~The defendant is allowed jail credit of ___ days on this sentence for in-custody dates of ___.~~
11. ~~The defendant (is) of (is not)~~ rendered infamous.
12. The costs of this cause shall be paid by the defendant

DATE Sept. 18, 1987

JUDGE (Signature)

TOTAL COURT COSTS: $ ___

Walter C. Kurtz
(Print or Type Judge's Name)

OTHER LOCAL INFORMATION

Attachment 11

JUDGMENT AND COMMITMENT (Rev. 2-63)

MARSHAL'S RETURN FILED. 25a

United States District Court

FOR THE
EASTERN DISTRICT OF VIRGINIA-Richmond DIVISION

OCT 13 1972
CLERK, U. S. DIST. COURT

FILED
SEP 11 1972
CLERK, U. S. DIST. COURT
RICHMOND, VA.

United States of America

v.

JAMES LEE JONES, JR.

No. CR 57-72-R

On this 11th day of September 19 72 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of not guilty of the crime of First Degree Murder as charged in Count 1 of the indictment and a ~~has been convicted of the offense~~ of verdict of guilty of the lesser included offense of Second Degree Murder; and a verdict of guilty of the offense of conveyance of contraband within a Federal penal and correctional institution, in violation of 18 U.S.C., Section 1792 as charged in Count 2 of the indictment.

RECEIVED
U.S. MARSHAL'S OFFICE
OCT 13 8 38 AM '72
RICHMOND, VIRGINIA

~~as charged~~

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Life, pursuant to 18 U.S.C., Section 4208(a)(2) for the offense of Second Degree Murder; and imprisonment for a period of TEN(10)YEARS, pursuant to 18 U.S.C., Section 4208(a)(2), on Count 2 of the indictment.

IT IS ADJUDGED that the period of confinement imposed on Count 2 is to run concurrently with the period of confinement imposed for the offense of Second Degree Murder.

A TRUE COPY, TESTE
CLERK, U.S. DISTRICT COURT
BY: Fredie C. George
DEPUTY CLERK

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge.
ROBERT R. MERHIGE, JR.

The Court recommends commitment to

institution wherein defendant may receive psychiatric treatment.

E. FARLEY POWERS, JR.
Clerk.

A True Copy. Certified this day of SEP 11 1972

(Signed) E. Farley Powers, Jr.
Clerk.

(By) Fredie C. George
Deputy Clerk.

000802

Attachment 12

From: **Bryce Coatney** Bryce.Coatney@tn.gov
Subject: RE: Abu Ali Abdur'Rahman, aka James Lee Jones, Jr., TOMIS # 117262
Date: January 10, 2018 at 2:50 PM
To: **Bradley MacLean** brad.maclean9@gmail.com

Brad,

A federal detainer was lodged as of 7-20-1987, out of the US Marshall's office in Nashville for parole violation. It appears in TOMIS as still outstanding.

From: Bradley MacLean [mailto:brad.maclean9@gmail.com]
Sent: Wednesday, January 10, 2018 2:08 PM
To: Bryce Coatney
Subject: Abu Ali Abdur'Rahman, aka James Lee Jones, Jr., TOMIS # 117262

Bryce,

When Abu Ali was arrested in February 1986 and sentenced in 1987, he was on parole in the federal system. His federal case was United States v. James Lee Jones, Jr., No. CR 57-72-R, Eastern District of Virginia - Richmond Division.

I understand that after he was arrested, a federal detainer warrant for parole violation was issued in March 1986.

Could you please let me know how I can find out whether that detainer warrant was lodged with TDOC, and whether it is still outstanding?

Thanks,

Bradley A. MacLean
1702 Villa Place
Nashville, TN 37212
(615) 943-8716

Attachment 13

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN	)	
	)	
Petitioner	)	
	)	No. 87-W-417
vs.	)	
	)	
STATE OF TENNESSEE	)	
	)	
Respondent	)	

MOTION TO REOPEN POST-CONVICTION PETITION

Pursuant to Tenn. Code Ann. § 40-30-117, the Sixth, Eighth, and Fourteenth Amendments, and the Tennessee Constitution, Petitioner Abu-Ali Abdur'Rahman moves this Court to reopen his post-conviction proceedings, order a hearing, and grant him post-conviction relief because his conviction and death sentence violate the Sixth, Eighth and Fourteenth Amendments and Article I §§ 8 & 16 of the Tennessee Constitution.

This Court should reopen proceedings and grant relief in light of three recent United States Supreme developments: (1) Foster v. Chatman, 578 U.S. ____ (2016); (2) Obergefell v. Hodges, 576 U.S. ____ (2015); and (3) Glossip v. Gross, 576 U.S. ____ (2015)(Breyer, J., dissenting):

> (1) In Foster v. Chatman, 578 U.S. ____ (2016), the Supreme Court has just held that in state post-conviction proceedings, the prosecution's striking of an African-American prospective juror violates the Fourteenth Amendment if the strike was "motivated in substantial part by discriminatory intent." Foster, 578 U.S. at ____ (slip op. at 23). *Foster* establishes a new rule of law that is retroactive to Abdur'Rahman's case and entitles him to relief, where the prosecution's strikes against African-American jurors Thomas and Baker – who were struck because of race and for reasons that were equally applicable to White jurors who were not struck. Applying *Foster*, Abdur' Rahman is entitled to a new trial;
>
> (2) In Obergefell v. Hodges, 576 U.S. ____ (2015), the Supreme Court has held that the state may not deny an individual basic human dignity and any fundamental right – which includes the fundamental right to life.

Obergefell is new and retroactive, and therefore the death sentence is unconstitutional, because it violates Abu-Ali Abdur'Rahman's fundamental right to life; and

(3) As recently explained by Justice Breyer, the imposition of the death penalty is cruel and unusual and violates the Eighth Amendment: It is unreliable, arbitrary, sought to be carried out after an unconscionably long delay (in this case, nearly 30 years), serves no legitimate penological objective and/or is not narrowly tailored and the least restrictive means of serving any such interest, and is unusual or rare. Glossip v. Gross, 576 U.S. ____ (2015) (Breyer, J., dissenting).

Under Tenn. Code Ann. §40-30-117, a motion to reopen is proper when it involves the application of a new, retroactive rule of constitutional law. That is precisely the case with *Foster*, *Obergefell*, and *Glossip*. As in Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), this Court may recognize in this proceeding Abdur'Rahman's fundamental Eighth and Fourteenth Amendment rights as expressed in *Foster*, *Obergefell*, and Justice Breyer's dissent in *Glossip*, declare such rights to be new law that is retroactive, and thus permit a motion to reopen under §40-30-117. See also Montgomery v. Louisiana, 577 U.S. ____ (2016)(requiring retroactive application of substantive rules in post-conviction proceedings).

This Court should therefore grant Abu-Ali Abdur'Rahman's motion to reopen, reopen his post-conviction proceedings, grant him an evidentiary hearing, and conclude that his conviction and death sentence violated the Eighth and Fourteenth Amendments, and Article I §§ 8 & 16 of the Tennessee Constitution.

I.
Under Foster v. Chatman, 578 U.S. ____ (2016), Abdur'Rahman Has Meritorious Challenges To The Prosecution's Unconstitutional Peremptory Strikes, *Foster* Is Retroactive In Post-Conviction Proceedings, And Abdur'Rahman Is Entitled To Relief

In Foster v. Chatman, 578 U.S. ____ (2016), the United States Supreme Court has

held, in a post-conviction proceeding, that a post-conviction petitioner is entitled to a new trial if the prosecution struck an African-American or other minority juror and that strike was "motivated in substantial part by discriminatory intent." Foster, 578 U.S. at ____, slip op. at 23. Exactly as in *Foster*, Abu-Ali Abdur'Rahman is entitled to relief here, because he, too, shows that the prosecution's peremptory strikes were motivated in substantial part by discriminatory intent.

A.

Foster Is A Post-Conviction Case In Which The Supreme Court Has Held That A Post-Conviction Petitioner Must Be Granted Relief If A Prosecutor's Peremptory Strike Was "Motivated In Substantial Part By Discriminatory Intent" And Foster And Abdur'Rahman Are Identically Situated

Foster has held that a petitioner is entitled to relief if a prosecutor has used a peremptory strike that was "motivated in substantial part by discriminatory intent." That test was first stated by the Supreme Court in Snyder v. Louisiana, 552 U.S. 472, 485 (2008),which was a case reviewed by the Supreme Court on direct appeal. **Because *Foster* is a post-conviction case, however, the United States Supreme Court's granting relief in *Foster* makes it eminently clear that the *Foster/Snyder* test applies with full force and retroactively in post-conviction cases which include both *Foster* and Abdur'Rahman's case.**

In fact, Foster and Abdur'Rahman are identical cases. An African-American, Foster was convicted in 1987 for a capital offense that occurred in Georgia in 1986. See Foster v. State, 258 Ga. 736, 374 S.E.2d 188 (1988). Exactly like Foster, Abu-Ali Abdur'Rahman is an African-American who was convicted in 1987 for an 1986 offense. In addition, before Foster and Abdur'Rahman obtained access to the prosecution's jury selection notes during post-conviction proceedings, both Foster and Abdur'Rahman raised on direct appeal

challenges to the prosecution's use of peremptory strikes against African-American jurors. Without those notes to show that the prosecution's claimed reasons for striking the jurors was simply not true but racially motivated, both Foster and Abdur'Rahman could not prove a *Batson* violation on direct appeal. Compare Foster, 258 Ga. at 737-739 (denying relief under *Batson*) *with* State v. Jones, 789 S.W.2d 545, 548-549 (Tenn. 1990)(denying relief under *Batson*).

As shown in *Foster*, however, after the direct appeal, Foster finally obtained the prosecution's jury selection notes, which prove that the prosecution's peremptory strikes against African-Americans were indeed "motivated in substantial part by discriminatory intent," as the Supreme Court has now held. Foster, 578 U.S. at ____, slip op. at 23. And just like Foster, after direct appeal, Abdur'Rahman obtained the prosecution's notes in this case which, as shown *infra*, establish that the prosecution's peremptory strikes in this case were "motivated in substantial part by discriminatory intent." Id.

In other words, just as the United States Supreme Court has granted relief in the post-conviction case of *Foster*, this Court is compelled to reopen Abdur'Rahman's post-conviction petition and grant Abdur'Rahman post-conviction relief – where his case is identical to Foster's, and where Abdur'Rahman establishes that the prosecution's peremptory strikes were indeed "motivated in substantial part by discriminatory intent."

B.
Like Foster, Abdur'Rahman Establishes That The Prosecution's Strikes Against Jurors Robert Thomas And Sharon Baker Were Motivated In Substantial Part By Discriminatory Intent

Here, the prosecution peremptorily struck two African-American jurors – Robert Thomas and Sharon Baker – with strikes that were "motivated in substantial part by

discriminatory intent." Foster, 578 U.S. at ____, slip op. at 23. That discriminatory motive becomes clear when, as in *Foster*, one examines the strikes in light of the prosecution's own notes about the jurors – which proves that the prosecution's strikes were indeed motivated by race or proxies for race, which were not applied to strike similarly-situated White jurors. Abdur'Rahman is therefore entitled to relief under *Foster*.

Foster provides that to determine whether the prosecution had discriminatory intent in striking a particular juror, a reviewing court must undertake several steps. First, a court must examine the reasons the prosecution articulated to the trial court for striking the juror. Foster, 578 U.S. at ____, slip op. at 12. Yet even if those reasons "[o]n their face . . . seem reasonable enough," a court must conduct an "independent examination of the record" to determine the prosecution's true motivation. Id. Where "An examination of the record . . . convinces us that many of the[] justifications" proffered by the prosecution at trial "cannot be credited," the strike is unconstitutional. Id., slip op. at 17.

In conducting its review, a reviewing court must examine both the prosecutor's actual notes and the prosecution's actions during *voir dire* to assess whether the prosecution's articulated reasons are: (a) "false," (b) "contrary to the prosecution's submissions" to the trial court, (c) "contradicted by the record," (d) "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [a peremptorily-struck African-American] an unattractive juror," or (e) otherwise create "serious doubts about the prosecution's account of the strike." Id., slip op. at 14-16, 21. See also Id., 578 U.S. at ____, slip op. at 19 (white juror not struck for reasons articulated for striking African-American juror). In fact, disparate treatment of white jurors *vis-a-vis* African-American jurors provides "compelling" evidence of intentional discrimination.

Id., 578 U.S. at ____, slip op. at 23.

Just as the strikes in *Foster* were substantially motivated by discriminatory intent, so, too, were the prosecution's strikes of African-American jurors in Abdur'Rahman's case. When one applies the very same standards and analysis undertaking by the United States Supreme Court in *Foster*, Abdur'Rahman is entitled to relief, just like Foster.

1.
The Prosecution's Strike Of Juror Robert Thomas
Was Motivated In Substantial Part By Discriminatory Intent

Prospective juror Robert Thomas is the first African-American juror whose strike was motivated in substantial part by racial animus. This becomes obvious when, as in *Foster*, one examines the prosecution's articulated reasons and compares them with the truth derived from the record and the prosecution's own notes. As in *Foster*, it becomes eminently clear that the prosecution articulated reasons that were false, misleading, and simply untrue to mask the prosecution's discriminatory intent in striking Thomas.

As an initial matter, it is worth noting that in the trial court, reasons for the prosecution's peremptory strikes were offered by Assistant District Attorney John Zimmerman, who has already been found to have acted improperly and/or unethically in this and other cases.[1] Zimmerman's misconduct in this case and willingness to violate

[1] For instance, the Tennessee Supreme Court previously found some of Zimmerman's actions in this case to be improper and bordering on deception. State v. Jones, 789 S.W.2d at 552. Zimmerman also withheld evidence in this case. See
Justice Birch himself recognized that "the evidence of prosecutorial misconduct alleged by Abdur'Rahman is strong. . . ." State v. Abdur'Rahman, No. M1988-00026-SC-DPE-PD (Tenn. Jan. 15, 2002)(Birch, J., dissenting). Zimmerman violated *Brady* in another first-degree murder case (Garrett v. State, 2001 Tenn.Crim.App.Lexis 206 (2001)), was once held in contempt failing to disclose evidence (In Re Zimmerman, 1986 WL 8586 (Tenn.Cr.App. 1986)), and sanctioned for unethical conduct. Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989).

ethical or legal precepts confirm that the prosecution's trike of Robert Thomas was indeed "motivated in substantial part by discriminatory intent" as required by *Foster*.

With regard to the strike of Juror Thomas, Zimmerman immediately provided the court the following reasons as the primary reasons why Thomas was struck. Thomas was struck, he explained, because Thomas: (a) appeared uneducated; (b) was slow like another white juror the prosecution didn't want on the jury; (c) was not communicative; and (d) had a reduced intellect. But for the seriousness of this matter, it quite clearly appears that ***Zimmerman's reasons were nothing but the articulation of false, racist stereotyping of the African-American Thomas as an ignorant, stupid, inarticulate person because he was Black.***

In reality, Thomas was anything but uneducated, slow, uncommunicative, or a person of reduced intellect. The record – including the prosecution's own notes of jury selection – proves that Zimmerman was lying about his motivations, which proves that, as in *Foster*, Thomas was indeed struck in substantial part because of the prosecution's racist motivations.

Zimmerman's racist justifications which he set forth when asked the reasons for striking Thomas were as follows. Zimmerman initially claimed to the trial judge: "Mr. Thomas had given us the appearance that he was an uneducated, not very communicative individual." Tr. 1239. Zimmerman continued to try to justify the removal of Mr. Thomas by equating Mr. Thomas' alleged mental disabilities with those of a white prospective juror, Harding, who had described himself as "a slow learner" and a "slow intellectual individual." Tr. 1239. Zimmerman further contended that "General Bernard and I expressed concern over Mr. Thomas and Mr. Harding." Tr. 1240. Zimmerman claimed that Thomas lacked the

ability to communicate and lacked intelligence. "We wanted both of those individuals off the jury because of their significantly reduced ability to communicate, articulate and . . . reduction in intellect." As Zimmerman claimed, Thomas was "less in the communicative type skills and the intellect skills." Tr. 1241.

As in *Foster*, we know that these justifications merely hid the prosecution's illicit racial motivations, because each of these justifications are demonstrably "false" and contradicted by the prosecution's now-available notes from jury selection. Compare Foster, 578 U.S. at ____, slip op. at 14-23.

Abdur'Rahman deconstructs each of these untrue statements which the prosecution proffered to the trial court, but were nothing more than cloaked racism:

> **Thomas Was Not Uneducated, As Zimmerman Claimed Through His Racist Stereotyping Of Robert Thomas**: It was easy for Zimmerman to equate the African-American Thomas as "appearing" uneducated and ignorant. Of course, that is a typical stereotype of an African-American: Ignorant and uneducated. Yet Zimmerman's racist stereotype isn't true (which is the fundamental problem with the prosecution's racist stereotyping of Robert Thomas). Mr. Thomas *is* educated. He graduated from high school, attended college, and was ordained as a minister of the gospel. He even pastored churches – not bad for the ignorant Black man Zimmerman claimed Mr. Thomas to be. See Exhibit 1 (Affidavit of Rev. Robert Thomas). And it's not simply that Zimmerman claimed that Thomas *was* uneducated. *He* simply *looked* uneducated to the prosecution. What could be more racist? And if Zimmerman was really concerned about Thomas' education, why

didn't he simply ask Thomas about his education? The answer is obvious: Zimmerman and the prosecution were not in the least concerned about Thomas' education. His supposed lack of education was a smokescreen and pretext for racism. Indeed, any prosecutor truly concerned about a person's education would simply ask. By failing to ask, the prosecution showed that this primary reason for striking Thomas was pretextual and race-based.

Thomas Was Not Uncommunicative: Zimmerman also lied about Robert Thomas being uncommunicative. In fact, the prosecution's own notes glow about how Thomas "[h]ad good answers" during *voir dire* and "During general *voir dire* he seemed to respond well to Lionel [defense counsel] and to us." Exhibit 2, p. 7 (excerpts of prosecution's *voir dire* notes). Mr. Thomas' having "good answers" during *voir dire* directly contradicts Zimmerman's claim that Thomas was uncommunicative. In fact, the prosecution's notes make clear that Thomas was articulate and "seemed to respond well" to the prosecutors themselves. Thomas was a church pastor and teacher. Uncommunicative? Zimmerman's claim was ludicrous and race-based.

Thomas Was Not A Slow Learner Or Of Slow Intellectual Ability Like White Juror Harding: The prosecution's notes again prove Zimmerman's lies when he equated Thomas with the "slow" white juror Harding. *Nothing in the prosecution's notes about Thomas indicates in any way that Thomas was intellectually "slow."* See Exhibit 2, p. 7. And, in fact, in their notes, the prosecution was clear to identify jurors which they deemed to be "slow." In the prosecution's notes, Geneva Steele was said to "have a

hard time expressing herself" (Id., p. 1), George Harding was described as "not very smart" (Id., p. 5), Barbara McCrary was said to be in "over her head" (Id. p. 6), and Dudley Sorrells was noted as being "not very smart" and "maybe a little slow." Id., pp. 11, 14. **Yet nowhere did the prosecution in its notes describe Robert Thomas as "slow."** The reason for this (again) is obvious. Thomas *wasn't* slow, and the prosecution didn't think he was "slow." But Zimmerman tried to claim that Thomas was "slow" to try to justify his strike. The trouble with his explanation is: Neither the truth nor the prosecutor's notes shows that Thomas is slow. Thomas' "slowness" was but another pretext and proxy for racism.

In Fact, The Prosecution Allowed A "Dumb" And "Not Real Smart" White Juror To Serve, While Striking Thomas: The falsity of the prosecution's justifications is also apparent when one sees that the prosecutor actually seated a White Juror – Swarner – whom the prosecution in its notes described as "dumb," "not real smart" and a "rough old boy." Exthibit 2, p. 12. This likewise proves that striking Thomas for allegedly being "slow" was a pretext for racism, for indeed, the prosecution was content to leave a "dumb" and "not real smart" white juror to sit in judgment.

Thomas Did Not Have A Reduced Ability To Communicate, To Articulate Or A Reduced Intellect: As already noted, the truth is that Robert Thomas was neither uncommunicative nor inarticulate. And again, the prosecution's notes prove the racism flowing from these supposed reasons for striking Thomas. In fact, the prosecution's notes recount the deeply

philosophical and moral position articulated by Thomas about the death penalty. According to the prosecution's notes, Thomas' position about capital punishment was intellectually quite deep, philosophical, and nuanced: "*A person should not take a life [because he] has taken something he can not give . . . .*" Exhibit 2, p. 7 (prosecution notes quoting Robert Thomas). Thomas' statement sounds like something one might articulate in a class or talk about theology or philosophy (which is what one might expect from a minister like Thomas). A reduced intellect? Far from it. The reasons articulated by the prosecution were racist to the core, belied by the prosecution's own notes.

At bottom, therefore, Abu-Ali Abdur'Rahman's case is indeed identical to *Foster*. Thomas was unconstitutionally struck and Abdur'Rahman is therefore entitled to relief because an "independent examination of the record . . . reveals that much of the reasoning provided by [Zimmerman] has no grounding fact." Foster, 578 U.S. at ____, slip op. at 12. "[M]any of these justifications cannot be credited." Id., 578 U.S. at ____, slip op. at 17. And they clearly mask racist stereotypes.

Indeed, completely contrary to the prosecution's assertions, Thomas *was not* uneducated. Exactly as in *Foster*, "That was not true." Id., 578 U.S. at ____, slip op. at 21. Thomas was not ever asked about his education. Thomas *was not* uncommunicative, as the prosecution's own notes prove. Exactly as in *Foster*, "That was not true" either. Id. Thomas *was not* like juror Harding, and the prosecution never described the college-educated Thomas as "slow." Exactly as in *Foster*, "That was not true." Id. The prosecution allowed a "dumb" white juror (Swarner) to serve, further proving the racist pretext here. Id., 578 U.S.

at ____, slip op. at 15-16. Exactly as in *Foster*, "The comparison between [Thomas] and [Swarner] is particularly salient," because if the prosecution didn't want unintelligent jurors to serve, it would have struck the intellectually limited Swarner (not the educated Thomas), "[y]et the State struck [Thomas] and accepted [Swarner]." Id., 578 U.S. at ____, slip op. at 19. And Thomas *was not* intellectually dull: The prosecution even recorded his thoughtful and profound views on capital punishment. Again, the prosecution relied on another lie to try to justify its improper strike.

When one looks at all of the prosecution's implausible and utterly false justifications for striking Robert Thomas, exactly as in *Foster*, "the record persuades us that [Thomas'] race . . . was [the prosecution's] true motivation." Id., 578 U.S. at ____, slip op. at 20. Importantly, exactly as in *Foster*, the "prosecution's file fortifies our conclusion that" the reasons proffered by the prosecution for striking Thomas were "pretextual." The file shows that the prosecution did not consider Thomas uneducated. The file never described Thomas as "slow" like other jurors. The file showed that he was articulate, not uncommunicative. The file acknowledged answers that proved he was quite intelligent. And especially where the prosecution struck Thomas but accepted juror Swarner, whom the file described as "dumb," as in *Foster* the "evidence is compelling" that the prosecution struck Thomas for racial reasons. Id., 578 U.S. at ____, slip op. at 23.

In sum, exactly as in *Foster*, "Considering all of the circumstantial evidence that bears upon the issue of racial animosity, we are left with the firm conviction that the strike[] of [Thomas was] 'motivated in substantial part by discriminatory intent.'" Foster, 578 U.S. at ____, slip op. at 23. In fact, when looks at all of the primary reasons articulated by the prosecution for striking Thomas, they all fall by the wayside as being pretexts and proxies

for racism, both subtle and overt.

To be entitled to relief, *Foster* makes clear that all Abdur'Rahman has to show is that the strike of Thomas was '*motivated in substantial part* by discriminatory intent.'" Foster, 578 U.S. at ____, slip op. at 23 (emphasis supplied). Where all of the reasons articulated by the prosecution out of the box have been shown to be pretextual and ultimately racially based, Abdur'Rahman meets the *Foster* test. In fact, in *Foster*, the United States Supreme Court did not debunk every single of the eleven (11) reasons articulated by the prosecution for striking Juror Garrett. Rather, the Supreme Court focused on whether "much of the reasoning provided by" the prosecutor was race-based, and finding much of it to be pretextual, the Court granted relief. Id., 578 U.S. at ____, slip op. at 12. Where all the reasons already discussed have been shown to be false and/or racially discriminatory, Abdur'Rahman meets the *Foster* test and he is likewise entitled to relief.

To be sure, a final reason given for the strike – not as part of the prosecution's "principal reasons" for the strike of Thomas – was that Thomas was struck because he knew defense counsel Barrett. Tr. 1241. What is noteworthy is that this reason was *not* proffered as *the* reason for striking Thomas, or even as the *first* reason for striking Thomas. If that reason had truly been the real and legitimate basis for striking Thomas, then certainly the prosecution would have said so first, and emphatically, and without importing all of the racist reasoning just discussed. The fact that the prosecution left this reason until the end proves that this reason was neither the primary nor the exclusive reason for striking Thomas. The real reasons were all the false and racist reasons quickly articulated by the prosecution when asked why they struck Thomas: supposedly being uneducated, slow, uncommunicative, and of a reduced intellect – none of which is true.

Having proven that each of the primary reasons stated by the prosecution for its strike – Thomas' being uneducated, being uncommunicative, being slow like juror Harding, and being of reduced intellect – are *all* false and pretexts for racism, Abdur'Rahman has shown, as in *Foster*, that the strike was indeed "motivated in substantial part by discriminatory intent." Foster, 578 U.S. at ____, slip op. at 23. Indeed, even if one were to conclude that Thomas' knowledge of defense counsel could be a valid reason for the strike, the other four or five articulated reasons are unquestionably race-based, thus proving that the strike of Thomas was "motivated in substantial part by discriminatory intent." Where 4 of 5 (or 5 of 6) reasons provided by a prosecutor are clearly racially based, *Foster* holds that relief must be granted.

So it is here. Robert Thomas was struck in substantial part for racist reasons. Abu-Ali Abdur'Rahman is thus entitled to relief under *Foster*.

2.
The Prosecution's Strike Of Juror Sharon Baker
Was Also Motivated In Substantial Part By Discriminatory Intent

The prosecution also struck prospective African-American juror Sharon Baker, asserting that she was struck because, *inter alia*, she was allegedly not communicative and gave "short cryptic answers," (Tr. 1237) and "avoided eye contact" with the prosecution. Tr. 1238. As in *Foster*, however, the prosecution's notes belie these assertions as valid reasons for striking Baker.

First, juror Baker was questioned after waiting all day, after which she was "pretty tired." Tr. 213. This explains such alleged "short answers." Second, she was asked numerous leading questions which asked for a "yes" or "no" response. How else would one respond except in short answers? See Tr. 213-220 (prosecution's questioning on *voir dire*). Faulting

her for answering leading questions with short answers is dubious.

Third, when not asked leading questions asking for a yes-or-no answer, her responses were not, as a matter of fact, "cryptic." For example, she stated: "I've never really given the death penalty much thought, to be perfectly honest with you, but I can't think of anything offhand that would keep me from going along with it if we found a person guilty." Tr. 217. In other words, exactly as in *Foster*, Baker's supposed use of "cryptic" answers is simply not true. Exactly as in *Foster*, that "predicate" for the prosecution's strike of Baker "was false." Foster, 578 U.S. ____, slip op. at 14. It was "contradicted by the record," and therefore provides proof of racial motivation. Id., 578 U.S. at ____, slip. op. at 15.

Fourth, the prosecution did not strike white jurors who, according to the prosecution's notes, were also non-communicative, including white juror Swarner (cited *supra*) and white juror Steele who had "a hard time expressing herself." See Exhibit 2, p. 1. Again, exactly as in *Foster*, this disparate treatment of the African-American Sharon Baker *vis-a-vis* similarly-situated white jurors Swarner and Steele proves racial discrimination. Foster, 578 U.S. at ____, slip op. at 15-16, 19 (disparate treatment proves racial motivation).

To be sure, with regard to Sharon Baker, the evidence of racial motivation is not so substantial as it is with regard to Robert Thomas, but the outcome is still the same. Where the prosecution's "cryptic answer" justification is not true, and where Ms. Baker was treated more harshly than similar white jurors, Abu-Ali Abdur'Rahman has shown that the striking of Ms. Baker was "motivated in substantial part by discriminatory intent." Foster, 578 U.S. at ____, slip op. at 23.

C.

Abu-Ali Abdur'Rahman Is Entitled To Seek Relief Via A Motion To Reopen Because *Foster* Establishes A Retroactive Rule Of Law Applicable In Post-Conviction Proceedings

Under Tenn. Code Ann. §40-30-117(a), a post-conviction petitioner is entitled to reopen post-conviction proceedings if s/he relies on a "final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. §40-30-117(a)(1). Importantly, a motion to reopen is proper when the right which a petitioner seeks to have recognized is recognized in his own case. Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001). Thus, for example, in *Van Tran* itself, the Tennessee Supreme Court initially recognized a constitutional prohibition against the execution of the intellectually disabled and then proceeded to find that right retroactive and applied it to *Van Tran* himself. Id. at 811.

Foster is a new rule of law that must be applied retroactively in these post-conviction proceedings via a motion to reopen. That *Foster* is retroactive is apparent when one examines the opinion in *Foster*. In *Foster*, the United States Supreme Court granted relief in post-conviction proceedings by finding that Foster had shown that "the strikes of [jurors] were 'motivated in substantial part by discriminatory intent.'" Foster, 578 U.S. at ____, slip op. at 23. In applying this standard, the Supreme Court quoted from Snyder v. Louisiana, 552 U.S. 472, 485 (2008), which was a case the Supreme Court reviewed on direct review.

By applying the *Snyder* standard in the post-conviction case of *Foster*, the Supreme Court made clear that the *Snyder* standard applies in post-conviction proceedings. See Montgomery v. Louisiana, 577 U.S. ____ (2016). And indeed, if the *Snyder* "motivated in substantial part by discriminatory intent" test was not retroactive to post-conviction proceedings, the United States Supreme Court could not have granted Foster relief. As

noted *supra*, both Foster and Abdur'Rahman were tried at the same time and completed direct review around the same time. Where the Supreme Court has applied the "motivated in substantial part by discriminatory intent" test to the post-conviction proceedings in *Foster*, Abdur'Rahman is entitled to that very same application. Otherwise, *Foster* makes no sense whatsoever. As this Court does not have the authority to ignore the dictates of *Foster* which applied *Snyder*'s "motivated in substantial part" test retroactively, this Court must likewise apply that standard here as well.

In sum, therefore, because the post-conviction case of *Foster* itself proves that the the "motivated in substantial part by discriminatory intent" test is retroactive to post-conviction proceedings, this Court must apply it here. This Court must conclude that *Foster* is new and retroactive, such that Abdur'Rahman may obtain its application via a motion to reopen under Tenn. Code Ann. §40-30-117. This Court should therefore grant the motion to reopen, reopen proceedings, apply *Foster*, conduct a hearing as necessary, and for all the reasons stated *supra*, conclude that Abdur'Rahman was denied his right to a fairly selected jury free from racism, find that the jury strikes of Robert Thomas and Sharon Baker were "motivated in substantial part by discriminatory intent," and order a new trial.

II.
The Death Sentence Is Unconstitutional Under The Intervening Decision In Obergefell v. Hodges, 576 U.S. ____ (2015), Because The Death Sentence Violates Abu-Ali Abdur'Rahman's Fundamental Constitutional Rights To Life And Human Dignity

A.
Obergefell Holds That No State May Deny A Fundamental Right, May Not Deny Human Dignity, May Not Impose Stigma And Demean Persons By Denying The Exercise Of A Fundamental Right, And May Not Diminish The Personhood Of Individuals

The Declaration Of Independence expresses the self-evident truth that all are created

equal and endowed by their Creator with certain inalienable rights, including the right to life. The right to life is self-evidently fundamental and it was recognized as such at the founding of our Nation. It was later given legal status as a fundamental right in both the Fifth and Fourteenth Amendments. Now, in *Obergefell v. Hodges*, the Supreme Court has given full recognition to the right to life by recognizing that the states lack any power to deny an individual any fundamental right of personhood – which obviously include the right to life.

In Obergefell v. Hodges, 576 U.S. ____ (2015), the Supreme Court held that the Fourteenth Amendment prohibits a state from denying basic human dignity to a citizen. As the Supreme Court explained, when assessing the scope of the Fourteenth Amendment, "The identification and protection of fundamental rights is an enduring part of the judicial responsibility of the judicial duty to interpret the Constitution." Id, 576 U.S. at ____, 135 S.Ct. at 2598. The Supreme Court, therefore, must:

> exercise reasoned judgment in identifying interests of the person *so fundamental that the State must accord them respect.*

Id. (emphasis supplied).

In *Obergefell*, the Supreme Court concluded that "the right to marry is fundamental under the Due Process Clause." Id. In addition, "the right to personal choice in marriage is *inherent in the concept of individual autonomy.*" Id., 576 U.S. at ____, 135 S.Ct. at 2599. The Supreme Court held that there is "dignity" in the bond between two persons of any gender (Id.) that no state can deny through its laws. Laws that prevent marriage of persons of the same genders also "harm and humiliate the children" of such persons. Id., 576 U.S. at ____, 135 S.Ct. at 2601. Laws that prevent such marriage also "teach[] that" certain

persons are "unequal in important respects" and "demean[]" such persons. Id., 576 U.S. at ____, 135 S.Ct. at 2602. Such laws "impose stigma and injury of the kind prohibited by our basic charter." Id.

Fundamentally, enforcement of a state law precluding the marriage of any person to another:

would . . . **diminish their personhood to deny them this right.**

Id. (emphasis supplied). Such laws "burden[] a right of fundamental importance" and as such cannot stand. Id., 576 U.S. at ____, 135 S.Ct. at 2603. Such laws cannot stand because under such laws, persons "are barred from exercising a fundamental right" and such laws "serve[] to disrespect and subordinate them." Id., 576 U.S. at ____, 135 S.Ct. at 2604. In sum, the right to marry another "is a fundamental right inherent in the liberty of a person," and persons "may not be deprived of that right" under any circumstances. Id. In sum, such state laws simply cannot stand despite their being enacted by democratic process, because such democratic process is valid only "so long as that process does not abridge fundamental rights." Id., 576 U.S. at ____, 135 S.Ct. at 2605.

In sum, the petitioners in *Obergefell* "ask for equal dignity in the eyes of the law. The Constitution grants them that right." Id., 576 U.S. at ____, 135 S.Ct. at 2608. That is the very same dignity to which Abu-Ali Abdur'Rahman is entitled.

B.
Under *Obergefell*, Abu-Ali Abdur'Rahman's Death Sentence And
The Tennessee Death Penalty Statute Are Unconstitutional
And This Court Should So Conclude

The very principles and holding identified and applied by the Supreme Court in *Obergefell* now make perfectly clear that the death penalty is unconstitutional here. Even

more than the right to marry, the right to *life* is a fundamental right – as it is the very foundation of human personhood. It is the very foundation of human dignity. Just as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life, which is *the* fundamental human right and provides the predicate for the exercise of all other rights. Under *Obergefell* and the Fourteenth Amendment, the death sentence must be struck down here.

In fact, *every single factor* identified by the Supreme Court in *Obergefell* applies to Abu-Ali Abdur'Rahman's right to life, making denial of his fundamental right to life through the death penalty unconstitutional under the Fourteenth Amendment and Tennessee Constitution:

(1) Abu-Ali Abdur'Rahman's right to life is a right "so fundamental that the State must accord [it] respect." Obergefell, 576 U.S. at ____, 135 S.Ct. at 2598.

(2) His right to life "is inherent in the concept of individual autonomy"(Id. at ____, 135 S.Ct. at 2599), for without the right to life, there is no personal autonomy whatsoever.

(3) His right to life thus must be accorded fundamental "dignity" – no less than the dignity of marriage between any two persons. Id.

(4) The state law designed to take Abu-Ali Abdur'Rahman's life serves to "harm and humiliate" both him and his relatives – even more than the states' laws on marriage. Id., 576 U.S. at ____, 135 S.Ct. at 2601.

(5) The state law which seeks to take his life also teaches not simply that he is "unequal in important respects" but that he is unequal *in all*

respects to all other persons: He has no right to live, while all others do. This is an even more hideous societal statement than any statement made by the states' marriage laws. Id., 576 U.S. at ____, 135 S.Ct. at 2602.

(6) Needless to say, a law that tells and demonstrates that Abu-Ali Abdur'Rahman is not worthy of life itself serves to "demean[]"Abu-Ali Abdur'Rahman in the eyes of all – in a manner even more demeaning than the states' laws regarding marriage. Id.

(7) No less than the states' laws regarding marriage, the death penalty law which Tennessee seeks to apply to Abu-Ali Abdur'Rahman "impose[s] stigma and injury of the kind prohibited by our basic charter." Id.

(8) It would not simply "diminish the[] personhood" of Abu-Ali Abdur'Rahman to take his life, but it would *completely deny* him his "personhood" to take his life, and therefore it is unconstitutional to deny him his very personhood. Id.

(9) The death penalty "burdens a right of fundamental importance" – the right to life – and therefore cannot stand. Id., 576 U.S. at ____, 135 S.Ct. at 2603.

(10) Because, under the Tennessee death penalty law which the state seeks to apply here, Abu-Ali Abdur'Rahman would absolutely be "barred from exercising a fundamental right" and "abridge[s] fundamental rights" (Id., 576 U.S. at ____, 135 S.Ct. at 2604) – namely the fundamental right to life – the Tennessee death penalty statute and the death penalty here must be struck down, exactly as occurred in *Obergefell*.

In sum, Abu-Ali Abdur'Rahman "ask[s] for equal dignity in the eyes of the law," and the "Constitution grants [him] that right." Id., 576 U.S. at ____, 135 S.Ct. at 2608. Just as numerous state laws were struck down in *Obergefell* because they barred individuals from the exercise of a fundamental right, the death penalty here must likewise be struck down, as it unconstitutionally denies Abu-Ali Abdur'Rahman's the exercise of *the* fundamental right protected by our Constitution – the fundamental right to life.

C.
Under *Obergefell*, Abu-Ali Abdur'Rahman Is Entitled To Reopen His Post-Conviction Procedings And Have His Death Sentence Vacated

As noted *supra*, when the United States Supreme Court sets forth a new retroactive rule of constitutional law, it must be applied retroactively in post-conviction proceedings, and a petitioner is entitled to reopen proceedings under Tenn. Code Ann. §40-30-117. That is the case with *Obergefell*, under which Abdur'Rahman's fundamental right to life receives absolute protection.

Under *Obergefell*, it is now apparent that the state may not infringe upon any fundamental right, including the fundamental right to life. The death sentence is thus categorically prohibited. Thus, this newly-articulated right is retroactive because this new law "place[s] certain . . . punishments altogether beyond the State's power to impose" and when new case law "eliminate[s] a State's power to . . . impose a given punishment," it must be applied retroactively to cases on collateral review, such as Abdur'Rahman's. Montgomery v. Louisiana, 577 U.S. at ____, 136 S.Ct. at 729, 730. Put another way, under *Obergefell*, the death sentence is a prohibited punishment, given Abdur'Rahman's "status or offense," that is, his status as a human being with a fundamental right to life. Id., 577 U.S. at ____, 136 S.Ct. at 734. Thus, the right he requests is retroactive. Id. Because the State of Tennessee

has no power "to mandate that a prisoner continue to suffer punishment barred by the Constitution," this Court is compelled to apply *Obergefell* retroactively and "has a duty to grant the relief that federal law requires." Id., 577 U.S. at ____, 136 S.Ct. at 727, 731 (emphasis supplied).

Obergefell establishes a new way of looking at fundamental rights such as the right to life. Under the Fourteenth Amendment: (a) the state cannot enforce a law under which persons are "barred from exercising a fundamental right" such as the right to life (Obergefell, 576 U.S. at ____, 135 S.Ct. at 2604); (b) the "State must accord . . . respect" to the fundamental right to life (Id. at ____, 135 S.Ct. at 2598); and (c) the state is absolutely prohibited from "diminish[ing] the[] personhood" of persons seeking to exercise fundamental rights encompassed by the Fourteenth Amendment – such as the right to life. Id. at ____, 135 S.Ct. at 2603. Thus, the dissenters in *Obergefell* were quick to note that the majority opinion had established a new Fourteenth Amendment jurisprudence of fundamental rights, which now applies to Abu-Ali Abdur'Rahman. As Chief Justice Roberts observed, *Obergefell*'s "application of substantive due process breaks sharply with decades of precedent." Obergefell, 576 U.S. at ____, 135 S.Ct. at 2618 (Roberts C.J., dissenting). The Fourteenth Amendment now demands that the state "must accord . . . respect" to fundamental rights without exception. Obergefell, 576 U.S. at ____, 135 S.Ct. at 2598.

Notably, Justice Thomas himself acknowledges that this Nation was founded on the truth that "all humans" – including Abu-Ali Abdur'Rahman – "are created in the image of God and therefore of inherent worth." Id., 576 U.S. at ____, 135 S.Ct. at 2639 (Thomas, J., dissenting). Justice Thomas also made manifest that "one's dignity [is] something to be shielded from – not provided by – the State." Id. **He is absolutely right. Abu-Ali**

Abdur'Rahman's right to life and to human dignity are to be shielded from the state – and now they must be, under the clear dictates of *Obergefell*.

Obergefell's new holding on fundamental rights – that a state simply cannot deny a fundamental right to individuals when doing so, *inter alia* "diminsh[es] their personhood" (Id., 576 U.S. at ____, 135 S.Ct. at 2603) – constitutes a new rule of constitutional law that is retroactive here. It breaks new ground, and it places the death sentence "beyond the power of the criminal law-making authority to proscribe" for the crime of murder and is implicit in the concept of ordered liberty. See Tenn. Code Ann. §40-30-122. Indeed, if the right to marriage is, as held in *Obergefell*, implicit in ordered liberty, *a fortiori*, the right to life is the very foundation of any conception of society based upon life and liberty. This Court should so recognize. And where that right precludes the denial of the right to life, it is also retroactive under §40-30-117.

This Court, therefore, should grant Abdur'Rahman's motion to reopen, apply *Obergefell*, hold that the death sentence violates Abdur'Rahman's fundamental right to life, and vacate the death sentence.

III.
As Explained By Justice Breyer in Glossip v. Gross, 576 U.S. ____ (2015), The Death Sentence Is Unconstitutional Under The Eighth And Fourteenth Amendments And Article I §§ 8 & 16, Because It Is Unreliable, Arbitrary, Subject To Excessive Delay, Fails To Serve Any Legitimate Penological Objective, And Is Unusual And Rare

A.
Glossip

In Glossip v. Gross, 576 U.S. ____, 135 S.Ct. 2726 (2015)(Breyer, J., dissenting), Justices Breyer and Ginsburg have concluded that the death penalty likely constitutes a prohibited cruel and unusual punishment, which violates the Eighth and Fourteenth

Amendments (and in turn violates Article I §§ 8 & 16 of the Tennessee Constitution). Abu-Ali Abdur'Rahman relies on all of the arguments and evidence contained and discussed in Justice Breyer's dissent in support of his discussion that the death sentence in this case is unconstitutional. Abu-Ali Abdur'Rahman expressly incorporates all of Justice Breyer's *Glossip* opinion as factual, legal, and evidentiary support for his request for an evidentiary hearing and for post-conviction relief given the unconstitutionality of the death penalty in this case. See Glossip, 576 U.S. at ____, 135 S.Ct. at 2755-2780 (incorporated by reference and attached as Exhibit 3).

As Justice Breyer has explained, the death sentence is unconstitutional here because it is: unreliable (Glossip, 576 U.S. at ____, 135 S.Ct. at 2756-2759 (Breyer, J., dissenting)); arbitrary (Id., 135 S.Ct. at 2759-2764); cruel, given excessive delays and its failure to serve any legitimate penological objective (Id., 135 S.Ct. at 2764-2772); and highly unusual or rare. Id., 135 S.Ct. at 2772-2776. Abu-Ali Abdur'Rahman need not repeat every specific point made by Justice Breyer on these particular matters, though he specifically relies upon those here. They are, in and of themselves, sufficient to entitle him to an evidentiary hearing and to vacation of his death sentence.

B.

Abdur'Rahman's Death Sentence Is Unreliable, Cruel And Unusual

Abu-Ali Abdur'Rahman would like to elaborate upon Justice Breyer's statements, however, illuminating additional specific facts and factors which make the death penalty unconstitutional as applied to Abu-Ali Abdur'Rahman and in Tennessee, and which entitle him to relief:

(1) ***The Death Sentence Is Unreliable***: As Justice Breyer has

noted, the death sentence may constitutionally be imposed only if there is reliability in the process of convicting persons and imposing the death sentence. That is, the death penalty must be imposed only upon persons actually guilty of capital crimes, and only if defendants have been accorded all the rights and guarantees that the U.S. (and/or Tennessee) Constitution require(s). See Glossip, 576 U.S. at ____, 135 S.Ct. at 2756-2759 (Breyer, J., dissenting). There has been no such reliability in Abu-Ali Abdur'Rahman's case, for the following reasons:

(a) ***The Jury Sentenced Abdur'Rahman To Death Without Knowing Critical Mitigating Evidence About Abdur'Rahman's Mental Illness And Troubled Past***: There is no dispute that at the capital sentencing proceeding, trial counsel failed to present any real mitigating evidence, even though there was significant available mitigating evidence that Abdur'Rahman suffered horrible abuse as a child and has suffered serious mental illness as a result. Trial counsel's failures were so egregious that the United States District Court granted habeas relief because of counsel's ineffectiveness in failing to present mitigating evidence,[2] though that decision was overturned in a 2-1 decision by the Sixth Circuit.[3] Needless to say, however, where two federal judges concluded that Abdur'Rahman was denied effective counsel and two federal

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[2] Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D.Tenn. 1998).

[3] Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000).

judges disagreed with that conclusion, one cannot *reliably* conclude that Abdur'Rahman's death sentence was *reliably* imposed. It wasn't.

(b) ***Death Sentences In Tennessee Are Unreliable, Imposed Upon The Innocent, And With Approximately 60% Of All Death Sentences Being Imposed In Violation Of Law***: In Tennessee since 1977, there have been 220 proceedings in which a death sentence has been imposed, but in **126** of those cases, the capital conviction and/or death sentence has been overturned – **for a reversal rate of 57.3%**. See Exhibit 4 (Chart). In 29 of those cases (13%), individuals were found to have been unconstitutionally *convicted* of a capital offense. Id. Moreover, as of 2001, the death sentence reversal rate was already 50%. See Exhibit 5: Shiffman, Half Of Death Sentences Overturned On Appeal, *The Tennessean*, July 23, 2001, 1A (as of 2001, 76 of 151 death sentences imposed had been overturned on appeal, with nearly 80% of all reversals ultimately leading to a sentence less than death). Shockingly, in Tennessee, the reliability of the death sentence has actually *decreased* over the past decade and a half.

(2) ***Abu-Ali Abdur'Rahman's Death Sentence Is Arbitrary And/Or Disproportionate***. The death penalty is also arbitrary, where Abdur'Rahman's equally culpable co-defendant, DeValle Miller, received a sentence less than death, and where *worse* murders and murderers in Davidson County have received life sentences:

(a) In this case, the death sentence is arbitrary and disproportionate because co-defendant DeValle Miller testified for the state

and received a lesser sentence for the very same crime for which Abdur'Rahman was sentenced to death. It is arbitrary for an one defendant (like Abdur'Rahman) to receive death when a similarly situated defendant such as Miler receives a much lighter sentence. Abdur'Rahman's death sentence is arbitrary and unfair.

(b) Moreover, in Davidson County, life sentences have been given to first-degree murderers whose crimes are far worse than this offense – including to persons who have committed triple or double homicides. For example, Davidson County defendant Kelvin Dewayne King committed three first-degree murders and an aggravated robbery and only received life sentences. State v. King, 2010 Tenn.Crim.App.Lexis 259 (Mar. 26, 2010). See Exhibit 6 (Tennessee Supreme Court Rule 12 Report in *State v. King*). Likewise, Davidson County defendants John Woodruff and Walter Kendrick were both convicted of two counts of first-degree murder and only received life sentences for kidnaping two victims, torturing and strangling one, and then raping and shooting the other. State v. Woodruff, 1996 Tenn.Crim.App. Lexis 469 (Aug. 1, 1996); State v. Kendrick, 1995 Tenn.Crim. App.Lexis 870 (Oct. 25, 1995). In fact, in Davidson County, numerous persons convicted of double first-degree murders have received only life sentences for first-degree murder. See e.g., State v. Steven McCain, 2002 Tenn. Crim.App.Lexis 455 (May 22, 2002)(life sentences imposed for double first-degree murder convictions); State v. James Arthur Johnson, 2010 Tenn.Crim.App.Lexis 699 (Aug. 24, 2010); State v. Nathaniel Carson, 2012 Tenn.Crim. App.Lexis 253

(Apr. 27, 2012). These few examples make clear that the imposition of death on Abdur'Rahman for a single homicide is unconstitutionally arbitrary and disproportionate – where the death sentence was never given for much, much worse crimes in Davidson County.

(c) In fact, throughout the state, dozens of persons who have committed 6 first-degree murders, 5 first-degree murders, 4 first-degree murders, and 3 first-degree murders have received life sentences for their crimes. Thus, for example, Henry Burrell and Zakkawanda Moss committed ***6*** first-degree murders in Lincoln County yet were sentenced to life.[4] Jacob Shaffer committed ***5*** first-degree murders and he, too, was sentenced to life.[5] Curtis Johnson in Shelby County committed ***4*** first-degree murders,[6] as did Carey Caughron,[7] Thomas Elder,[8] and Courtney Matthews,[9] yet none of these multiple murderers was sentenced to death.

Moreover, there are literally *dozens* of triple murderers throughout the state who were also given life sentences, not death. The following is a list of persons who received life sentences for killing three (3) victims: See e.g., State

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[4] See Exhibit 7: Rule 12 Reports, *State v. Burrell & Moss*.

[5] See Exhibit 8: Rule 12 Reports, *State v. Shaffer*.

[6] Johnson v. State, 1995 Tenn.Crim.App.Lexis 370; See Exhibit 9, Rule 12 Report: *State v. Curtis Johnson*.

[7] See Exhibit 10: Rule 12 Report, *State v. Carey Caughron*.

[8] See Exhibit 11: Rule 12 Report, *State v. Thomas Elder*.

[9] See State v. Matthews, 2008 Tenn.Crim.App. 598.

v. Cox, 1991 Tenn.Crim.App.Lexis 1990;[10] Chung v. State, 1994 Tenn. Crim. App.Lexis 609;[11] Bounnam v. State, 1999 Tenn.Crim.App.Lexis 842;[12] Angel v. State, 2015 Tenn.Crim.App.Lexis 72 (two defendants received life for three first-degree murder convictions);[13] Bailey v. State, 2010 Tenn.Crim.App.Lexis 357; State v. Billington, Hamilton Co. No. 240690;[14] State v. Howell, 34 S.W.3d 484 (Tenn. 2000)(6 different persons convicted of triple first-degree murders sentenced to life); State v. Casteel, 2004 Tenn.Crim.App.Lexis 814;[15] State v. Jenkins, Davidson Co. No. 2013-A-866;[16] State v. Johnson, Bradley Co. No. 08-456;[17] State v. Kelley, 683 S.W.2d 1 (Tenn.Crim. App. 1984)(two defendants sentenced to life for triple first-degree murders);[18] State v. Myers, 2004 Tenn.Crim.App.Lexis 390;[19] Norman v. State, 1990 Tenn.Crim.App. Lexis 199; Palmer v. State, 2007 Tenn.Crim.App.Lexis 71;[20] State v. Matthew

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[10] See Exhibit 12: Rule 12 Report, *State v. Brian Cox.*

[11] See Exhibit 13: Rule 12 Report, *State v. Hung Van Chung.*

[12] See Exhibit 14: Rule 12 Report, *State v. Kong Chung Bounnam.*

[13] See Exhibit 15: Rule 12 Reports, *State v. Angel & Wood.*

[14] See Exhibit 16: Rule 12 Report, *State v. Peter Billington.*

[15] See Exhibit 17: Rule 12 Report, *State v. Frank Casteel.*

[16] See Exhibit 18: Rule 12 Report, *State v. Lorenzo Jenkins.*

[17] See Exhibit 19: Rule 12 Report, *State v. Maurice Johnson.*

[18] See Exhibit 20: Rule 12 Reports, *State v. Kelley & Kelley.*

[19] See Exhibit 21: Rule 12 Report, *State v. Raymond Myers.*

[20] See Exhibit 22: Rule 12 Report, *State v. Percy Palmer.*

V. Perkins, Coffee Co. No. 38306F;[21] State v. Fredrick Robinson, Davidson Co. No. 99-A-403;[22] State v. Taylor, 2006 Tenn.Crim.App.Lexis 678.[23] Consequently, the death sentence here is cruel and unusual, disproportionate and arbitrary. It goes without saying that it is arbitrary and disproportionate for these multiple, multiple murderers to have received life, while Abu-Ali Abdur'Rahman received death. Again, Abdur'Rahman's sentence is way out of proportion, disproportionate, and arbitrary in comparison to these much more horrible offenses which resulted in life sentences.

(3) ***Execution Of The Death Sentence Would Occur Only After Excessive Delay And Thus Constitute Cruel Punishment***: Abu-Ali Abdur'Rahman has been sentenced to death for an offense that occurred in 1986. It has thus been 30 years since the offense. Where Abu-Ali Abdur'Rahman has been threatened with being executed for decades, this time frame constitutes cruelty in the constitutional sense, as Justice Breyer has recognized.

(4) ***The Death Sentence Is Unusual And Rare In Tennessee***: In the last 55 years, Tennessee has executed 7 people. In the last 15 years, Tennessee has executed 6 persons. This, in a state where there have been over 4000 homicides in the last decade alone. In fact, in the 10 years

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[21] See Exhibit 23: Rule 12 Report, *State v. Matthew Perkins*.

[22] See Exhibit 24: Rule 12 Report, *State v. Fredrick Robinson*.

[23] See Exhibit 25: Rule 12 Report, *State v. Latonya Taylor*.

from 2004 to 2014, death sentences have been validly imposed only 8 times – despite over 4200 murders during that same time period. See Exhibit 26 (Chart). Fewer than 1 in 500 murders get the death sentence, and there is an even lower proportion of persons who ultimately get executed, in comparison to the number of death sentences imposed: There has been only 1 execution per year per every 850 homicides. Id. Whether being imposed or being executed, the death sentence is unusual and rare in Tennessee, and thus unconstitutional to carry out upon Abu-Ali Abdur'Rahman.

In sum, therefore, it is clear that in Abu-Ali Abdur'Rahman's case, and in Tennessee, the death sentence is unreliable, cruel, unusual, arbitrary, and therefore unconstitutional, as Justice Breyer indicated in his opinion in *Glossip*. The death sentence violates the Eighth and Fourteenth Amendments, and Article I §16 of the Tennessee Constitution.

C.
Abdur'Rahman Is Entitled To Seek Relief Via A Motion To Reopen Where This Court's Conclusion That The Death Sentence Is Cruel And Unusual Is New And Retroactive

Because the death sentence is cruel and unusual for all the reasons stated, Abdur'Rahman is exempt from execution. By ruling in Abdur'Rahman's favor, this Court will establish that the punishment of death is prohibited because of Abdur'Rahman's "status or offense." Montgomery, 577 U.S. at ____, 136 S.Ct. at 734. Accordingly, under *Montgomery*, this Court's conclusion that the death sentence is unconstitutional as cruel and unusual must be applied retroactively – just like Abdur'Rahman's right not to be executed because he retains the fundamental right to life, as explained *supra*.

Consequently, under Tenn. Code Ann. §40-30-117, this Court should conclude that

the death sentence is cruel and unusual, arbitrary and disproportionate under the Eighth Amendment and the Tennessee Constitution, apply that law retroactively under *Montgomery*, and vacate the death sentence here, including after conducting an evidentiary hearing on Abdur'Rahman's claims that the death sentence is cruel and unusual under Article I §16 of the Tennessee Constitution and the Sixth, Eighth and Fourteenth Amendments

CONCLUSION

This Court should grant Abu-Ali Abdur'Rahman motion to reopen on his claims that, in violation of *Foster*, the prosecution's peremptory strikes of jurors Thomas and Baker were motivated in substantial part by discriminatory intent, and that the death penalty violates the Sixth, Eighth and Fourteenth Amendments (and the Tennessee Constitution) and therefore must be struck down as violating the fundamental right to life and being cruel and unusual. This Court should conduct a hearing as necessary on these claims, and afterwards grant post-conviction relief.

Respectfully Submitted,

Bradley A. MacLean
454 Mariner Point Drive
Clinton, Tennessee 37716
(615) 943-8716

VERIFICATION

I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Sworn to and subscribed before me this the 23rd day of June, 2016

GAYE NEASE
STATE OF TENNESSEE NOTARY PUBLIC
COUNTY OF DAVIDSON

Notary Public, State of Tennessee

My commission expires: May 5, 2020

AFFIDAVIT OF INDIGENCY

I, Abu-Ali Abdur'Rahman, do solemnly swear (or affirm) that I am indigent, too poor to pay for going to court, and unable to pay court costs.

Abu-Ali Abdur'Rahman

Sworn to and subscribed before me this the 23rd day of June, 2016.

GAYE NEASE
STATE OF TENNESSEE NOTARY PUBLIC
COUNTY OF DAVIDSON

Notary Public, State of Tennessee

My commission expires: May 5, 2020

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion to reopen was sent to the Office of the District Attorney General, 222 2nd Avenue North, Suite 500, Washington Square, Nashville, Tennessee 37201-1649, this the 24th day of June, 2016.

B. MacLean

Bradley A. MacLean

Attachment 14

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY
AT NASHVILLE, 20th JUDICIAL DISTRICT

ABU ALI ABDUR'RAHMAN,	)	
	)	
Petitioner.	)	
	)	
Vs.	)	No. 87-W-417
	)	
STATE OF TENNESSEE,	)	Capital Post-Conviction / Habeas Corpus
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS
AND SUPPLEMENT TO MOTION TO REOPEN POST-CONVICTION CASE

Petitioner Abu Ali Abdur'Rahman hereby files this Petition for Writ of Habeas Corpus. This Petition is ancillary to and supplements his previously filed motion to reopen his post-conviction case. Because of the relationship between this Petition and Mr. Abdur'Rahman's motion to reopen, he is filing this Petition under the same case number as his post-conviction case.

In support of this Petition, Mr. Abdur'Rahman relies upon the material and arguments filed with his motion to reopen his post-conviction case, including the Affidavit of Mr. H. E. Miller, Jr.'s Affidavit filed on September 9, 2016. Mr. Abdur'Rahman is also filing herewith Mr. Miller's Revised Affidavit which reflects the results to date of his extensive study of public records (ultimately derived from court records) pertaining to first-degree murder cases decided during the period July 1, 1977 (beginning with the enactment of Tennessee's current capital sentencing scheme) through June 30, 2016 – a period of 39 years. Information compiled in Mr. Miller's study clearly reveals two points:

(i) The death penalty system as applied in Tennessee operates in an arbitrary and capricious manner in violation of Eighth Amendment principles first set forth in Furman v. Georgia, 408 U.S. 238 (1972).

(ii) The evolving standards of decency in Tennessee, and particularly in Davidson County, have rendered Mr. Abdur'Rahman's death sentence unconstitutional.

These new claims, never before litigated in the context of the historical record presented, have ripened over time. The kind of arbitrariness and capriciousness at issue here, as was true in Furman v. Georgia, can be evaluated only by viewing the manner in which the entire sentencing system has operated over a prolonged period. Similarly, by definition evolving standards of decency change over time and can be ascertained only by examining historical trends through the present. There can be a point in time long after the enactment of a capital punishment sentencing scheme when the scheme in its application becomes demonstrably arbitrary and contrary to evolving standards. See, e.g., Connecticut v. Santiago, 318 Conn. 1, 122 A.3d 1 (Conn. 2015) (ruling the Connecticut death penalty sentencing scheme unconstitutional by virtue of arbitrariness demonstrated over time and contemporary standards of decency, and applying that ruling retroactively to vacate all existing death sentences in the state). For reasons revealed by the statistical data, as explained below, that point in time has now arrived in Tennessee.

Moreover, never before has the full record concerning the operation of Tennessee's system been laid before the courts. This record is massive. It takes time for the record to accumulate. It takes time for trends to emerge. And it takes enormous time and effort to compile and analyze the record. Mr. Abdur'Rahman's claims did not arise and could not

have been presented when he originally filed his post-conviction petition. His claims are framed in the context of the historical record that has developed since then.

Mr. Abdur Rahman originally presented his claims regarding arbitrariness and evolving standards based upon the historically accumulated record in his motion to reopen his post-conviction petition, along with Mr. Miller's Affidavit supporting that motion. These claims go to the illegality of his death sentence. Accordingly, he is also presenting these claims in this pleading in the form of a petition for writ of habeas corpus under T.C.A. sections 29-21-101 et seq.

PETITION PURSUANT TO T.C.A. SECTIONS 29-21-101 *ET SEQ.*

1. Petitioner Abu Ali Abdur'Rahman is being illegally restrained on death row under a sentence of death that, in light of the historical record relating to first-degree murder cases since 1977 through the present, was imposed under a system that in its application has shown itself to be arbitrary and contrary to the evolved (and evolving) standards of decency in Tennessee and in Davidson County, in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and in violation of the Tennessee Constitution, Art. I, sections 8, 13 and 16.

2. The cause or pretense of such restraint was Petitioner's conviction of first-degree murder and death sentence in July 1987, in Davidson County, Tennessee, Case No. 87-W-417. (The original judgment is on file with the Court under the same case number as this petition). The judgment of the trial court was affirmed by the Tennessee Supreme Court. See State v. Jones, 789 S.W.2d 545 (Tenn. 1990).

3. The legality of the restraint, based upon the historical court records relating to first-degree murder cases in Tennessee through June 30, 2016, has not already been

adjudged upon a prior proceeding of the same character, to the best of Petitioner's knowledge. Petitioner has challenged the constitutionality of his death sentence on other grounds. Until this Petition, however, he has not challenged the constitutionality of his death sentence on the ground of arbitrariness and capriciousness based upon the historical statistical record through June 30, 2016; nor has he challenged the constitutionality of his death sentence on the grounds of the evolved (and evolving) standards of decency in Tennessee and in Davidson County based upon the historical trends in capital sentencing through June 30, 2016.

4. This is Petitioner's first application for a writ of habeas corpus in state court.

5. The facts supporting this Petition are set forth in the Revised Affidavit of Mr. H. E. Miller, Jr., filed herewith and incorporated herein by reference. All information in Mr. Miller's Revised Affidavit is derived from public records, and ultimately from court records.

WHEREFORE, pursuant to T.C.A. section 29-21-101, Petitioner prays the Court to issue the writ of habeas corpus and to vacate his death sentence as unconstitutional as applied to him and grant such other relief as is just.

Petitioner, Abu Ali Abdur'Rahman, hereby affirms under oath that the information contained in this Petition is true and accurate.

Abu Ali Abdur'Rahman, Petitioner

Sworn to and subscribed before me, a notary public, this 22nd day of September, 2016.

My Commission expires: 6/18/2017

ARGUMENT

I.

Imagine entering a lottery. It works this way. You are given a list of the 2,095 first-degree murder cases since 1977, along with a description of the facts of each case in whatever detail you request, but you are not told what the final sentences were – whether Life, Life Without Parole (LWOP), or Death. Then your job is to make two guesses. First, you are to guess which 89 defendants, out of the 2,095, received sustained death sentences. Second, you are to guess which six defendants were actually executed. What are the odds that your guesses would be correct? We submit that the odds would be close to nil. Even with an abundance of information about the cases, trying to figure out who was sentenced to death, and who was actually executed, would be nothing but a crap shoot.

And what would you look for to make your guesses? The egregiousness of the crime? The problem is that the vast majority of the most egregious cases (such as multiple murder cases) resulted in Life or LWOP sentences. Perhaps it would make sense to look for other factors, such as: the county where the case occurred (with a strong preference for Shelby County), the race of the defendant (choosing black for the most recent cases would be a very good strategy), the prosecutor (because some prosecutors like the death penalty, and others do not), the defense lawyers (because some know how to effectively try a capital case, and many do not), the wealth or appearance of the defendant, the publicity surrounding the trial, the trial judge (because some judges are more prosecution oriented, and others are more defense oriented), or the judges that reviewed the case on appeal or in post-conviction or federal habeas (because some judges are more inclined to reverse death sentences, and others almost always vote the other way), or the year of the sentencing (because 30 years

ago a defendant convicted of first-degree murder was ten times more likely to be sentenced to death than over the past five years). In guessing who may have been executed, perhaps the age of the defendant and his health would be relevant (because at current rates a condemned inmate is four times more likely to die of natural causes than to suffer the fate of execution).

Of course, other than the egregiousness of the crime, none of these factors should play a role in deciding the ultimate penalty of death. Yet we know, and the statistical evidence bears out, that these are exactly the kinds of factors we would need to consider in making our guesses in the lottery, if we were to have any chance whatsoever of guessing correctly.

II.

The reason behind our current capital sentencing scheme is often forgotten. It stems from Furman v Georgia, 408 U.S. 238 (1972), where the Court expressed three principles that underlie the Cruel and Unusual Punishments Clause.

First, death is different. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." Id. at 306 (Stewart, J., concurring). The Supreme Court has reiterated this principle. "From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357 (1977). The qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and

fairness in capital sentencing decisions. *See, e.g.,* Ford v. Wainwright, 477 U.S. 399, 411 (1986); Spaziano v. Florida, 468 U.S. 447, 468 n. 7 (1984); California v. Ramos, 463 U.S. 992, 998-99 (1983); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Therefore, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357 (1977). Courts must "carefully scrutinize" sentencing decisions "to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." Spaziano, 468 U.S. at 460 n. 7.

Second, whether a punishment is constitutional is to be judged by contemporary, "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (plurality opinion) (quoted by Douglas, J., in Furman, 408 U.S. at 242). As Justice Douglas further explained, "[T]he proscription of cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" Id. at 242-43 (quoting from Weems v. United States, 217 U.S. 349, 378 (1909)). The court's constitutional decisions should be informed by "contemporary values concerning the infliction of a challenged sanction." Gregg v. Georgia, 428 U.S. 153, 173 (1976). Obviously, "contemporary values" change over time.

Third, the death penalty must not be imposed in an arbitrary and capricious manner. Justices Stewart and White issued the decisive opinions in Furman that represent the Court's

holding – the common denominator among the concurring opinions constituting the majority.[1] Justice Stewart explained it this way:

> [T]he death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone. These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, **the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed**. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

408 U.S. at 309-10. (internal citations omitted; emphasis added).

And Justice White explained:

> I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. **But when imposition of the penalty reaches a certain degree of infrequency**, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that

[1] Justices Brennan and Marshall opined that the death penalty is *per se* unconstitutional. Justice Douglas's position on the *per se* issue was unclear, but he found that the death penalty sentencing schemes at issue were unconstitutional.

> community values are measurably reinforced by authorizing a penalty so rarely invoked.
> ...
>
> [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

Id. at 311-12 (emphasis added).

> It is also my judgment that **this point has been reached with respect to capital punishment as it is presently administered** under the statutes involved in these cases.... I cannot avoid the conclusion that as the statutes before us are now administered, the penalty **is so infrequently imposed** that the threat of execution is too attenuated to be of substantial service to criminal justice.

Id. at 312-13 (emphasis added).

Furman makes at least three more specific points concerning a proper Eighth Amendment analysis in the death penalty context:

(i) Courts must view how the entire sentencing system operates – *i.e.*, how the few are selected to be executed from the many murderers who are not - and not just focus on the particular case under review. As the Supreme Court explained, we must "look[] to the sentencing system as a whole (as the Court did in Furman ...)," Gregg v. Georgia, 428 U.S. 153, 200 (1976) (emphasis added): a constitutional violation is established if a defendant demonstrates a "pattern of arbitrary and capricious sentencing." Id. at 195 n. 46 (joint opinion of Stewart, Powell, and Stevens, JJ.).

(ii) The application of the death penalty system, as well as evolving standards of decency, will change over time and eventually can reach a point where the system is operating in an unconstitutional manner.

(iii) An essential factor to consider in the Eighth Amendment analysis is the frequency with which the death penalty is carried out.

When we analyze the Eighth Amendment issue in this way, by viewing the sentencing system as a whole and ascertaining the frequency with which the death penalty is carried out, it is necessary to look at statistics over time. After all, frequency is a statistical concept. A similar need to analyze statistics, particularly statistical trends, applies when assessing evolving standards of decency.

And, indeed, that is exactly what the majority did in Furman. Each of the concurring opinions in Furman relied upon various forms of statistical evidence that purported to demonstrate patterns of inconsistent or otherwise arbitrary sentencing. Furman, 408 U.S. at 249-52 (Douglas, J., concurring); Id. at 291-95 (Brennan, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 313 (White, J., concurring); id. at 364-66 (Marshall, J., concurring). Evidence of such inconsistent results, of sentencing decisions that could not be explained on the basis of individual culpability, indicated that the system operated arbitrarily and therefore violated the Eighth Amendment.

When Furman was decided, the death penalty statutes under review, and virtually all then-existing death penalty statutes, were "discretionary." Under those sentencing schemes, if the jury decided that the defendant was guilty of a capital offense, then either the jury or judge would decide whether the defendant would be sentenced to life or death. The sentencing decision was completely discretionary, with no narrowing or guidance if the defendant was found guilty. Furman held that under those kinds of discretionary sentencing schemes the death penalty was being so irrationally imposed that any particular death sentence could be presumed arbitrary and excessive. This problem arose in large measure from the infrequency of the death penalty's application and the irrational way in which so few defendants were selected for death.

In response to Furman, various states enacted two different kinds of capital sentencing schemes, which the Court reviewed in 1976. The two leading decisions were Woodson v. North Carolina, 428 U.S. 280 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976).

In Woodson, the Court looked at a mandatory sentencing scheme – if the defendant was found guilty of the capital crime, then there would be no discretion in the sentencing decision because a death sentence would be mandated. Presumably, by making the death sentence mandatory, the problem with unfettered discretion discussed in Furman would be eliminated. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that North Carolina's mandatory death sentence statue "fail[ed] to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. ... [W]hen one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to Furman have simply papered over the problem of unguided and unchecked jury discretion." 423 U.S. at 302. (Again, the Court looked at the historical record.) The mandatory statute merely shifted discretion away from the sentencing decision to the guilty/not-guilty decision which, historically, had involved an excessive degree of discretion - and therefore arbitrariness - in capital cases. The Court emphasized that mandatory sentencing schemes "do[] not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Id. at 303 (emphasis added).

In Gregg, the Court upheld a "guided discretion" sentencing scheme. This type of scheme was designed to address Furman's concern with arbitrariness by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision; (ii) narrowing the class of death-eligible defendants by requiring the prosecution to prove aggravating circumstances, thereby narrowing the range of discretion that could be exercised; (iii) allowing the defendant to present mitigating evidence, to ensure that the sentencing decision is individualized, another constitutional requirement; (iv) guiding the jury's exercise of discretion within that narrowed range by instructing the jury on the proper consideration of aggravating and mitigating circumstances; and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions. The Court explained the fundamental principle of Furman, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 189.

When Gregg was decided, states had no prior experience with "guided discretion" capital sentencing. Whether such a scheme would "fulfill Furman's basic requirement" of removing arbitrariness and capriciousness from the system, and whether it would comply with our evolving standards of decency, could only be determined over time. Essentially, Gregg's discretionary sentencing statute was an experiment, never previously attempted or tested.

In 1977, Tennessee responded to Furman, Woodson, and Gregg by enacting its version of a guided discretion capital sentencing scheme. See T.C.A. sections 39-13-204 and

206. Tennessee's scheme was closely patterned after the Georgia scheme upheld in Gregg. Whereas the General Assembly subsequently amended Tennessee's statute a number of times, its basic structure remains.[2]

III.

It now has become clear, from Mr. Miller's examination of Tennessee's first-degree murder cases that have accumulated over the past 39 years, that Tennessee's capital sentencing scheme fails to fulfill Furman's basic requirement. Capital sentencing in Tennessee is not "regularized" or "rationalized." The statistics and experience show that at least eleven (11) factors contribute to and demonstrate unconstitutional capriciousness in the system:

(1) Infrequency

As pointed out above, frequency of application is the single most important factor in assessing the constitutionality of the death penalty. It sets the foundation for analysis of the system. Since July 1, 1977, there have been at least 2,095 Tennessee cases[3] resulting in first-degree murder convictions. A total of 193 defendants have been sentenced to death. Of

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[2] The most important amendments broadened the class of death-eligible defendants by adding numerous aggravating circumstances. This broadening of the class of death-eligible defendants correspondingly broadened the range of discretion for the prosecutor in deciding whether to seek death, and for the jury in making the sentencing decision at trial, which in turn increased the potential for arbitrariness. It is therefore significant that over the past ten to twenty years, Tennessee has experienced a sharp decline in new death sentences, notwithstanding the availability of death as a sentencing option in an increasing class of cases. This is an indicator of Tennessee's evolving standard of decency.

[3] No Rule 12 reports were filed in more than 30% of first-degree cases. This has made the search for all first-degree murder cases difficult. While Mr. Miller has accounted for all death penalty cases and all cases for which Rule 12 reports have been filed, he is continuing his search for cases with no Rule 12 reports. He inevitably will find more of those cases, which will further skew the statistics towards a greater number of total cases and a correspondingly lower death penalty frequency rate.

those, 89 defendants' death sentences have been sustained so far, and 104 have been vacated or reversed. Accordingly, over the span of the past 39 years only approximately 4.2% of convicted first-degree murderers have received sustained death sentences – and most of those cases are still under review.

Since 2000, the death penalty rate is substantially lower. Over the past 16 years, there have been 974 first degree murder convictions, and only 21 of those defendants received death sustained death sentences, most of which are still under review. The death penalty rate since 2000 has dropped to 2.2%, roughly half of the rate for the entire period since 1977.

The frequency of actual executions is much lower. Tennessee has executed only six condemned inmates since 1977 – just 0.3% of the defendants convicted of first-degree murder over the past 39 years have been executed. Even if Tennessee were to hurriedly execute the dozen or so death row inmates who have completed their three tiers of review (see Tenn. S. Ct. R. 13), the percentage of executed defendants as compared to all first-degree murder cases would remain infinitesimally small.

These frequency rates compare to the situation at the time of Furman, when Justice Stewart pointed out that the application of the death penalty then was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 310. The same can be said today.

At this level of infrequency, it is impossible to conceive how Tennessee's death penalty system is serving any legitimate penological purpose. No reasonable scholar could maintain that there is any deterrence value to the death penalty when it is imposed with

such infrequency.[4] And there is minimal retributive value when the overwhelming percentage of cases end up with Life or LWOP.[5] Any residual deterrent or retributive value in Tennessee's sentencing system is further diluted to the point of non-existence by the other factors of arbitrariness listed below.

(2) Error rates

Of the 193 Tennessee defendants who received death sentences since 1977, only 89 defendants have had their sentences sustained so far, and most of their cases are still under review. Convictions or death sentences have been reversed or vacated in 104 cases. This amounts to a reversal rate of 54%.

If 54% of General Motors automobiles over the past 39 years had to be recalled because of manufacturing defects, consumers would be outraged, the government would be involved, and the company certainly would go out of business. One of the fundamental

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[4] Although a small minority of studies have purported to document a deterrent effect, none have documented such an effect in a state like Tennessee where the vast majority of killers get Life or LWOP sentences, and where those who do receive death sentences long survive their sentencing date, usually until they die of natural causes, and are rarely executed. In fact, "the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate." D. Beschle, "Why Do People Support Capital Punishment? The Death Penalty as Community Ritual," 33 Conn. L.Rev. 765, 768 (2001).

[5] Moreover, the federal courts have recognized that, as society has evolved and matured, the erstwhile importance of retribution as a goal of and justification for criminal sanctions has waned. Over time, "our society has moved away from public and painful retribution toward ever more humane forms of punishment." Raze v. Rees, 128 S.Ct. 1520, 1548, 80 (2008) (Stevens, J., concurring in the judgment). In addition, the United States Supreme Court has cautioned that, of the valid justifications for punishment, "retribution ... most often can contradict the law's own ends. This is of particular concern ... in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 128 S.Ct. 2641, 2650 (2008). Accordingly, "[r]etribution is no longer the dominant objective of the criminal law." Williams v. New York,, 337 U.S. 241, 248 (1949).

principles under the Eighth Amendment is that our death penalty system must be reliable. With a 54% reversal rate, reliability is lacking.

The existence of error in capital cases and the prospect of reversal is a random factor that introduces a substantial element of arbitrariness into the system.

(3) Geographic disparity

Death sentences are not evenly distributed throughout the state. Whether it is a function of political environment, racial tensions, the attitude of prosecutors, the availability of resources, the competency of defense counsel, or the characteristics of typical juries, some counties have zealously pursued the death penalty in the past, while others have avoided it altogether. Death sentences have been imposed in only about one-half the counties in Tennessee – in 48 out of 95 counties.

Shelby County stands at one end of the spectrum. Since 1977, it has accounted for 37% of all sustained death sentences.

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County over the past 39 years, there have been ten first-degree murder cases involving eleven defendants and 22 victims (an average of 2.2 victims per case). No death sentences were imposed, even in two mass murder cases. For example, in the recent case of State v. Moss, No. 2013-CR-63 (Tenn. Crim. App., Sep. 21, 2016), the defendant and his co-defendant were convicted of six counts of first-degree premeditated murder. The victims included a sixteen-month-old child and an unborn child along with four young adults. The defendants received consecutive life sentences, not death. According to the Rule 12 reports, in another Lincoln County case, State v. Jacob Shaffer, on July 22, 2011, the

defendant was convicted of five counts of first-degree murder and was sentenced to LWOP, not death.

Indeed, in the entire Middle Grand Division, over the past 25 years, since January 1, 1992, only six defendants received sustained death sentences – a rate of only one case every four years, on average over that entire period, and no cases since February 2001. How can we sustain this kind of system?

The statistics from recent years show increasing geographic disparity. Over the past ten years (from July 1, 2006 to June 30, 2016), juries have imposed death sentences in fourteen cases from a total of seven counties, as follows:

County	Number of Death Sentences	Populatio [6]
Chester	1	17,471
Knox	1	451,324
Madison	1	97,610
Shelby	8	938,069
Sullivan	1	156,791
Tipton	1	61,870
Washington	1	126,302
Totals	14	1,849,437

The population of the entire state is 6,600,299. Accordingly, over the past ten years, death sentences have been imposed in only 7.4% of Tennessee's counties representing only 28% of the state's total population. As just pointed out, there have been no new death sentences in the Middle Grand Division of the State during the past fifteen years. Importantly, Shelby County accounts for 57% of all death sentences over the past ten years.

There is a statistically significant disparity between the geographic distribution of first-degree murder cases, on the one hand, and the geographic distribution of capital cases,

[6] These population figures are from the U.S. Census Bureau's estimates for 7/1/15. *See* www.census.gov.

on the other. Mere geographic location of a case makes a difference, contributing yet another element of arbitrariness to the system.

(4) Comparative disproportionality

How do we select the few most egregiously culpable defendants for execution from the many other defendants who receive Life or LWOP sentences? The Eighth Amendment requires comparative proportionality, but that is not what Tennessee's sentencing scheme produces. Are we imposing death sentences only on the "worst of the worst"?

It is beyond the scope of this brief to identify the many extremely egregious cases resulting in Life or LWOP, and compare them to the many significantly less egregious cases leading to death sentences or executions. But the statistics concerning one simple metric make the point – number of victims. Mr. Miller has identified 251 defendants convicted of multiple counts of first-degree murder since 1977. Of those, only 33 (or 13%) received death sentences, whereas 216 (or 86%) received Life or LWOP (not counting the two awaiting retrial or resentencing). Several in the Life/LWOP category were convicted of three or more murders. (*See, e.g.,* State v. Moss, supra, involving six murder victims.) Thus, from these statistics, if a defendant deliberately killed two or more victims, he is seven times more likely to be sentenced to Life or LWOP than death; and the sentence he receives most likely will depend on extraneous factors such as the geographic location of the crime, the prosecutor, quality of defense counsel, and the other factors itemized herein.

This comparative disproportionality demonstrates a lack of rationality and the presence of arbitrariness in Tennessee's system. As pointed out above, evidence of such inconsistent results, of sentencing decisions that cannot be explained on the basis of

individual culpability, indicate that the system operates arbitrarily and therefore violates the Eighth Amendment.

(5) Duration of cases and natural death

To the consternation of many, capital cases take years to work through the three tiers of review – from trial and direct appeal through post-conviction and federal habeas – and further litigation beyond that. Among the 60 inmates currently on death row under sentence of death, the average length of time they have lived on death row is more than 20 years. Of the six whom Tennessee has executed, one had been on death row for close to 29 years, and their average length of time on death row was 20 years. (This includes Daryl Holton who had been on death row only 8 years when he was executed, because he waived his post-conviction proceedings.) We now have several death row inmates who have lived on death row for close to 30 years or longer.

The length of time inmates serve on death row facing possible execution further diminishes any arguable penological interest in capital punishment to the point of nothingness. With the passage of time, the force of deterrence disappears, and the meaning of retribution is lost.

Moreover, to date 22 condemned inmates have died of natural causes on death row. This means that, so far at least, an inmate with a sustained death sentence is almost four times more likely to die of natural causes than from an execution. Even if Tennessee hurriedly executes the dozen or so condemned inmates who have completed their "three tiers" of review, *see* T. S. Ct. R. 12, the number of natural deaths will continue to substantially exceed deaths by execution, and with the aging death row population natural deaths will continue to occur. Given the way the system operates, a high percentage of natural deaths is

an actuarial fact affecting the carrying out of the death penalty, which constitutes an additional element of arbitrariness in the system. Also, if a death sentenced inmate is four times more likely to die of natural causes than execution, then death sentences lose any possible deterrent or retributive effect.

(6) Quality of defense representation

Mr. Miller points to 45 defendants whose death sentences or convictions have been vacated by state or federal courts on grounds of ineffective assistance of counsel. In other words, courts have found that 23% of the Tennessee defendants sentenced to death were deprived of their constitutional right to legal representation. This is an astounding figure, especially given the difficulty in proving both the "deficiency" and "prejudice" prongs under the Strickland standard. These are findings of legal malpractice. If a law firm were found to have committed malpractice 23% of their clients over the past 39 years, the firm would incur substantial liability and dissolve. How can we tolerate a capital punishment system that yields these results?

There are good reasons for deficient defense representation in capital cases. Capital cases are unique in many respects, including mitigation investigation, use of experts, jury selection, and the sentencing phase trial. Handling a death case is all-consuming, requiring extraordinary hours and nerves. It is difficult for a private attorney to build and maintain a successful law practice while effectively defending a capital case at billing rates that do not cover overhead. *See* Tenn. S. Ct. R. 13 (setting maximum billing rates for appointed counsel). Most public defender offices have excessive caseloads without having to take on capital cases. For these and other reasons, capital defense litigation is a surpassingly difficult, highly specialized field of law, requiring extensive training and experience and the right frame of

mind – as well as sufficient time and resources. In Tennessee, especially with the sharp decline in the frequency of capital cases, few attorneys have acquired any meaningful experience in actually trying capital cases through the sentencing phase, and the training is sparse. Moreover, given the constraints on compensation and funds for expert services under Tenn. Sup. Ct. R. 13, Tennessee offers inadequate resources to properly defend a capital case, or to attract the better lawyers to the field.

On the other hand, some highly effective attorneys, willing to suffer the harsh economics of capital cases, do handle these kinds of cases, often with great success and at great personal sacrifice. But there are not enough of these kinds of lawyers to go around.

The quality of defense representation can make a difference in the outcome of a case. A defendant's life should not turn on his luck of the draw in the lawyer he obtains, but we know that it does – yet another source of arbitrariness in the system.

(7) Prosecutorial discretion and misconduct

Prosecutorial misconduct is a thorn in the flesh of the death penalty system. We have located at least seven capital cases in which either convictions or death sentences were set aside because of prosecutorial misconduct.[7] Presumably capital cases are handled by the

[7] See State v. Buck, 670 S.W.2d 600 (Tenn. 1984) (improper closing argument and *Brady* violation); State v. Smith, 755 S.W.2d 757 (Tenn. 1988) (improper closing argument); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (improper closing argument); Johnson v. State, 38 S.W.3d (Tenn. 2001) (*Brady* violation); Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) (improper closing argument); House v. Bell, 2007 WL 4568444 (E.D. Tenn. 2007) (*Brady* violation); Christopher A. Davis v. State, Davidson County No. 96-B-866 (April 6, 2010) (*Brady* violation); Gdongalay Berry v. State, Davidson County No. 96-B-866 (April 6, 2010)(*Brady* violation). There are other cases of Brady violations, including Mr. Abdur'Rahman's, which did not serve as grounds for reversal. See, e.g., Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1088-1090 (1998) (*Brady* violations found not material, sentence vacated on IAC grounds, reversed by the 6th Cir.); Rimmer v. State, Shelby Co. 98-010134, 97-02817, 98-01003 (Oct. 12, 2012) (while the prosecution suppressed evidence, the conviction was vacated on IAC grounds).

most experienced and qualified prosecutors, so there is no excuse for this level of judicially found misconduct. And we can reasonably assume that undetected misconduct, potentially affecting case outcomes, has occurred in other cases. Suppressed *Brady* material is not always discovered. Although inexcusable, some degree of misconduct is understandable, because prosecutors are elected officials, and capital cases are fraught with emotion and often closely followed by the press. These kinds of circumstances can lead to excessive zeal.

Beyond the problem of misconduct, prosecutors vary in their attitude towards the death penalty. Some strongly pursue it, while others avoid it. In more sparsely populated districts, the costs and burdens of prosecuting a capital case may be prohibitive. In other districts (such as Shelby County), the political environment and other factors may encourage the aggressive pursuit of the death penalty.[8]

The varying ways that prosecutorial discretion is exercised, and the occurrence of prosecutorial misconduct in some cases, are important additional factors contributing to arbitrariness.

(8) <u>Inaccuracy</u>

Aside from the total of 104 defendants whose death sentences have been set aside, three condemned inmates have been released from prison because they were exonerated by evidence of actual evidence. A fourth was released after his death sentence was vacated and

[8] Although we have not collected the data on this issue, it is well known among the defense bar that in Shelby County, in a significant percentage of capital trials juries do not return verdicts of first-degree murder, suggesting a tendency on the part of the prosecution to over-charge. In Davidson County, by contrast, in capital trials juries always return guilty verdicts for first-degree murder, although they also are known occasionally (especially in recent years) to return Life or LWOP sentences. See discussion of Davidson County, below.

a retrial was ordered in a *coram nobis* proceeding, on the strength of evidence of innocence. How many other death row inmates are actually innocent? We don't know.[9]

The lack of reliability of a capital sentencing scheme is an independent reason for declaring it unconstitutional under due process and Eighth Amendment principles. But it also infuses another arbitrary factor in the process by which the random few are selected for execution.

(9) Race

Implicit racial bias exists in our criminal justice system, and this bias inevitably infects the capital punishment system. In 1997 the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness issued its Final Report at the conclusion of its two-year review of the State's judicial system.[10] Among other things, the Commission concluded that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] ..., institutionalized bias is relentlessly at work."[11] While our society continually attempts to eradicate the effects of implicit bias from our institutions, there is no indication that it has been eliminated from our capital sentencing system.

In March 2007, the American Bar Association published Evaluating Fairness and Accuracy in State Death Penalty Systems: An Analysis of Tennessee's Death Penalty Laws,

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[9] As set forth in Mr. Miller's affidavit, Michael Lee McCormick was acquitted in his retrial, Paul Gregory House was released when his charges were dropped on the strength of his newly discovered evidence of actual innocence, and Gussie Willis Vann's charges were also dropped because of evidence of actual innocence. Ndume Olatushani was the person who was released upon entering an *Alford* plea.

[10] Final Report of the Tennessee Commission on Racial and Ethnic Fairness to the Supreme Court of Tennessee (1997).

[11] Id. at 5.

Procedures, and Practices.[12] As part of that study, the ABA commissioned a study of "Race and Death Sentencing in Tennessee, 1981-2000."[13] The study concluded that "white-on-white homicides are more likely than black-on-black homicides to result in a death sentence, even after the level of homicide aggravation is statistically controlled."[14]

The recent trend regarding race is disturbing. Over the past ten years, from July 1, 2006 to June 30, 2016, there have been fourteen trials resulting in death sentences. In ten of those cases (71%), the defendants were African-American. It appears that as the death penalty becomes less frequently imposed, in an increasing percentage of cases it is imposed on African-Americans.

Race certainly has an effect in capital cases, which is another source of unacceptable arbitrariness.

(10) Judicial disparity

While judges are presumed to be objective and impartial, from our experience in capital cases we know that different judges view these cases differently, and the disposition of a judge can influence his or her decisions in capital cases. We can begin by looking at deeply divided death penalty opinions issued by the Supreme Court on a yearly basis, from

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[12] This report is published on the ABA website at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf (visited 9/22/16). The members of the Tennessee Death Penalty Assessment Team who contributed to and signed off on the study were Professor Dwight L. Aarons (University of Tennessee College of Law), W.J. Michael Cody (former Tennessee Attorney General), Kathryn Reed Edge (former President of the Tennessee Bar Association), Jeffrey S. Henry (former director of the Public Defenders Conference), Judge Gilbert S. Merritt (6th Cir.), Bradley A. MacLean (private attorney and former member of the Office of the Post-Conviction Defender, and William T. Ramsey (private attorney with the law firm Neal & Harwell).

[13] Id., Appendix 1.

[14] Id. at Q.

the nine opinions issued in Furman (1972) through the five opinions in Glossip v. Gross, 135 S.Ct. 2726 (2015), and in cases since then. For example, Justices Brennan and Marshall categorically opposed the death penalty and always voted to vacate death sentences, while Justice Scalia consistently voted to uphold death sentences. We see similarly opposing views expressed on the United States Court of Appeals for the Sixth Circuit, where someone like Judge Merritt regularly issues opinions to vacate death sentences, and someone like Judge Siler inevitably votes to uphold death sentences. These judges, persons of integrity and intelligence, acting in good faith, and looking at the same cases involving the same legal principles, often come to opposing conclusions about what the proper outcomes should be. Among the defense bar, and probably within the Attorney General's office, we know that in many federal habeas cases, the judge or panel that we draw will likely determine the outcome of the case.

Without pointing to members of the Tennessee judiciary, we also know that different judges differently exercise their judgment in these kinds of cases.

And that is to be expected in the highly controversial and emotionally charged arena of capital punishment. It is human nature. Everyone approaches these kinds of issues with certain cognitive biases borne of differing world views.[15] Trial judges are elected officials. It goes without saying that liberal judges tend to be somewhat more sympathetic to defense arguments, and conservative judges tend to be somewhat more sympathetic to prosecution arguments. This is not a criticism, for in our society diversity of viewpoint is a good thing.

[15] For interesting discussions of how different cognitive styles deal with controversial social issues in different ways, *see, e.g.*, Richard A. Posner, How Judges Think (Harvard University Press) (2008); Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 Emory L. Rev. 312 (2008); and Dan M. Kahan & Donald Bramam, Cultural Cognition and Public Policy, 24 Yale Law & Policy Rev. 147 (2006).

But in death penalty cases, where divergent points of view are more likely to come to the fore, and where arbitrariness is not to be tolerated, differences in judicial disposition contribute to the capriciousness of the capital punishment system.

(11) Timing

The timing of a first-degree murder conviction is another arbitrary factor affecting the odds that the death penalty would be imposed. A defendant convicted before the year 2000 was three times more likely to be sentenced to death than a defendant convicted after 2000, and more than five times more likely than a defendant convicted any time during the past ten years.

The numbers of cases in which death sentences were imposed (both those that have been sustained and those that that were subsequently reversed or vacated), in five-year intervals as set forth in Mr. Miller's Revised Affidavit, are as follows:

7/1/1977 – 6/30/1982 = 34	(6.8 per year)
7/1/1982 – 6/30/1987 = 50	(10.0 per year)
7/1/1987 – 6/30/1992 = 45	(9.0 per year)
7/1/1992 – 6/30/1997 = 26	(5.2 per year)
7/1/1997 – 6/30/2002 = 37	(7.4 per year)
7/1/2007 – 6/30/2012 = 9	(1.8 per year)
7/1/2012 – 6/30/2016 = 3	(0.75 per year) (4 year interval)

The trend is clear. During the ten-year period from July 1982 through June 1992, death sentences were being imposed at the rate of 9.5 cases per year, whereas over the past nine years death sentences have been imposed at the rate of only 1.3 cases per year. The sharp downward trend continued to accelerate over the past four years during which we saw only three new death sentences (all from Shelby County, all African-American). The increasing rarity of death sentences reflects our evolving standard of decency away from

capital punishment. It also demonstrates that the timing of a case, along with its location, is another capricious factor in our capital sentencing system.[16]

IV.
Davidson County

In Davidson County, the death penalty is an endangered species and may be extinct. While the incidence of new death sentences in Davidson County was already declining, on October 18, 2001, the Office of the District Attorney General for the 20th Judicial District issued its Death Penalty Guidelines (copy attached). Since that date fifteen years ago, there has not been a single new death sentence in Davidson County. The last time a jury returned a death sentence in Davidson County was February 16, 2001, in the case of Robert Leach who died of natural causes while on death row, before his collateral review proceedings were completed. Since the beginning of 2000, there have been 178 Davidson County defendants convicted of first-degree murder, but only one (Robert Leach) received a death sentence.

Since the Guidelines were published, at least 24 Davidson County defendants have been convicted of multiple first-degree murders (*i.e.*, murders with two or more victims), and three of those were murders with three victims.. All 24 of the multi-murder defendants received Life or LWOP sentences.

We are aware of two post-Guidelines cases that went to trial in which the Davidson County District Attorney sought the death penalty. Both cases involved rape. In each case, a Davidson County jury found the defendant guilty but returned a Life or LWOP sentence – not death. *See* Melvin Crump v. State, No. M2006-022440CCA-R3-CD (Tenn. Crim. App. Mar. 18, 2009) (defendant convicted of first degree premeditated murder, first degree felony murder

[16] The increasing rarity of new death sentences is signaled by, among other things, the reduced staff of capital case attorneys.

based upon the predicate crime of rape, first degree felony murder based upon the predicate crime of larceny, and aggravated sexual battery; the jury returned a life sentence, not death); James Wayne Kimbrough v. State, No. M2003-00719-CCA-R3-CD (Tenn. Crim. App. Jan. 31, 2005) (defendant convicted of first degree premeditated murder, felony murder, and two counts of spousal rape; jury returned a LWOP sentence, not death). Jury decisions of this nature are strong indicators of contemporary standards of decency.

The bottom line is that in Davidson County, at least, the death penalty is contrary to contemporary standards of decency. Moreover, under the Davidson County District Attorney's Guidelines, and given Davidson County's history since their issuance in 2001, Mr. Abdur'Rahman's case does not qualify as a capital case. It is difficult for Mr. Abdur'Rahman to understand why he may face execution simply because he was convicted in a different era.

V.

We are not alone in claiming that the historical record shows that a capital sentencing system like Tennessee's fails Furman. The death penalty has hung by a thin thread since it was reinstated in Gregg. The vote to uphold the guided discretion scheme in Gregg was seven-to-two. The majority included Justices Powell, Blackmun, and Stevens. However, after years of observing the application of guided discretion sentencing schemes in the real world, each of these Justices changed his mind. These three Justices, combined with the dissenting Justices in Gregg,[17] would have constituted a majority going the other way.

Justice Powell dissented in Furman, voting to uphold discretionary death penalty statutes, and also authored the Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987),

[17] The dissenting votes were cast by Justices Brennan and Marshall.

which upheld Georgia's death penalty against a challenge based upon demonstrated racial bias. Shortly after his retirement, however, his biographer published the following colloquy:

> In a conversation with the author [John C. Jeffries Jr.] in the summer of 1991, Powell was asked if he would change his vote in any case:
>
> > "Yes, *McCleskey v. Kemp*."
> > "Do you mean you would now accept the argument from statistics?"
> > "No, I would vote the other way in any capital case."
> > "In *any* capital case?"
> > "Yes."
> > "Even in *Furman v. Georgia*?"
> > "Yes, I have come to think that capital punishment should be abolished."
>
> Capital punishment, Powell added, "serves no useful purpose." The United States was "unique among the industrialized nations of the West in maintaining the death penalty," and it was enforced so rarely that it could not deter.

John C. Jeffries Jr., Justice Lewis F. Powell Jr.: A Biography, at 451-52 (Charles Scribner's Sons)(1994).

Justice Blackmun, who also dissented in Furman and voted to uphold discretionary sentencing statutes, and voted with the majority in Gregg, first expressed his changed view in Callins v. Collins, 510 U.S. 1141, 1143 (1994):

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see Furman v. Georgia, 408 U.S. 238 (1972), and, despite the effort of the States and the Court to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

Justice Stevens, who was relatively new to the Court when he joined the Gregg majority, followed suit fourteen years later in Baze v. Rees, 128 S.Ct. 1520, 1549-51 (2008):

> I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is]

> patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman, 408 U.S. at 312 (White, J., concurring).

And speaking of current Justices who were not on the Court when Gregg was decided, Justices Breyer and Ginsburg recently looked at the historical record. In a careful analysis, they explained why a system such as Tennessee's no longer can be sustained. Glossip v. Gross, supra. *See* discussion of Glossip in Mr. Abdur'Rahman's Motion to Reopen. The Glossip dissent is significant because it represents a shifting view and eloquently reflects on the failed effort over forty years to apply guided discretion capital sentencing schemes that were supposed to address the problem of arbitrariness. The historical record speaks to how this kind of system simply has not been able to accomplish that goal.

CONCLUSION

"Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189. It is clear from the statistics and our experience over the past 39 years, which demonstrate arbitrariness and capriciousness, that Tennessee's death penalty system "fails to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences." Woodson, 428 U.S. at 302.

In the words of Justice Stewart, Mr. Abdur'Rahman is "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Furman, 408 U.S. at 310. In light of the historical record, which reflects the capriciously random way death sentences are imposed in Tennessee, as well as our evolving standard of decency, our

death penalty sentencing system as applied must be declared unconstitutional under Furman.

In the alternative, in light of the statistics in Davidson County, imposition of the death penalty in Mr. Abdur'Rahman's case is arbitrary and capricious and runs counter to the evolving standard of decency that now prevails in Davidson County, and his death sentence should therefore be vacated on that ground.

In looking at our experience with the death penalty over the past 39 years, we cannot escape the conclusion that the system is nothing more than a lottery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of September, 2016, a true copy hereof has been served on the Office of the District Attorney General, 222 2nd Avenue North, Suite 500 Washington Square, Nashville, Tennessee 37201-1649.

Bradley A. MacLean

OFFICE OF THE DISTRICT ATTORNEY GENERAL
20TH Judicial District

DEATH PENALTY GUIDELINES

INTRODUCTION:

> He is to judge between the people and the government; he is to be the **safeguard** of the one and the **advocate** for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, anymore than those who deserve prosecution to escape; he is to **pursue guilt**; he is to **protect innocence** . . . . ***Fout v. State***, 4 Tenn. 98, 99 (1816)

Under Tennessee law, the District Attorney General is solely responsible for determining which first degree murder cases are appropriate to seek the death penalty and which are not. The decision to seek the death penalty is the most serious one a prosecutor must make. Once such a decision has been made, it represents an enormous commitment of state resources and a recognition that the case will be reviewed and scrutinized exhaustively. Because of the issues at stake, it is imperative that the decision to seek the death penalty be made impartially based upon the applicable state statutes and case law and without regard to the defendant's or victim's sex, race, religion, ethnic background, national origin, sexual orientation or similar consideration. In order to ensure that the decision to seek the death penalty is made properly and the prosecution conducted fairly, this office has decided to implement written guidelines. These guidelines shall apply to all cases that have yet to be tried in the 20th Judicial District.

DEATH PENALTY DECISION PROCESS:

1. Every case that is indicted for first degree murder shall be reviewed by the assistant district attorney to whom it is assigned to determine whether any statutory aggravating factors exist that would justify legally seeking the death penalty or life without parole. In those first degree murder cases **where no such aggravating factors exist**, the assistant district attorney shall fill out a ***First Degree Murder Evaluation Form***; indicate that neither the death penalty nor life without parole is legally possible; obtain the signature of their team leader; and forward it to the District Attorney General for his signature.

2. In those first degree murder cases **where one or more aggravating factors are arguably present**, the assistant district attorney assigned to the case shall fill out a ***First Degree Murder Evaluation Form***; discuss the appropriate punishment with his or her team leader; consult with the family of the victim; and meet with the District Attorney General to discuss the case in detail.

3. If, after an initial review, the death penalty remains a possible sanction, the District Attorney General shall contact counsel for the defendant in writing and notify him/her of the intention to consider the case for possible death penalty application and give the attorney an opportunity to supply in writing or provide in person any mitigating information that might be relevant to the decision.

4. A final review of the case will not occur until counsel for the defendant has had an opportunity to provide any mitigating information or to explore bona fide plea negotiations.

5. The District Attorney General shall personally review the case and consider any mitigating information known to the office or provided by defense counsel. The District Attorney General will discuss the case with the assistant district attorney assigned and the team leader and make the ultimate decision.

6. Only after the District Attorney General has determined that the death penalty shall be sought, may notice of such determination be provided to the court and to defense counsel.

7. The decision to seek the death penalty shall be made as promptly as possible in order to provide ample notice to the court and defense counsel to ensure adequate preparation time for the defense, the appointment of additional counsel where appropriate, and the selection of a trial date.

8. Once notice has been provided of the state's intention to seek the death penalty, the case may not be settled upon a plea of guilty to a lesser crime or punishment without the approval of the District Attorney General.

9. The Office of the District Attorney General will seek the death penalty only in those cases where the evidence of guilt is substantial. The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice. Jail house informants may be used as corroborative witnesses but in no event shall a death penalty case be based principally upon their testimony.

10. Only those defendants who actually committed the murder or who planned and/or hired the murderer shall be eligible for death penalty consideration. Codefendants who were present and aided or abetted in the murder shall only be subject to the death penalty in those circumstances where the facts establish that they knowingly engaged in actions that carried a grave risk of death and their conduct exhibited a reckless indifference to the value of human life.

11. Until the review process has been completed, no office member shall make any public comment about whether a particular case is appropriate for the death penalty. An assistant may comment that a particular case is legally eligible for death penalty consideration in the future and may argue in open court that the defendant be held without bond because he/she is eligible for death penalty consideration.

12. The office shall keep statistical data on the age, sex and race of the defendants and victims in all cases where notice for the death penalty was given.

THE DISCOVERY PROCESS:

1. In all cases where notice for the death penalty has been given, the office shall provide counsel for the defendant an opportunity for open-file discovery. Counsel for the defendant shall be required to initial every document in the file to indicate it has been reviewed. Counsel for the defendant will be provided with copies of all written materials, and copies of audio tapes and video tapes will continue to be provided under existing office policy. Pretrial statements of witnesses subject to disclosure during trial (***Jencks*** material) may be reviewed during the open-file discovery process at any time in the discretion of the assistant district attorney. Copies of these statements shall be given to defense counsel at the time the statements are reviewed or at such time as the court directs but no later than at the conclusion of jury selection. In addition, copies of all statements in possession of the state will be provided to defense counsel and filed with the court at the conclusion of jury selection. The District Attorney's Office reserves the right to make other arrangements for the disclosure of information in the file when warranted for the safety of a witness or the public.

2. The office shall make written demand for all relevant information to be provided by all law enforcement agencies, laboratories and other offices engaged in the investigative process.

3. The Office of the District Attorney General will arrange for counsel for the defendant to review all physical evidence in the possession of any state or local agency.

4. The Office of the District Attorney General will request DNA testing for all items of physical evidence where relevant to determining the defendant's guilt or innocence.

5. The Office of the District Attorney General will not oppose the review and/or retesting of any physical evidence by experts retained by the defense provided adequate safeguards are implemented to ensure the integrity of the process.

POST CONVICTION PROCEDURES:

1. A defendant who has been convicted and sentenced to death may review any and all files in possession of the Office of the District Attorney General upon written request notwithstanding provisions to the contrary in Tennessee Code Annotated §40-30-209. Such files will be made available to the defendant's attorney or the defendant's representative under the terms and conditions applicable to all public records requests.

2. The defendant may choose to use the process outlined in this office's Post Conviction DNA Testing Procedure, issued this same date.

CONCLUSION:

The death penalty is a rarely employed sanction reserved for defendants who commit the most egregious homicides. While this office is determined to seek the death penalty in appropriate cases, it is equally resolute in its commitment to protect the rights of the accused. These guidelines are intended to establish a professional benchmark and to assist in the exercise of prosecutorial discretion.

Attachment 15

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V

ABU ALI ABDUR'RAHMAN, Petitioner	)		FILED
	)		
	)	No. 87-W-417	
v.	)	(capital case)	
	)	(post-conviction)	
STATE OF TENNESSEE, Respondent.	)	(habeas corpus)	

ORDER GRANTING "MOTION TO REOPEN POST-CONVICTION PETITION" IN PART AND DENYING IN PART

I. Introduction

This matter is before this Court on Petitioner's June 24, 2016, motion to reopen his petition for post-conviction relief. Petitioner, Abu-Ali Abdur'Rahman, by and through counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief petition based upon new rules of law as announced in (1) the majority opinion in *Foster v. Chatman,* 578 U.S. ___, 136 S. Ct. 1737 (2016), (2) *Justice* Breyer's dissent in *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726 (2015), and (3) the majority opinion in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). After reviewing the motion and the relevant authorities and for the reasons stated within this order, Petitioner's Motion to Reopen filed on June 24, 2016 and Petitioner's Writ of Habeas Corpus filed on September 23, 2016 is hereby DENIED as to the second and third issues. However, this Court will hold an evidentiary hearing in order to make a determination as to issue one, whether Petitioner is entitled to relief under *Foster v. Chatman.*

II. Evidentiary Hearing

This Court will hold an evidentiary hearing to determine whether Petitioner is entitled to relief under *Foster* based upon the prosecution's discriminatory practices during jury selection. Petitioner previously raised a challenge to the prosecution's use of peremptory strikes against African-American jurors on direct appeal.[1] However, Petitioner now raises this challenge again because Petitioner has now obtained a copy of the prosecution's trial file which includes notes from the jury selection process.

This Court seeks to determine whether *Foster* created a new rule of law or whether the "motivated in substantial part by discriminatory intent" test in *Snyder v. Louisiana* announced this new rule at issue.[2] If *Snyder* controls, this Court must determine whether Petitioner waived his claim by failing to file the motion to reopen for eight years.

III. Procedural History[3]

Trial and Sentencing

A Davidson County Jury convicted Petitioner of premeditated and felony first degree murder, assault with intent to commit murder, and armed robbery. After the guilty verdicts were returned, the jury sentenced Petitioner to death, finding three aggravating circumstances. The Tennessee Supreme Court affirmed Petitioner's convictions and sentence. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), *cert denied,* 498 U.S. 908 (1990).

Post-Conviction

Mr. Abu-Ali Abdur'Rahman subsequently filed a petition for post-conviction relief.

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[1] *See State v. Jones,* 789 S.W. 2d 545 (Tenn. 1990).
[2] *Snyder v. Louisiana,* 552 U.S. 472 (2008).
[3] The Hon. Walter Kurtz presided over the petitioner's trial and both post-conviction proceedings.

The post-conviction court denied the petition. The Court of Criminal Appeals affirmed the judgment of the post-conviction court. The Supreme Court denied Petitioner's writ of certiorari. *State v.* Jones, 789 S.W. 2d 545 (Tenn. 1990); Jones *v. Tennessee*, 516 U.S. 1122 (1996).

Federal Habeas Corpus Proceedings

Mr. Abdur'Rahman filed a timely petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee. The District Court denied relief via on January 21, 1998. *See Abdur'Rhman v. Bell,* 990 F.Supp. 985 (M.D. Tenn. 1998).

In a subsequent petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee, the District Court issued a writ vacating the death sentence because of Petitioner's ineffective assistance of counsel during the sentencing phase. *See Abdur'Raham v. Bell,* 999 F.Supp 1073 (M.D. Tenn. 1998). The Sixth Circuit Court of Appeals then vacated the District Court's writ. *See Abdur'Rahman v. Bell*, 226 F.3d 696, 715 (6th Cir. 2000).

Petitioner then filed a motion for relief from the District Court judgment denying the writ of habeas corpus. After a series of appeals and remands, the Sixth Circuit Court of Appeals remanded to the United States District Court for the Middle District of Tennessee to decide on Mr. Abdur'Raham's petition for writ of habeas corpus. The courts ultimately denied habeas corpus. *See In re Abdur'Rahman,* 392 F.3d 174 (6th Cir. 2004), *cert. granted sub nom. Bell v. Abdur'Rahman,* 545 U.S. 1151 (2005); *Abdur'Raham v. Bell*, 493 F.3d 738 (6th Cir. 2007); *Rahman v. Bell*, No. 3:96-0380, 2009 WL 211133 (M.D. Tenn. Jan. 26, 2009), *aff'd*, 649 F.3d 468 (6th Cir. 2011).

Petitioner then filed a Motion for Relief from Judgment in the United States

District Court for the Middle District of Tennessee. The District Court denied the motion, which the Sixth Circuit Court of Appeals affirmed. *Rahman v. Carpenter,* No. 3:96-0380, 2013 WL 3865071 (M.D. Tenn. Jul. 25, 2013), *aff'd*, 805 F.3d 710 (6th Cir. 2015).

IV. Applicable Law

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

> Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief . . . within one (1) year of the final action of the highest state appellate court to which an appeal is taken . . . ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. §40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, . . . a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." Id. These limited circumstances include the following:
>
> > (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
> >
> > (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
> >
> > (3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
> >
> > (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.
>
> (Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003). *Foster was decided May 23, 2016, Obergefell* was decided June 26, 2015, and *Glossip* was decided June 29, 2015, so Petitioner's motion is timely.

The post-conviction statutes further provide that

> a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122. Furthermore, as Petitioner asserts, the United Supreme Court's opinion in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016) provides that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."

A motion to reopen "*shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

V. Analysis

Petitioner's Claims under Glossip v. Gross Dissent

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Supreme Court concluded Oklahoma's three-drug lethal injection protocol did not violate the Eighth Amendment's protection against cruel and unusual punishment. Four justices wrote a dissent addressing the particular controversy at issue in *Glossip* (namely, the constitutionality of Oklahoma's lethal injection protocol), but in a separate dissent, joined by Justice Ginsburg, Justice Breyer argued for a reexamination of whether the death penalty itself should be held to be unconstitutional. *See id.* at 2755-80 (Breyer, J., dissenting). This dissent forms the basis for one of Petitioner's issues in the current motion to reopen. Specifically, Petitioner argues,

> In *Glossip v. Gross*, 576 U.S. __, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting), Justices Breyer and Ginsburg concluded that the death penalty likely constitutes a prohibited cruel and unusual punishment, which violates the Eighth and Fourteenth Amendments (and in turn violates Article I §§ 8 & 16 of the Tennessee Constitution). Abu-Ali Abdur'Rahman relies on all of the arguments and evidence in Justice Breyer's dissent to support his argument that the death sentence in his case is unconstitutional. Mr. Abdur'Rahman expressly incorporates all of Justice Breyer's *Glossip* opinion as factual, legal, and evidentiary support for his request for an evidentiary hearing and for post-conviction relief given the unconstitutionality of the death penalty in this case. *See Glossip*. 576 U.S. at ___, 135 S. Ct. at 2755-2780 (incorporated by reference, and attached as Exhibit 3).
>
> Mr. Abdur'Rahman's death sentence is unconstitutional for of the reasons that Justice Breyer explained: it is unreliable (Glossip, 576 U.S. at __, 135 S. Ct. at 2756-2759 (Breyer, J., dissenting)); arbitrary, given its disproportionality (*id.*, 135 S. Ct. at 2759-2764); cruel in light of its excessive delays and its failure to serve any legitimate penological objective (*Id.*, 135 S. Ct. at 2764-2772); and highly unusual or rare. *Id.*, 135 S. Ct. at 2772-2776. This motion relies on every specific point that Justice Breyer made on these issues, though Mr. Abdur'Rahman will not recite them all in detail. Although Justice Breyer's conclusions are sufficient in and of themselves to entitle Mr. Abdur'Rahman to an evidentiary hearing and vacation of his death sentence, in this motion Mr. Abdur'Rahman delineates specifically how, in light of specific facts, Justice

> Breyer's statements make the death penalty unconstitutional as applied to Mr. Abdur'Rahman and in Tennessee, entitling him to relief.[4]

Initially, this Court concludes the *Glossip* dissent is not a "final ruling of an appellate court" that would entitle Petitioner to relief. The final ruling of the Supreme Court in *Glossip* affirmed Oklahoma's lethal injection protocol. Justice Breyer's separate dissenting opinion has no precedential value and cannot be considered "a new substantive rule of constitutional law [which] controls the outcome of a case[.]" *Montgomery,* 136 S. Ct. at 729 (describing a new substantive rule of constitutional law as one that controls the outcome of a case). In short, Petitioner's *Glossip* claim must be denied because "the facts underlying the claim, if true, would [not] establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Tenn. Code Ann. § 40-30-117(a)(4). *See also Edmund Zagorski v. State*, No. M2016-00557-CCA-R28-PD, slip op. at 2 (Tenn. Crim. App. May 4, 2016) (order denying relief in appeal of motion to reopen decision based upon *Obergefell* opinion and *Glossip* dissent), *perm. app. filed* (Tenn. June 28, 2016).

This Court also notes Petitioner makes several arguments regarding what he views as the unreliability of the death penalty generally and as applied in his case in particular. Petitioner's claims regarding the unreliability of his convictions and sentences are, in large part, related to issues which either were or could have been litigated on direct appeal or post-conviction. A motion to reopen is not the proper means of raising such claims. To the extent Petitioner asserts trial and post-conviction counsel may have been deficient in failing to raise those claims identified in the current motion, such

[4] Motion to reopen at 24-25

claims are more appropriate for federal habeas claims under *Martinez* v. *Ryan*[5] and related cases. The case-specific "unreliability" claims are, therefore, denied as not cognizable for relief in a motion to reopen.

Petitioner's general assertions concerning the death penalty in Tennessee being unreliable, arbitrary, cruel, and highly unusual or rare are hardly new. Mindful of evolving standards of decency, the United States Supreme Court has concluded that executing certain classes of persons—such as the intellectually disabled[6] and persons committing capital offenses as juveniles[7]—is unconstitutional. However, both the federal and state supreme courts have repeatedly concluded the death penalty itself does not violate the United States and Tennessee constitutions. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726 (2015) (majority opinion); and *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012). Whatever the merits may or may not be of the concerns set forth in the *Glossip* dissent, binding precedent, which is clearly contained in the majority opinion of the same case, requires this Court to find Petitioner's claim here does not rely upon a new substantive rule of constitutional law as required by the statute.

Petitioner's Claims under Obergefell v. Hodges

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[5] In *Martinez*, the United States Supreme Court concluded that ineffective assistance of trial counsel claims will not be viewed as procedurally defaulted (i.e., waived) in a federal habeas corpus proceeding "if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 1320 (2012). Tennessee's courts have concluded *Martinez* and its progeny do not create the right to effective post-conviction counsel in this state, *see David Edward Niles v. State*, No. M2014-00147-CCA-R3-PC (Tenn. Crim. App. June 1, 2015), *perm. app. denied*, (Tenn. Sept. 17, 2015), and cannot form the basis for reopening post-conviction proceedings, *see Oscar T. Berry v. State*, No. M2013-01927-CCA-R3-PC (Tenn. Crim. App. June 26, 2014), *no perm. app. filed*. As stated above, the federal courts have rejected Petitioner's *Martinez* claims.

[6] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

[7] *See Roper v. Simmons*, 543 U.S. 551 (2005).

Petitioner also asserts he is entitled to relief under the United States Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), which concluded the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and therefore is guaranteed to all couples regardless of sex. Specifically, Petitioner argues the *Obergefell* opinion "give[s] full recognition to the right to life by recognizing that the states lack any power to deny an individual his or her fundamental rights of personhood—[rights] which obviously includes the right to life."[8] This Court disagrees.

The government's inability to deny any person his fundamental rights under the state or federal constitution is hardly a novel concept. Petitioner's assertion the death penalty denies him his fundamental right to life is also not a new claim. Numerous death row inmates have raised the claim in Tennessee's courts, and both the Tennessee Supreme Court[9] and the Court of Criminal Appeals[10] have denied these claims.

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[8] Motion to reopen at 18 (some alterations added).

[9] See *State v. Mann*, 959 S.W.2d 503, 536 (Tenn. 1997) (appendix); and *State v. Bush*, 942 S.W.2d 489, 524 (Tenn. 1997) (appendix). *See also State v. Freeland*, 451 S.W.3d 791, 825 (Tenn. 2014) (appendix); *State v. Sexton*, 368 S.W.3d 371, 427 (Tenn. 2012) (appendix); *State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010); *State v. Holton*, 126 S.W.3d 845, 871-72 (Tenn. 2004) (appendix); and *Nichols v. State*, 90 S.W.3d 576, 604 (Tenn. 2002).

[10] *See Cauthern v. State*, 145 S.W.3d 571, 629 (Tenn. 2004). *See also Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD (Tenn. Crim. App. Aug. 29, 2014); *Akil Jahi a.k.a. Preston Carter v. State*, No. W2011-02669-CCA-R3-PD (Tenn. Crim. App. Mar. 13, 2014); *David Ivy v. State*, No. W2010-01844-CCA-R3-PD (Tenn. Crim. App. Dec. 21, 2012); *Steven Ray Thacker v. State*, No. W2010-01637-CCA-R3-PD (Tenn. Crim. App. Mar. 23, 2012); *Gerald Lee Powers v. State*, No. W2009-01068-CCA-R3-PD (Tenn. Crim. App. Feb. 22, 2012); *John Michael Bane v. State*, No. W2009-01653-CCA-R3-PD (Tenn. Crim. App. July 21, 2011); *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD (Tenn. Crim. App. Apr. 25, 2011); *Vincent Sims v. State*, No. W2008-02823-CCA-R3-PD (Tenn. Crim. App. Jan. 28, 2011); *Detrick Cole v. State*, No. W2008-02681-CCA-R3-PD (Tenn. Crim. App. Mar. 8, 2011); *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD (Tenn. Crim. App. July 1, 2009); *Tyrone Chalmers v. State*, No. W2006-00424-CCA-R3-PD (Tenn. Crim. App. June 25, 2008); *Anthony Darrell Hines v. State*, No. M2006-02447-CCA-R3-PC (Tenn. Crim. App. Jan. 29, 2008); *James A. Dellinger v. State*, No. E2005-01485-CCA-R3-PD (Tenn. Crim. App. Aug. 28, 2007), *aff'd in part, rev'd in part on other grounds*, 279 S.W.3d 282 (Tenn. 2009); *William R. Stevens v. State*, No. M2005-00096-CCA-R3-PD (Tenn. Crim. App. Dec. 29, 2006); *Farris Genner Morris, Jr., v. State*, No. W2005-00426-CCA-R3-PD (Tenn. Crim. App. Oct. 10, 2006); *David Keen v. State*, No. W004-02159-CCA-R3-PD (Tenn. Crim. App. June 5, 2006); *Kevin B.*

Petitioner argues *Obergefell*'s conclusions regarding fundamental rights, human dignity, and the prohibition against the diminishment of one's personhood apply in all circumstances, not just the right to marry. However, this Court is not aware of any state or federal appellate opinion extending *Obergefell* to criminal law in general or capital punishment in particular. The *Obergefell* opinion does not state explicitly that the Supreme Court's holding applies to areas of the law beyond the right to marry.

In addition and as previously referred to above, the Court of Criminal Appeals has already denied relief in a similar case. In October 2015, Edmund Zagorski, convicted in Robertson County of two counts of first degree murder and sentenced to death,[11] filed a motion to reopen his post-conviction proceedings based upon the *Obergefell* opinion and the *Glossip* dissent discussed above. The post-conviction court denied the motion following a hearing, and on appeal the Court of Criminal Appeals affirmed the trial court:

> The Appellant argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). The Obergefell case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty." *Obergefell*, 135 S. Ct. at 2604-05. The Appellant argues that the death penalty, which has been imposed against him, "denies his fundamental right to life, denies him inherent human dignity, and unconstitutionally diminishes his personhood — all of which are prohibited by *Obergefell*." The death penalty, however, has not been ruled unconstitutional by the United States Supreme Court or the Tennessee Supreme Court. Accordingly, the trial court did not abuse its discretion in holding that *Obergefell* simply has no bearing on the Appellant's case. Moreover, the Appellant's reliance upon a dissenting opinion in *Glossip* offers him no avail. In order to succeed in reopening

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Burns v. State, No. W2004-00914-CCA-R3-PD (Tenn. Crim. App. Dec. 21, 2005); *Kennath Henderson v. State*, No. W003-01545-CCA-R3-PD (Tenn. Crim. App. June 28, 2005); *Byron Lewis Black v. State*, No. 01C01-9709-CR-00422 (Tenn. Crim. App. Apr. 8, 1999); *State v. Ricky Thompson*, No. 03C01-9406-CR-00198 (Tenn. Crim. App. Jan. 24, 1996).

[11] *See State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985).

> a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. 135 S. Ct. at 2731. Accordingly, the trial court did not abuse its discretion in denying relief to the Appellant based upon his reliance on Justice Breyer's dissent. Finally, the Appellant's reliance on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is misplaced. The Supreme Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Id. at 729. The issue in *Montgomery* dealt with juvenile offenders sentenced to life without the possibility of parole. As the trial court correctly noted, however, "the death penalty for the [Appellant] has not been eliminated" in this case. Again, the death penalty is currently a constitutionally acceptable form of punishment in this state and country.
>
> For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Appellant's application for permission to appeal is, therefore, denied.

Edmund Zagorski v. State, No. M2016-00557-CCA-R28-PD, slip op. at 2 (Tenn. Crim. App. May 4, 2016) (order denying relief in appeal of motion to reopen decision), *perm. app. filed* (Tenn. June 28, 2016).

Under existing precedents, this Court must conclude that while *Obergefell* indeed states a new rule of constitutional law related to same-sex marriage, that new rule does not alter the long-standing precedent under which the death penalty does not deny an inmate his fundamental right to life. *Obergefell* does not entitle Petitioner to relief, and, therefore, the motion to reopen should be denied as to this issue.

VI. Conclusion

An evidentiary hearing is hereby ordered to make a determination as to issue one. For the reasons stated above, Mr. Abdur-Rahman's motion to reopen his petition for post-conviction relief is DENIED as to issues two and three. Petitioner is indigent, so any costs associated with these proceedings are taxed to the State.

IT IS SO ORDERED.

Entered this the 14th day of October, 2016.

MONTE D. WATKINS, Judge
Criminal Court Division V

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following persons by U.S. Mail on this, the 7th day of October, 2016:

Deputy District Attorney General Roger Moore
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201

Mr. Bradley A. MacLean
454 Mariner Point Drive
Clinton, Tennessee 37716

Clerk / Deputy Clerk

Attachment 16

OFFICE OF THE DISTRICT ATTORNEY GENERAL

GLENN R. FUNK
District Attorney General

November 20, 2015

Director Jerry Estes
Tennessee District Attorneys General Conference
226 Capitol Boulevard, Suite 800
Nashville, TN 37243-0890

Honorable Kim Helper
District Attorney General
P. O. Box 937
Franklin, TN 37065-0937

Honorable Mike Dunavant
District Attorney General
121 N. Main St.
Ripley, TN 38063

Dear Director Estes, President Helper and General Dunavant,

I know the Conference works very hard to provide the best training possible for District Attorneys across the state. A tremendous amount of work goes into the planning, preparation and execution of our annual conference. I appreciate all the hard work of many people that went into this year's event. The annual conference provided some excellent training and great advice.

However, I need to address with leadership a real problem stemming from the Voir Dire panel discussion on Thursday, October 22. Rutherford County ADA John Zimmerman was on the panel, and he made comments which were insulting to the 20th Judicial District. More importantly, his presentation encouraged unethical and illegal conduct.

The first of these inappropriate comments was when he said that as an ADA in Nashville, he would strike jurors with a 37215 area code, an affluent part of town, if the if the case involved people from "the inner city" because "in Nashville, rich people don't care about what happens in East Nashville."

Washington Square, Suite 500 • 222 2nd Avenue North • Nashville, TN 37201-1649
Tel. 615 862-5500 • Fax 615 862-5599

While the racial implications in the previous comment were inferential, his next statements were blatant advice to use race in jury selection. Specifically, Mr. Zimmerman described prosecuting a conspiracy case with all Hispanic defendants. He stated he wanted an all African-American jury, because "all Blacks hate Mexicans."

During and after the conference, I received a number of complaints regarding Mr. Zimmerman's statements. I have attached three emails from Assistants in my office. As a result of this incident, I held a staff meeting to specifically disavow Mr. Zimmerman's comments and to provide a CLE on Batson in order to reiterate to every member of my office that race should never be used by a prosecutor as a consideration in jury selection.

I believe the Conference has a responsibility to all of the prosecutors in Tennessee to provide correct instruction and advice. I believe the Conference should also acknowledge when a mistake is made and incorrect information is provided by the Conference's chosen panel members. In this situation, I recommend that every District address Mr. Zimmerman's comments and provide correct training. As stated by my ADAs in their emails, prosecutors today are under intense scrutiny. Mr. Zimmerman's comments, if not disavowed, leave the impression that they are endorsed by the Conference.

Sincerely,

Glenn R. Funk
District Attorney General

GRF/deh

Funk, Glenn (D.A.)

From: Norman, Janice (D.A.)
Sent: Friday, November 13, 2015 3:31 PM
To: Funk, Glenn (D.A.)
Cc: Moore, Roger (D.A.)
Subject: Re: Voir Dire Panel Discussion

Glenn,

Thank you for correcting the misinformation from the panel discussion. The voir dire panel was coordinated purposefully as an open discussion and we were not asked to provide any information before the panel discussion. I would assume that the Conference had no idea about General Zimmerman's comments before the panel session. However, I regret that myself, the other panel members and/or the moderator did not specifically address the misinformation at the time of the panel discussion. Specifically, we should have stated the obvious that the advice to choose jurors based on their race (i.e. Zimmerman stated that he *wanted* and obtained an all-black jury because the defendant was Mexican and because he believed that all blacks hate Mexicans) was not only offensive, but also a direct violation of Batson. We should have clarified that we do not ever choose to strike jurors OR keep jurors based on race and that doing either is a violation of law. Personally, I do not want the impression of the Assistant District Attorneys in Tennessee to be that I agreed with that advice to violate Batson or even appear that I am supporting someone else's past violation of Batson. I am glad that our office addressed this issue and corrected the misinformation that was stated in the Panel Discussion at the conference, please let me know if I can do anything further to assist with this issue.

Jan

From: Moore, Roger (D.A.)
Sent: Tuesday, November 10, 2015 6:08 PM
To: Funk, Glenn (D.A.)
Cc: Norman, Janice (D.A.)
Subject: RE: Scanned from a Xerox multifunction device.pdf - Adobe Reader

The comments I was referrring to were ADA Zimmerman's remarks that jury selection could (and apparently should) be conducted based on racial motivations/stereotyping. By that I am specifically recalling that he said words to the effect that if you have a Hispanic defendant you should try and get African-American jurors because "all blacks hate Mexicans". That was after he said that you shouldn't leave people from Belle Meade on a jury because they don't know and don't care about what happens in the poor parts of town. I seem to recall that he didn't know the zip code for Belle Meade, but I think his point was that people should be excused based just on where they live. I'm sure Jan may recall things in more detail as she is much more detail oriented than I willl ever be (plus she was closer).

From: Moore, Roger (D.A.)
Sent: Monday, November 09, 2015 3:57 PM
To: Funk, Glenn (D.A.)
Cc: Norman, Janice (D.A.)
Subject: Scanned from a Xerox multifunction device.pdf - Adobe Reader

I thought the attached article was timely in light of the comments made by ADA Zimmerman during the Voir Dire panel discussion at the Annual Conference. Jan and I have discussed on more than one occasion since the Conference that his comments were not only factually incorrect, but could be interpreted as having the endorsement of the Tennessee District Attorneys General Conference. Jan and the other panelists were no doubt taken by surprise, as I would imagine that had his comments been pre-screened there would have been a disclaimer at the very least, and perhaps his removal from the panel. Public scrutiny of prosecutors may be at an all-time high and any suggestion that the goal of

Tennessee prosecutors is to subvert the holding in Batson would be a disservice to the vast majority of us whose goal is to do the right thing the right way. I know that is what you expect from everyone in this Office, and perhaps it might be good to discuss Batson at the next Staff Meeting as not everyone was at the Voir Dire breakout session.

Charles, Jenny (D.A.)

Something I witnessed at the fall conference has been bothering me to the point where I regret not speaking up earlier. The conference has always been a place where assistants can enjoy fellowship with each other, tell war stories and hopefully learn a few things about being a better attorney. This year I was particularly interested in watching the panel on voire dire as my colleague Jan Norman and former colleague John Zimmerman, were speaking.

John told a story about a drug free school zone trial where he was the prosecutor and the defendants were Hispanic. He then began to describe how both he and the defense attorneys aimed to get a jury comprised of black jurors because according to John, the black race does care about Hispanics. After hearing what John had to say, I left with real concerns about the message the conference is sending to assistants across the state about inclusion and what is acceptable conduct. I am not one to carefully scrutinize others' words for political correctness and understand there are generational differences in how we talk about race in this country. But let me clear; stating "blacks do not care about Mexicans" is not ok and it is a message that should have been immediately repudiated. At best, it was a careless statement that generalized an entire race of people. At worst, it was an overtly racist stereotype.

This comment could not come at a worse time as our entire profession is under nationwide scrutiny. The public and the media are looking for any reason to criticize prosecutors and police and John's comment provided ample fodder.

In sum, I do not believe John intended to hurt others by his comments at the conference. However, the DA's conference needs to make an intentional and thoughtful effort to ensure that comments like these are not made in the future as they surely reflect poorly upon prosecutors in the state of Tennessee.

Jenny Charles
Davidson County District Attorney's Office
Assistant District Attorney
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201-1649
Office: (615) 862-5546
Fax: (615) 862-5599

Attachment 17

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
	)	
v.	)	**No. M1988-00026-SC-DDT-DD**
	)	
ABU ALI ABDUR'RAHMAN,	)	
	)	
Defendant.	)	

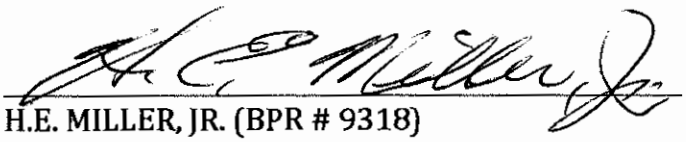
DECLARATION UNDER PENALTY OF PERJURY
OF H.E. MILLER, JR.

Mr. H.E. Miller, Jr., states under penalty of perjury as follows:

1. I am an attorney duly licensed and in good standing to practice law in the State of Tennessee. My Board of Professional Responsibility Number is 9318. I am a resident of Williamson County, Tennessee.

2. Attached is my report of my survey of first degree murder cases in Tennessee during the period July 1, 1977, through June 30, 2017. All of the statements contained in this report are true and correct to the best of my knowledge, information and belief.

Respectfully submitted,



H.E. MILLER, JR. (BPR # 9318)
8216 Frontier Lane
Brentwood, Tennessee 37027
(615) 953-7465

Dated: 2/27/18

Appendix 1

REPORT ON SURVEY OF TENNESSEE FIRST DEGREE MURDER CASES AND CAPITAL CASES DURING THE 40-YEAR PERIOD FROM JULY 1, 1977, TO JUNE 30, 2017

By H. E. Miller, Jr.

Dated: February 7, 2018[1]

Forty years ago, the Tennessee legislature enacted the state's current capital sentencing scheme to replace prior statutes that had been declared unconstitutional.[2] Although the current scheme has been amended in certain of its details, its essential features remain in place.[3]

In Tennessee, a death sentence can be imposed only in a case of "aggravated" first degree murder upon a "balancing" of statutorily defined aggravating circumstances[4] proven by the prosecution and the mitigating circumstances presented by the defense.[5] The Tennessee Supreme Court is statutorily required to review each death sentence "to determine whether (A) the sentence of death was imposed in any arbitrary fashion; (B) the evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) the evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[6] The Court's consideration of whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases" is referred to as "comparative proportionality review."

In 1978, the Court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47), requiring that "in all cases ... in which the defendant is convicted of first-degree murder," the trial judge shall complete and file a report (the "Rule 12 Report") to include information about the case. Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review.[7]

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[1] This report is subject to updating as additional first degree murder cases are found.

[2] See State v. Hailey, 505 S.W.2d 712 (Tenn. 1974), and Collins v. State, 550 S.W.2d 643 (Tenn. 1977) (invalidating Tennessee's then-existing death penalty statutes).

[3] See Tenn. Code Ann. § 39-13-204 (Sentencing for first degree murder) and § 39-13-206 (Appeal and review of death sentence).

[4] Aggravating circumstances are defined in Tenn. Code Ann. § 39-13-104(i).

[5] See Tenn. Code Ann. § 39-13-204(g) (to impose a death sentence, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; if a single juror votes for life or life without parole, then the death sentence cannot be imposed).

[6] Tenn. Code Ann. § 39-13-206(c)(1).

[7] In State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987), the Court stated that "our proportionality review of death penalty cases since Tennessee Supreme Court Rule 12 (formerly Rule 47) was promulgated in 1978 has been predicated largely on those reports and has never been limited to the cases that have come before us on appeal." *See, also*, the Court's press release issued January 1, 1999, announcing the use of CD-ROMs to store

The modern history of Tennessee's death penalty system raises questions that go to the heart of constitutional issues: How have we selected the "worst of the bad"[8] among convicted first degree murderers for imposition of the ultimate sanction of death? Is there a meaningful distinction between those cases resulting in death sentences and those resulting in life (or life without parole) sentences? Does Tennessee's capital punishment system operate rationally, consistently, and reliably; or does it operate in an arbitrary and unpredictable fashion? Is there meaning to comparative proportionality review?

To assist in addressing these questions, I undertook a survey of all Tennessee cases resulting in first degree murder convictions since implementation of the state's current death penalty system – covering the 40-year period from July 1, 1977, through June 30, 2017.

THE SURVEY PROCESS

My starting point was to review all Rule 12 Reports on file with the Administrative Office of the Courts and the Office of the Clerk of the Tennessee Supreme Court. I quickly encountered a problem. In close to half of all first degree murder cases, trial judges failed to file the required Rule 12 Reports; and in many other cases, the filed Rule 12 Reports were incomplete or inaccurate, or were not supplemented by subsequent case developments such as reversal or retrial. I found that because many first degree murder cases are reviewed on appeal, appellate court decisions are an essential source of the information that cannot be found in the Rule 12 Reports. But many cases are resolved by plea agreements at the trial level without an appeal, leaving no record with the appellate court; and many appellate court decisions are not published in the standard case reporters.

Accordingly, over the past three years I have devoted untold hours searching various sources to locate and review Tennessee's first degree murder cases.[9] I have had the assistance of Bradley A. MacLean and other attorneys who handle first degree murder cases. I have also received generous help from officials with the Tennessee Administrative Office of the Courts and the Tennessee Department of Correction, along with numerous court officials throughout the state. I would like to specifically acknowledge the tremendous assistance offered by the staff of the Tennessee State Library.

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copies of Rule 12 reports, in which then Chief Justice Riley Anderson was quoted as saying, "The court's primary interest in the database is for comparative proportionality review in these cases, which is required by court rule and state law, ... The Supreme Court reviews to data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process." (Available at tncourts.gov/press/1999/01/01/court-provides-high-tech). *Compare* State v. Bland, 958 S.W.2d 651 (Tenn. 1997) (changing the comparative proportionality review methodology by limiting the pool of comparison cases to capital cases that previously came before the Court on appeal).

[8] The expression "the worst of the bad" has been used by the Court to refer to those defendants deserving of the death penalty. See, *e.g.*, State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994); State v. Branam, 855 S.W.2d 563, 573 (Tenn. 1993) (Drowota, J., concurring).

[9] I have spent well in excess of 3,000 hours on this project.

In conducting this survey, I have reviewed the following sources of information:

- All Rule 12 Reports as provided by the Tennessee Administrative Office of the Courts and the office of the Clerk for the Tennessee Supreme Court;
- Reports on capital cases issued by the Administrative Office of the Courts;
- The Report on Tennessee Death Penalty Cases from 1977 to October 2007 published by The Tennessee Justice Project;
- Tennessee Court of Criminal Appeals and Tennessee Supreme Court decisions in first degree murder cases, as published on the Administrative Office of the Courts' website;
- Cases published in *Fastcase* on the Tennessee Bar Association website;
- Cases published in *Westlaw* and *Google Scholar*;
- Data furnished by the Tennessee Department of Correction;
- Information found in the Tennessee Department of Correction's TOMIS system as published on its website, and information separately provided by officials at the Tennessee Department of Correction;
- Information found in the Shelby County Register of Deeds Listing of Tennessee Deaths (the state-wide "Death Index" maintained by Tom Leatherwood, the Register of Deeds, has been very helpful in obtaining information regarding victims);
- Original court records;
- News publications.

I have attempted to compile the following data regarding each first degree murder case, to the extent available from the sources I reviewed:

- Name and TOMIS number of the defendant;
- Date of the offense;
- Defendant's date of birth and age on the date of the offense;
- Defendant's gender and race;
- Number, gender, race, and age(s) of first degree murder victim(s) in each case;
- Whether a notice to seek the death penalty was filed (if indicated in the Rule 12 Forms);

- County where the judgment of conviction was entered, and county where the offense occurred (if different);

- Sentence imposed for each first degree murder conviction; and

- Whether a Rule 12 Report was filed.

- In capital cases, whether the conviction or sentence was reversed, vacated or commuted, and the status of the case as of June 30, 2017.

The data I compiled is set forth in the following Appendices:

Appendix A : Master Chart of Adult Defendants with Sustained First Degree Murder Convictions from July 1, 1977 through June 30, 2017, in which Rule 12 Reports Were Filed.

Appendix B: Master Chart of Adult Defendants with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Not Filed.

Appendix C: Master Chart of Juvenile Defendants (tried and convicted as adults) with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Filed.

Appendix D: Master Chart of Juvenile Defendants (tried and convicted as adults) with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Not Filed.

Appendix E: Chart Showing Numbers of Adult & Juvenile Defendants with Sustained First Degree Convictions.

Appendix F: Chart of Adult Cases Broken Down by County and Grand Division and Rule 12 Compliance.

Appendix G: Chart of Adult Multi-Murder Cases.

Appendix H: Chart of Tennessee Capital Trials During the 40-Year Period.

Ultimately all of this data can be derived from public court records.

Caveats

I am confident that I have found and reviewed all cases decided during the 40-Year Period in which death sentences have been imposed. This was a feasible task, for several reasons. The total number of capital trials that resulted in death sentences during this period (221) is relatively small compared to the total number of first degree murder cases (2,514)[10] that I have been able to find. The Tennessee Supreme Court reviews on direct appeal all trials resulting in death sentences, creating a published opinion in each case. There exist various sources of information that specifically deal with capital cases, including records maintained by public defender offices, The Tennessee Justice Project reports of 2007 and 2008, the monthly and quarterly reports on capital cases issued by the Tennessee Administrative Office of the Courts, and records maintained by the Tennessee Department of Correction concerning the death row population.

On the other hand, I am equally confident that I have not found all first degree murder cases. I have carefully studied all filed Rule 12 Reports, but in 46% of first degree murder cases trial judges failed to file the required Rule 12 Reports. This Rule 12 noncompliance is especially problematic in regards to the most recent cases because of the time it typically takes for a first degree murder case to create a readily accessible record as it works through the trial and appellate processes.[11]

Consequently, the ratios presented in this report are distorted because the totals of first degree murder cases that I have found are lower than the totals of actual cases. For example, among the cases I have been able to find, 3.4% of defendants convicted of first degree murder convictions received Sustained Death Sentences. We can be sure that, in fact, the actual percentage of Sustained Death Sentences is lower, because I am certain that I have not found all first degree murder cases resulting in life or LWOP sentences that should be included in the totals.

I have spent considerable time verifying my data by double-checking and cross-referencing my research, and by consulting with others in the field. Due to the sheer volume of data involved, the absence of Rule 12 Reports in many cases, and the inaccuracies in the Rule 12 Reports that have been filed in several other cases, I am sure my data contain some errors. Notwithstanding, in my view any errors are relatively minor and statistically insignificant except as otherwise noted.

I have included two master charts reflecting Sustained First Degree Murder Convictions of juveniles – *i.e.,* of defendants who were less than 18 years old at the time of the offense but were tried and convicted as adults. This report does not focus attention on juvenile cases because juvenile defendants are ineligible for the death sentence. Nonetheless, information about juvenile defendants may be helpful to indicate the scope of juvenile convictions and the degree of Rule 12 noncompliance in juvenile cases.

The percentages indicated in this report are rounded to the nearest 1% unless otherwise indicated.

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[10] This excludes cases of juvenile offenders who were not eligible for the death penalty.

[11] For example, there were only 93 first degree murder cases from the past four years (2013 – 2017), as compared to an average of 269 cases for each of the nine preceding four-year periods, even though Tennessee's murder rate over this most recent period was virtually the same as in prior periods. See Tables 23 and 25, *infra.*

SUMMARY OF FINDINGS

I. DEFINITIONS

For purposes of this report and the Appendices, the following definitions apply:

40-Year Period: The period of this survey, from July 1, 1977, to June 30, 2017. This survey is based on the date of the crime. All data regarding defendants on Death Row are as of June 30, 2017, without taking account of subsequent developments in their cases.

Awaiting Retrial: A Capital Case in which the defendant received Conviction Relief or Sentence Relief and was awaiting a retrial as of June 30, 2017.

Capital Case: A case decided during the 40-Year Period in which the defendant received a death sentence at the Initial Trial, including cases in which death sentences or the underlying convictions were subsequently reversed or vacated.

Capital Trial: An Initial Trial or a subsequent Retrial resulting in a death sentence.

Conviction Relief: A defendant receives Conviction Relief from a Capital Trial when a conviction from that Capital Trial is reversed on direct appeal or vacated in state post-conviction or federal habeas proceedings, even if the defendant is convicted on retrial.

Death Row consists of all defendants with Pending Death Sentences as of June 30, 2017. It does not include defendants not under death sentence while awaiting Retrial.

Death Sentence Reversal Rate: The percentage of Capital Trials that result in Conviction Relief or Sentence Relief. The Death Sentence Reversal Rate refers to Capital Trials, not capital defendants. A defendant's Initial Capital Trial might be reversed, and on Retrial he might be resentenced to death. That would count as one reversal out of two trials.

Deceased: A defendant who died during the 40-Year Period while he was under a sentence of death.

Initial Capital Trial: In any Capital Case during the 40-Year Period, the Initial Capital Trial is the initial trial at which the defendant was sentenced to death. The Initial Capital Trial is to be distinguished from any Retrial.

LWOP: Life without parole sentence.

Multi-Murder Case: A Sustained Adult First Degree Murder Case in which the defendant was convicted of two or more counts of first degree murder involving two or more murder victims.

New Death Sentence: Death sentence(s) imposed in the Initial Capital Trial. Except as otherwise indicated, multiple death sentences imposed in a single Multi-Murder Case are treated statistically as a single "death sentence." If a Retrial results in a death sentence, it is not treated as a "New Death Sentence."

Pending Death Sentence: Death sentence that was in place and pending as of June 30, 2017. If a defendant received Conviction Relief or Sentence Relief and was awaiting Retrial as of June 30, 2017, then the defendant did not have a Pending Death Sentence.

Retrial: In Capital Cases, a second or subsequent trial on the underlying criminal charge, or a second or subsequent sentencing hearing, following a remand after the original conviction or sentence from the Initial Capital Trial was reversed or vacated. (As of June 30, 2017, there were eight defendants who were not under death sentence but were awaiting Retrial.)

Reversed versus Vacated: The term "reversed" refers to the setting aside of a conviction or sentence on direct appeal, which may or may not be followed by a Retrial on remand. The term "vacated" refers to the setting aside of a conviction or sentence in collateral litigation such as state post-conviction or federal habeas corpus, which may or may not be followed by a Retrial.

Rule 12 Report: The report filed in a first degree murder case pursuant to Tenn. S. Ct. R. 12.

Rule 12 Noncompliance: The failure of a trial judge to fill out and file a Rule 12 Report as required by Tennessee Supreme Court Rule 12. Rule 12 Compliance indicates that a Rule 12 Report was filed in the case, but "Compliance" as used here does not indicate whether the Report was completely filled out in an accurate manner.

Sentence Relief: A defendant receives Sentence Relief from a Capital Trial when his/her death sentence from that Capital Trial is reversed on direct appeal, vacated in state post-conviction or federal habeas proceedings, or commuted by the Governor.[12]

Sustained Death Sentence: Death sentence(s) imposed during the 40-Year Period that were in place as of June 30, 2017, or as of the date of the defendant's death. If a conviction or sentence was vacated and the case remanded for Retrial, and if as of June 30, 2017, or as of the date of the defendant's death, the case had not been retried and the defendant was not under a death sentence, then the case does not count as a Sustained Death Sentence.

Sustained Adult First Degree Murder Cases: Cases in which the defendant was age 18 or older on the date of the offense, the defendant was convicted of one or more counts of first degree murder, and the conviction was sustained on appeal and/or post-conviction review. In the master charts attached as Appendices A through D, the cases are dated as of the date of the offense and are listed according to the defendants convicted. In some cases, the same defendant was convicted of two or more first degree murders in two or more separate proceedings involving different first degree murder charges. In those cases, the defendant is listed only once in the master charts and treated as one case, although the charts indicate if the defendant was involved in more than one separate case involving separate charges. Sustained Juvenile First Degree Murder Cases are those in which the defendant was under 18 years of age at the time of the offense and was tried and convicted as an adult.

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[12] In one case, the federal court granted a conditional writ of habeas corpus barring execution until the state conducts a hearing on the defendant's intellectual disability. See *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014). The state has not conducted the hearing within the time required, and therefore the state is barred from executing the defendant. For our purposes, this case is counted as Sentence Relief and Awaiting Retrial.

II. SUSTAINED ADULT FIRST DEGREE MURDER CASES

For the 40-Year Period, I have found at least 2,514 with Sustained Adult First Degree Murder Cases and 210 Sustained Juvenile First Degree Murder Cases. The numbers can be broken down as follows:

TABLE 1

Breakdown of Sustained First Degree Murder Cases By Rule 12 Compliance (Adult & Juvenile Cases)

	Totals	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Noncompliance Rate
Sustained Adult First Degree Murder Cases	2,514	1,348	1,166	46%
Sustained Juvenile First Degree Murder Cases	210	104	106	50%
TOTALS of Adult + Juvenile Cases	2,724	1,452	1,272	47%

TABLE 2

Breakdown of Sustained First Degree Murder Cases According to Sentences Statewide (Adult Cases)

Sentences for First Degree Murder Convictions (Adult) - Statewide	Number of Defendants	% of the Total (rounded)
Life	2,090	83%
Life Without Parole (LWOP)	332	13%
Sustained Death Sentence	85	3.4%[13]
Awaiting Retrial	7	0.2%
TOTAL	2,514	100%

[13] As explained in the *Caveats* section above, the actual percentage of Sustained Death Sentences is almost certainly lower than 3.4%. While I am relatively certain that I have captured all cases resulting in death sentences, both sustained and unsustained, I am equally sure that I have not found all first degree murder cases because of the high rate of Rule 12 Noncompliance. As more first degree murder cases are found, the measured percentage of Sustained Death Sentence cases will decline.

TABLE 3

Breakdown of Sustained First Degree Murder Cases According to Sentences Shelby County (Adult Cases)

Sentences for First Degree Murder Convictions (Adult) – Shelby County	Number of Defendants	% of the Total (rounded)
Life	476	80%
Life Without Parole (LWOP)	85	14%
Awaiting Retrial	6	1%
Sustained Death Sentence	30	5%
TOTAL	597	100%

TABLE 4

Breakdown of Sustained First Degree Murder Cases According to Sentences Davidson County (Adult Cases)

Sentences for First Degree Murder Convictions (Adult) – Davidson County	Number of Defendants	% of the Total (rounded)
Life	332	88%
Life Without Parole (LWOP)	35	9%
Awaiting Retrial	0	0%
Sustained Death Sentence	11	3%
TOTAL	378	100%

TABLE 5

Breakdown of Sustained First Degree Murder Cases According to Sentences Knox County (Adult Cases)

Sentences for First Degree Murder Convictions (Adult) – Knox County	Number of Defendants	% of the Total (rounded)
Life	149	86%
Life Without Parole (LWOP)	17	10%
Awaiting Retrial	1	<1%
Sustained Death Sentence	6	<4%
TOTAL	173	100%

BREAKDOWN OF SUSTAINED ADULT FIRST DEGREE MURDER CASES ACCORDING TO RACE AND RULE 12 COMPLIANCE

TABLE 6

Statewide Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop)[14]	Rule 12 Reports Filed[15] (Compliance Rate)	Rule 12 Reports Not Filed[16] (Non-Compliance Rate)	Total Cases	% of Total Cases[17]
Black (17%)	646 (54% Filed)	543 (46% Not Filed)	1,189	47%
White (78%)	665 (53% Filed)	602 (47% Not Filed)	1,267	50%
Other (5%)	37 (64% Filed)	21 (36% Not Filed)	58	2%
TOTALS	**1,348 (54% Filed)**	**1,166 (46% Not Filed)**	**2,514**	100%

[14] In this column, the percentages designate the percentage of that race in the general population according to the 2010 Census. For example, according to the 2010 Census, 17% of Tennessee's general population was black.

[15] This column represents the numbers and percentages of cases in which Rule 12 Reports were filed in cases involving defendants in the designated races. For example, among the total of 1,189 cases involving black defendants, Rule 12 Reports were filed in 646 of those cases for a Rule 12 Compliance Rate of 54%.

[16] This column represents the numbers and percentages of cases in which Rule 12 Reports were not filed in cases involving defendants in the designated races. For example, among the total of 1,166 cases involving black defendants, Rule 12 Reports were not filed in 543 of those cases for a Rule 12 compliance rate of 46%.

[17] This column represents the percentage of defendants of the designated race. Thus, 47% of all Sustained Adult First Degree Murder Cases throughout the state during the 40-Year Period involved black defendants.

TABLE 7
Shelby County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (52%)	271 (52% Filed)	252 (48% Not Filed)	523	88%
White (41%)	38 (57% Filed)	29 (43% Not Filed)	67	11%
Other (7%)	5 (83% Filed)	1 (17% Not Filed)	6	1%
TOTALS	**314 (53% Filed)**	**282 (47% Not Filed)**	**596**	100%

TABLE 8
Davidson County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop.)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (28%)	136 (62% Filed)	85 (38% Not Filed)	221	58%
White (61%)	81 (58% Filed)	59 (42% Not Filed)	140	37%
Other (11%)	12 (71% Filed)	5 (29% Not Filed)	17	5%
TOTALS	**229 (60% Filed)**	**149 (40% Not Filed)**	**378**	100%

TABLE 9
Knox County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop.)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (8%)	42 (58% Filed)	30 (42% Not Filed)	72	42%
White (86%)	56 (59% Filed)	39 (41% Not Filed)	95	55%
Other (6%)	4 (67% Filed)	2 (33% Not Filed)	6	3%
TOTALS	**102 (59% Filed)**	**71 (41% Not Filed)**	**173**	100%

III. MULTI-MURDER CASES

Sentences imposed in the Multi-Murder Cases break down as follows:

TABLE 10: Multi-Murder Cases - Statewide

Sentences for Multi- Murder Convictions During the 40-Year Period Statewide - Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	230	68%
Life Without Parole (LWOP)	76	22%
Sustained Death Sentence	33	10%
TOTAL	339	100%

TABLE 11: Multi-Murder Cases – Shelby County

Sentences for Multi- Murder Convictions During the 40-Year Period Shelby County – Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	30	54%
Life Without Parole (LWOP)	14	25%
Sustained Death Sentence	12	21%
TOTAL	56	100%

TABLE 12: Multi-Murder Cases – Davidson County

Sentences for Multi- Murder Convictions During the 40-Year Period Davidson County – Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	35	66%
Life Without Parole (LWOP)	11	21%
Sustained Death Sentence	7	13%
TOTAL	53	100%

TABLE 13: Multi-Murder Cases – Knox County

Sentences for Multi- Murder Convictions During the 40-Year Period Knox County- Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	19	79%
Life Without Parole (LWOP)	4	27%
Sustained Death Sentence	1	4%
TOTAL	24	100%

TABLE 13A

Multi-Murder Cases - Breakdown By Number of Victims & Sentences

Number of Victims	Life or LWOP Sentences	Sustained Death Sentences	Totals
2	259 (92% of 2-Victim cases)	24 (8% of 2-Victim cases)	283
3	32 (82% of 3-Victim cases)	7 (18% of 3-Victim cases)	39
4	11 (92% of 4-Victim cases)	1 (8% of 4-Victim cases)	12
5	1 (100% of 5-Victim cases)	0 (0% of 5-Victim cases)	1
6	3 (75% of 6-Victim cases)	1 (25% of 6-Victim cases)	4
TOTALS	306 (90% of Multi-Murder Cases)	33 (10% of Multi-Murder Cases)	339

The total of single-murder cases during the 40-Year Period was 2,175. Among those, 53 (2.4%) received Sustained Death Sentences

PRE-OCTOBER 21, 2001 MULTI-MURDER CASES

On October 18, 2001, the Office of the District Attorney General for the 20th Judicial District issued its Death Penalty Guidelines. Since that date through June 30, 2017, no death sentences have been imposed in Davidson County. The breakdown of single and Multi-Murder Cases, before and after October 18, 2001, can be set forth as follows:

TABLE 14

Pre-October 2001 Multi-Murder Cases
By Largest Counties

Sentence	Shelby County	Davidson County	Knox County
Life	23	18	9
LWOP	6	4	1
Sustained Death	9	7	0
TOTALS	**38**	**29**	**10**
% Sustained Death Sentences	**24%**	**24%**	**0%**

TABLE 15

Pre-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

Sentence	West	Middle	East	Statewide Totals
Life	23	56	58	137
LWOP	11	10	13	34
Sustained Death	10	12	4	26
TOTALS	**44**	**78**	**75**	**197**
% Sustained Death Sentences	**22%**	**15%**	**5%**	**13%**

POST-OCTOBER 2001 MULTI-MURDER CASES

TABLE 16

Post-October 2001 Multi-Murder Cases
By Largest Counties

Sentence	Shelby County	Davidson County	Knox County
Life	7	17	10
LWOP	8	7	3
Sustained Death	3	0	1
TOTALS	**18**	**24**	**14**
% Sustained Death Sentences	**17%**	**0%**	**7%**

TABLE 17

Post-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

Sentence	West	Middle	East	Statewide
Life	18	37	29	84
LWOP	9	22	11	42
Sustained Death	4	0	2	6
TOTALS	**31**	**59**	**42**	**132**
% Sustained Death Sentences	**13%**	**0%**	**5%**	**5%**

IV. CAPITAL CASES

A. Basic Capital Case Statistics During the 40-Year Period
TABLE 18

Separate Capital Trials resulting in death sentences[18]	221	
Defendants who received death sentences[19]	192	
Defendants with Sustained Death Sentences	86	(45% of total def's)
Defendants whose death sentences were not Sustained	106	(55% of total def's)[20]
Trials resulting in Conviction Relief	28	(13% of total trials)
Trials resulting in Sentence Relief	104	(47% of total trials)
Total Trials resulting in Relief	132	(60% of total trials)[21]
Defendants with Pending Death Sentences	56	(29% of total def's)[22]
Defendants who died of natural causes with Sustained Death Sentences	24	(12% of total def's)
Multi-Murder Defendants with Sustained Death Sentences	32	(37% of Sust. Death Sent.)
Single-Murder Defendants with Sustained Death Sentences	54	(63% of Sust. Death Sent.)
Awaiting Retrial	8	(4% of total def's)
Executions in Tennessee	6	(3% of total def's)

[18] These include all Initial Trials and Retrials.

[19] One defendant (Paul Reid) is listed with three Initial Capital Trials and another (Stephen Laron Williams) with Two Initial Trials, all on separate murder charges, which were not Retrials. Eighteen other defendants are listed with two trials on the same charges resulting in death sentences (i.e., an Initial Trial and a Retrial); and four are listed with three trials on the same charges (i.e., an Initial Trial and two Retrials), leaving a total of 26 Retrials. Of those Retrials, in 14 cases the death sentences were reversed or vacated (54%), and in 12 cases they were sustained (46%), which closely corresponds with the overall ratio of reversed vs. sustained death sentences.

[20] This is the overall Death Sentence Reversal Rate among defendants who received death sentences, after accounting for Retrials. Commutations are counted here as reversals.

[21] This is the overall reversal rate of trials resulting in death sentences.

[22] This is the size of Death Row as of June 30, 2017, based on the definitions set forth in Part I, *supra*. Additionally, eight defendants whose convictions or sentences were vacated were awaiting retrial.

B. Exonerations

During the 40-Year Period, there have been three exonerations of death row inmates, as follows:

Michael Lee McCormick (acquitted in his retrial)
Sentenced in 1988; Exonerated in 2008; 20 years on death row.

Paul Gregory House (charges dismissed based on evidence of actual innocence)
Sentenced in 1986; Exonerated in 2009; 23 years on death row.

Gussie Willis Vann (charges dismissed based on evidence of actual innocence)
Sentenced in 1994; Exonerated in 2011; 17 years on death row.

Additionally, Ndume Olatushani (formerly Erskine Johnson), who was sentenced to death in 1985, was granted a new trial in his *coram nobis* proceeding, in which he claimed actual innocence. He was released in 2012 on an *Alford* plea after being incarcerated for 26 years.

C. Commutations

Governor Bredesen commuted the death sentences of three defendants, as follows:

Michael Boyd (*a.k.a. Mika'eel Abdullah Abdus-Samad)* was granted a commutation of his sentence to life without parole on September 14, 2007, after being on death row for 19½ years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case where the grossly inadequate legal representation received by the defendant at his post-conviction hearing, combined with procedural limitations, has prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial..."

Gaile K. Owens' sentence was commuted to life on July 10, 2010, after being on death row for 2 ½ years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case in which the defendant admitted her involvement in the murder of her husband and attempted to accept the district attorney's conditional offer of life imprisonment. This acceptance was ineffective only because of her co-defendant's refusal to accept such an agreement..."

Edward Jerome Harbison's sentence was commuted to life without parole on January 11, 2011, after being on death row for 26 years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case where grossly inadequate legal representation received by the defendant at the direct appeal phase, combined with procedural limitations, have prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial...."

D. Executions

During the 40-Year Period, six defendants were executed:

TABLE 19

Executed Defendant	Sentencing Date	Execution Date	Time on Death Row
Robert Glenn Coe	Feb. 2, 1981	Apr. 19, 2000	19 years, 2 months
Sedley Alley	Mar. 18, 1987	June 28, 2006	19 years, 3 months
Philip Workman	Mar. 31, 1982	May 9, 2007	25 years, 1 month
Daryl Holton	June 15, 1999	Sept 12, 2007	8 years, 3 months[23]
Steve Henley	Feb. 28, 1986	Feb. 4, 2009	22 years, 11 months
Cecil C. Johnson, Jr.	Jan. 20, 1981	Dec. 2, 2009	28 years, 10 months

E. Residency on Death Row

Among the 56 defendants with Pending Death Sentences, the lengths of time they resided on death row (from sentencing date in the Initial Capital Trial to June 30, 2017), can be summarized as follows:

TABLE 20

Length of Time on Death Row	Number of Defendants (as of 6/30/2017)
> 30 Years	10
20 – 30 Years	20
10 – 20 Years	16
< 10 Years	10

The median residency on Death Row (as of June 30, 2017) was 21½ years.

The longest residency on Death Row (as of June 30, 2017) was 35 years, 3 months.

[23] Daryl Holton waived his rights to post-conviction and federal habeas review, which accounts for the shortened period between his sentencing and execution dates.

F. Geographic / Racial Distribution of Sustained Death Sentences

During the 40-Year Period, 48 of the 95 Tennessee Counties (51%) conducted Capital Trials, although only 28 of the 95 (29%) counties imposed Sustained Death. The 28 counties that imposed Sustained Death Sentences represent 64% of Tennessee's general.

TABLE 21
SUSTAINED DEATH SENTENCES BY COUNTY/RACE DURING 40-YEAR PERIOD

County	Grand Division	Race of Def: Black	Race of Def: White	Race of Def: Other	Totals	Most Recent Crime Date[24]
Dyer	West	1	1	0	2	1/2/00
Fayette	West	1	0	0	1	5/2/97
Hardeman	West	0	1	0	1	1/17/02
Henderson	West	0	1	0	1	2/5/97
Lake	West	0	1	0	1	2/3/86
Madison	West	2	3	0	5	1/11/05
Shelby	West	18	10	2	30	1/19/12
Tipton	West	1	0	0	1	6/1/10
Weakley	West	0	1	0	1	9/7/79
Bedford	Middle	0	1	0	1	11/30/97
Cheatham	Middle	0	1	0	1	3/3/85
Coffee	Middle	1	0	0	1	1/1/85
Davidson	Middle	4	7	0	11	7/8/99
Jackson	Middle	0	1	0	1	7/24/85
Montgomery	Middle	0	1	0	1	7/8/96
Robertson	Middle	0	1	0	1	4/23/83
Stewart	Middle	0	2	1	3	8/20/88
Williamson	Middle	0	1	0	1	9/24/84
Blount	East	0	2	0	2	2/22/92
Bradley	East	0	1	0	1	12/9/98
Campbell	East	0	2	0	2	8/15/88
Cocke	East	0	1	0	1	12/3/89
Hamilton	East	0	3	0	3	9/6/01
Knox	East	1	5	0	6	1/7/07
Morgan	East	0	1	0	1	1/15/85
Sullivan	East	1	2	0	3	11/27/04
Union	East	0	1	0	1	3/17/86
Washington	East	0	2	0	2	10/6/02
TOTALS		30 (35%)	53 (62%)	3 (3%)	86 (100%)	

Western Grand Division = 23 Blacks + 18 Whites + 2 Other = 43 (50% of statewide total)
Middle Grand Division = 5 Blacks + 15 Whites + 1 Other = 21 (24% of statewide total)
Eastern Grand Division = 2 Blacks + 20 Whites + 0 Other = 22 (26% of statewide total)

[24] The "Most Recent Crime Date" is the date of the most recent offense in the county that resulted in a Sustained Death Sentence.

Since October 2001[25], 14 New Death Sentences, that have been sustained, were imposed in 8 counties – or in 8% of the counties representing 34% of Tennessee's general population (according to the 2010 Census).

TABLE 22

SUSTAINED DEATH SENTENCES BY COUNTY/RACE SINCE OCTOBER 2001

County	Grand Division	Race of Def: Black	Race of Def: White	Race of Def: Other	Totals
Hardeman	West	0	1	0	1
Madison	West	1	0	0	1
Shelby	West	7	0	0	7
Tipton	West	1	0	0	1
Hamilton	East	0	1	0	1
Knox	East	1	0	0	1
Sullivan	East	0	1	0	1
Washington	East	0	1	0	1
Totals		10 (71%)	4 (29%)	0	14 (100%)

Western Grand Division = 9 Blacks + 1 White = 10 Total (71% of statewide total)
Middle Grand Division = 0 Total
Eastern Grand Division = 1 Black + 3 Whites = 4 Total (29% of statewide total)

As indicated in Table 21, above, for each of the three Grand Divisions, the last murder resulting in a Sustained Death Sentence occurred on the following dates:

West Grand Division: January 19, 2012 (Shelby County)
Middle Grand Division: July 8, 1999 (Davidson County)
East Grand Division: January 7, 2007 (Knox County)

[25] As mentioned above, in October 2001 the Office of the District Attorney General for the 20th Judicial District issued its Death Penalty Guidelines. Since then, no death sentences have been imposed in Davidson County, or the entire Middle Grand Division of the State. Also, the frequency of death sentences throughout the State since October 2001 is markedly lower than during the prior 24 year period. Accordingly, it may be useful to compare certain statistics from the two different periods before and after October 2001.

G. Frequency and Decline

During the 40-Year Period, the frequency of trials resulting in New Death Sentences reached a peak around 1990. Beginning around 2005, we have seen a steady and accelerating decline, as follows:

TABLE 23

FREQUENCY OF TENNESSEE DEATH SENTENCES IN 4-YEAR INCREMENTS

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[26]	Ave. New Death Sentences per Year	1st Degree Murder Cases[27]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25 per year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25 per year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00 per year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25 per year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45 per year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00 per year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00 per year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00 per year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50 per year	284	2%	1.7%
7/1/13 – 6/30/17	3	1	1	0.25 per year	Incomplete Data[28]	Incomplete Data	Incomplete Data
TOTALS	**221**	**195[29]**	**89[30]**	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

[26] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.

[27] Counted by defendants, not murder victims.

[28] Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to T.B.I. statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See* Table 25.

[29] One defendant had 3 separate "new" trials each resulting in "new" and "sustained" death sentences; another defendant had 2 such trials. *See* footnote 1, *supra*. Accordingly, there were 195 "new" trials involving a total of 192 defendants, and 89 "sustained" death sentences involving a total of 86 defendants.

[30] See note 28. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

Totals for the first 24 years, from July 1, 1977, to June 30, 2001:

168 "New" death sentences =>
7 "New" death sentences per year (13.2% of First Degree Murder Cases)

74 "Sustained" death sentences =>
4 "Sustained" death sentences per year (5.8% of First Degree Murder Cases)

Totals for the most recent 16 years, from July 1, 2001, to June 30, 2017:

27 "New" death sentences =>
1.7 "New" death sentences per year (3.5% of First Degree Murder Cases)

15 "Sustained" death sentences =>
0.9 "Sustained death sentences per year (< 2.0% of First Degree Murder Cases)

Throughout the state, no new death sentences were imposed during the most recent three-year period (from 6/15/2014 to 6/30/2017).

The decline in death sentences is also reflected in the numbers of counties that have imposed death sentences, which can be broken down in 4-year increments as follows:

TABLE 24

NUMBER OF COUNTIES CONDUCTING CAPITAL TRIALS BY 4-YEAR INCREMENTS

4-Year Period	Number of Counties Conducting Capital Trials[31] During the Indicated 4-Year Period
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11
7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

[31] These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.

The annual rate of "New Death Sentences" has declined while the annual number of murder cases has remained relatively constant.

TABLE 25

NEW DEATH SENTENCES COMPARED TO MURDERS
2002 - 2016

Year	"Murders"[32]	New Death Sentences	% New Death Sentences per Murders	Sustained New Death Sentences	% Sustained New Death Sentences per Murders
2002	385	6	1.6 %	1	0.3 %
2003	394	3	1.0 %	3	1.0 %
2004	350	4	1.1 %	0	0 %
2005	430	2	0.4 %	1	0.2 %
2006	409	1	0.3 %	1	0.3 %
2007	395	1	0.3 %	1	0.3 %
2008	408	1	0.3 %	1	0.3 %
2009	461	1	0.4 %	1	0.4 %
2010	360	2	0.6 %	2	0.6 %
2011	375	2	0.6 %	1	0.3 %
2012	390	1	0.3 %	1	0.3 %
2013	333	0	0 %	0	0 %
2014	375	1	0.3 %	1	0.3%
2015	406	0	0 %	0	0 %
2016	470	0	0 %	0	0 %
TOTALS	**5,941 (Ave = 396/year)**	**25 (1.7/year)**	**0.4 %**	**14 (0.9/year)**	**0.2 %**

During the 10-year period 2003 – 2012:
Total non-negligent homicides = 3,972 => (397 / year)
Total New Death Sentences = 18 => (1.8 / year)
% New Death Sentences per non-neg. homicides = 0.5%
Total sustained New Death Sentences = 12 => (1.2 / year)
% sustained new death sentences per non-neg. homicides = 0.3%

During the 4-year period 2013 – 2016:
Total non-negligent homicides = 1,584 => (396 / year)
Total New Death Sentences = 1 => (0.25 / year)
% New Death Sentences per non-neg. homicides = 0.06%

Of the 19 defendants who received New Death Sentences over this 14-year period, none have been executed, and six have had their sentences vacated. The remaining Pending Cases are under review and could ultimately result in reversals.

[32] The "Murders" statistics come from the T.B.I. annual reports, which date back to 2002. For statistical purposes, T.B.I. defines "Murders" as non-negligent homicides.

Attachment 18

TENNESSEE'S DEATH PENALTY LOTTERY

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February 20, 2018

Table of Contents

I. INTRODUCTION

Imagine entering a lottery in which you are given a list of Tennessee's 2,514 adult first-degree murder cases since 1977, when our modern death penalty system was installed, along with a description of the facts and circumstances surrounding each case in whatever detail you request. You are not told what the final sentences were – whether Life, Life Without Parole (LWOP), or Death. Your job is to make two guesses. First, you must guess which 86 defendants, out of the 2,514, received sustained death sentences (*i.e.*, death sentences sustained on appeal and in post-conviction and federal habeas review). Second, you must guess which six defendants were actually executed during the 40-year period from 1977 to 2017. What are the odds that your guesses would be correct?

We submit that the odds would be close to nil. Even with an abundance of information about the cases, trying to figure out who was sentenced to death, and who was actually executed, would be nothing but a crapshoot.

And what would you look for to make your guesses? The egregiousness of the crime? Maybe, but the vast majority of the most egregious cases (including rape-murder cases and multiple murder cases involving children) resulted in Life or LWOP sentences. Perhaps it would make sense to look for other factors, such as the county where the case occurred (with a strong preference for Shelby County); the race of the defendant (choosing black for the most recent cases would be a very good strategy); the prosecutor (because some prosecutors like the death penalty, and others do not; and some prosecutors cheat, while others don't); the defense lawyers (because some know how to effectively try a capital case, and others do not); the wealth or appearance of the defendant (virtually all capital defendants were indigent at the time of trial, and all defendants on death row are indigent); the publicity surrounding the trial;

the trial judge (because some judges are more prosecution oriented, and others are more defense oriented); or the judges who reviewed the case on appeal or in post-conviction or federal habeas (because some judges are more inclined to reverse death sentences, and others almost always vote the other way); or the year of the sentencing (because a defendant convicted of first-degree murder during the mid-1980's was at least ten times more likely to be sentenced to death than a defendant convicted over the most recent years). In guessing who may have been executed, perhaps the age of the defendant and his health would be relevant (because at current rates a condemned defendant is four times more likely to die of natural causes than to suffer the fate of execution).

Of course, other than the egregiousness of the crime, none of these factors should play a role in deciding the ultimate penalty of death. Yet we know, and the statistical evidence bears out, that these are exactly the kinds of factors we would need to consider in making our guesses in the lottery, if we were to have any chance whatsoever of guessing correctly.

The intent of this article is to bring to light a survey conducted by one of the co-authors, attorney H.E. Miller, Jr., of Tennessee's first degree murder cases over the 40-year period from July 1, 1977, when Tennessee's current capital sentencing scheme went into effect, through June 30, 2017. Mr. Miller conducted his survey in order to address the issue of arbitrariness in Tennessee's capital sentencing system. Mr. Miller's report is attached as Appendix 1.

Before turning to a discussion of Mr. Miller's survey, we need to set the stage with the historical context of Tennessee's system. Accordingly, in Part II we discuss the legal background of Tennessee's scheme beginning with the seminal United States Supreme Court decision in Furman v. Georgia[1] through the enactment of Tennessee's scheme in response to

[1] 408 U.S. 238 (1972).

Furman. In Parts III and IV we discuss two important developments in Tennessee's scheme. In Part III we discuss the expansion of the class of death eligible defendants resulting from two sources: (i) the Tennessee Supreme Court's liberal interpretation of the "aggravating circumstances" that define the class, and (ii) the General Assembly's addition over the years of new "aggravating circumstances." In Part IV we discuss the Tennessee Supreme Court's evisceration of its "comparative proportionality review" of death sentences. In Part V, we return to our lottery analogy by comparing two extreme cases, one resulting in the death sentence and the other in a life sentence. Then, having set the historical stage, in Part VI we turn to a description and evaluation of the results of Mr. Miller's survey. Finally, in Part VII, we look at what others have said about our capital sentencing system, and we state our conclusion that Tennessee's death penalty system is nothing more than a capricious lottery.

II. BACKGROUND

We tend to forget the reason behind Tennessee's current capital sentencing scheme. It stems from the 1972 case of Furman v Georgia,[2] where the United States Supreme Court expressed three principles that underlie the Court's death penalty jurisprudence under the Eighth Amendment Cruel and Unusual Punishments Clause.

The first principle is that death is different. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.

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[2] Id.

And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[3]

The second principle is that the constitutionality of a punishment is to be judged by contemporary, "evolving standards of decency that mark the progress of a maturing society."[4]

And third, viewing how the sentencing system operates as a whole, the death penalty must not be imposed in an arbitrary and capricious manner. Justices Stewart and White issued the decisive opinions in Furman that represent the Court's holding – the common denominator among the concurring opinions constituting the majority.[5] Justice Stewart explained it this way:

> [T]he death sentences now before us are the product of a **legal system** that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone. These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, **the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed**. My concurring

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[3] Id. at 306 (Stewart, J., concurring). The Supreme Court has reiterated this principle. The death penalty "is different in kind from any other punishment imposed under our system of criminal justice." Gregg v. Georgia, 428 U.S. 153, 188 (1976). "From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357 (1977).

[4] Trop v. Dulles, 356 U.S. 86, 101 (plurality opinion) (quoted by Douglas, J., in Furman, 408 U.S. at 242). As Justice Douglas further explained, "[T]he proscription of cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" Id. at 242-43 (quoting from Weems v. United States, 217 U.S. 349, 378 (1909)). The Court's constitutional decisions should be informed by "contemporary values concerning the infliction of a challenged sanction." Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[5] Justices Brennan and Marshall opined that the death penalty is *per se* unconstitutional. Justice Douglas's position on the *per se* issue was unclear, but he found that the death penalty sentencing schemes at issue were unconstitutional.

Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[6]

And Justice White explained:

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. **But when imposition of the penalty reaches a certain degree of infrequency**, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

...

[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.[7]

...

It is also my judgment that **this point has been reached with respect to capital punishment as it is presently administered** under the statutes involved in these cases.... I cannot avoid the conclusion that as the statutes before us are now administered, the penalty **is so infrequently imposed** that the threat of execution is too attenuated to be of substantial service to criminal justice.[8]

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[6] 408 U.S. at 309-10. (internal citations omitted; emphasis added).

[7] Id. at 311-12 (emphasis added).

[8] Id. at 312-13 (emphasis added).

Since Furman and Gregg, the Court has repeatedly emphasized that the judicial system must guard against arbitrariness in the imposition of the death penalty; and the qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions. *See, e.g.,* Gardner v. Florida[9] ("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, based on reason rather than caprice or emotion."); Zant v. Stephens [10] ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'"); California v. Ramos[11] ("The court ... has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Ford v. Wainwright[12] ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."); Spaziano v. Florida,[13] ("[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."). Therefore, courts must "carefully scrutinize ... capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a

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[9] 430 U.S. 349, 357 (1977).

[10] 462 U.S. 862, 884-85 (1983).

[11] 463 U.S. 992, 998-99 (1983).

[12] 477 U.S. 399, 411 (1986).

[13] 468 U.S. 447, 468 (1984).

valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."[14]

Furman makes at least three more key points concerning a proper Eighth Amendment analysis in the death penalty context:

(i) Courts must view how the entire sentencing system operates – *i.e.*, how the few are selected to be executed from the many murderers who are not - and not just focus on the particular case under review. As the Supreme Court explained, we must "look[] to the sentencing system as a whole (as the Court did in Furman ...)";[15] "a constitutional violation is established if a defendant demonstrates a "pattern of arbitrary and capricious sentencing."[16] It is worth noting that in Furman, Justice Stewart's opinion makes no reference to the facts or circumstances of the individual cases under review, and Justice White's opinion only referred to the dates of the trials in the cases in a footnote.[17] Their opinions, along with the other three concurring opinions, dealt with the operation of the death penalty system under a discretionary sentencing scheme, and not with the merits of the individual cases.

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[14] Id. at 460 n. 7.

[15] Gregg v. Georgia, 428 U.S. 153, 200 (1976) (emphasis added).

[16] Id. at 195 n. 46 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[17] Indeed, there is virtually no reference to the facts of the cases under review in any of the nine Furman opinions.

(ii) How the capital sentencing system operates as a whole, as well as evolving standards of decency, will change over time and eventually can reach a point where the system is operating in an unconstitutional manner – as was the case in Furman.[18]

(iii) An essential factor to consider in the Eighth Amendment analysis is the infrequency with which the death penalty is carried out.

To analyze the Eighth Amendment issue by viewing the sentencing system as a whole and ascertaining the infrequency with which the death penalty is carried out, it is necessary to look at statistics. After all, frequency is a statistical concept. A similar need to analyze statistics, particularly statistical trends, applies when assessing evolving standards of decency.

And, indeed, that is exactly what the majority did in Furman. Each of the concurring opinions in Furman relied upon various forms of statistical evidence that purported to demonstrate patterns of inconsistent or otherwise arbitrary sentencing.[19] Evidence of such inconsistent results, of sentencing decisions that could not be explained on the basis of individual culpability, indicated that the system operated arbitrarily and therefore violated the Eighth Amendment.

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[18] Post-Furman, by virtue of our evolving standards of decency, the Court has removed "various classes of crimes and criminals from death penalty eligibility. Examples include those who rape adults, Coker v. Georgia, 433 U.S. 584 (1977); the insane, Ford v. Wainwright, 477 U.S. 399 (1986); the intellectually disabled, Atkins v. Virginia, 536 U.S. 304 (2002); juveniles, Roper v. Simmons, 543 U.S. 551 (2005); and those who rape children, Kennedy v. Louisiana, 554 U.S. 407 (2008)." State v. Pruitt, 415 S.W.3d 180, 224 n. 6 (Tenn. 2013) (Koch, J., concurring and dissenting).

[19] Furman, 408 U.S. at 249-52 (Douglas, J., concurring); Id. at 291-95 (Brennan, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 313 (White, J., concurring); id. at 364-66 (Marshall, J., concurring).

The death penalty statutes under review in Furman, and virtually all then-existing death penalty statutes, were "discretionary."[20] Under those sentencing schemes, if the jury decided that the defendant was guilty of a capital offense, then either the jury or judge would decide whether the defendant would be sentenced to life or death. The sentencing decision was completely discretionary, with no narrowing of discretion or guidance in the exercise of discretion if the defendant was found guilty. Furman determined that under those kinds of discretionary sentencing schemes, the death penalty was being imposed capriciously, in the absence of consistently applied standards, and accordingly any particular death sentence under such a system would be deemed unconstitutionally arbitrary. This problem arose in large measure from the infrequency of the death penalty's application and the irrational manner by which so few defendants were selected for death.

In response to Furman, various states enacted two different kinds of capital sentencing schemes, which the Court reviewed in 1976. The two leading decisions were Woodson v. North Carolina,[21] and Gregg v. Georgia, [22]

In Woodson, the Court examined a mandatory sentencing scheme – if the defendant was found guilty of the capital crime, a death sentence followed automatically. Presumably, a mandatory scheme would eliminate the Furman problem of unfettered sentencing discretion. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that

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[20] In 1838,Tennessee was the first state to convert from a "mandatory" capital sentencing scheme to a "discretionary" scheme, purportedly to mitigate the strict harshness of a mandatory approach. Eventually all states with the death penalty followed course and converted to discretionary schemes. Stuart Banner, The Death Penalty – An American History 139 (Harvard Univ. Press, 2002).

[21] 428 U.S. 280 (1976).

[22] 428 U.S. 153 (1976).

North Carolina's mandatory death penalty statute "fail[ed] to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. ... [W]hen one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to Furman have simply papered over the problem of unguided and unchecked jury discretion."[23] (Again, the Court looked at the historical record.) The mandatory statute merely shifted discretion away from the sentencing decision to the guilty/not-guilty decision, which historically had involved an excessive degree of discretion - and therefore arbitrariness - in capital cases. The Court emphasized that mandatory sentencing schemes "do[] not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." [24]

In Gregg, the Court upheld a "guided discretion" sentencing scheme. This type of scheme, patterned in part after the American Law Institute Model Penal Code, §210.6 (1962), was designed to address Furman's concern with arbitrariness by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision; (ii) narrowing the class of death-eligible defendants by requiring the prosecution to prove aggravating circumstances, thereby narrowing the range of discretion that could be exercised; (iii) allowing the defendant to present mitigating evidence, to ensure that the sentencing decision is individualized, another constitutional requirement; (iv) guiding the jury's exercise of

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[23] 423 U.S. at 302.

[24] Id. at 303 (emphasis added).

discretion within that narrowed range by instructing the jury on the proper consideration of aggravating and mitigating circumstances; and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions. The Court explained the fundamental principle of Furman, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[25]

When Gregg was decided, states had no prior experience with "guided discretion" capital sentencing. Whether such a scheme would "fulfill Furman's basic requirement" of removing arbitrariness and capriciousness from the system, and whether it would comply with our evolving standards of decency, could only be determined over time. Essentially, Gregg's discretionary sentencing statute was an experiment, never previously attempted or tested.

In 1977, Tennessee responded to Furman, Woodson, and Gregg by enacting its version of a guided discretion capital sentencing scheme.[26] Tennessee's scheme was closely patterned after the Georgia scheme upheld in Gregg and included the same elements itemized above. While the Tennessee General Assembly subsequently amended Tennessee's statute a number of times, its basic structure remains.[27] As was the case in Georgia, under Tennessee's scheme a

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[25] 428 U.S. at 189.

[26] See Tenn. Code Ann. §§ 39-13-204 and 206.

[27] In 1993, the General Assembly provided for life without parole as an alternative sentence for first degree murder. T.C.A. § 39-13-204(f). In 1995, as part of the "truth-in-sentencing" movement the General Assembly amended the provisions of Tenn. Code. Ann. § 40-35-501pertaining to release eligibility, which has been interpreted to require a defendant sentenced to life for murder to serve a minimum of 51 years before release eligibility. *See* Vaughn v State, 202 S.W.3d 106 (Tenn. 2006). In 1999 the General Assembly adopted lethal injection as the preferred method of execution and subsequently, in 2014, allowed for electrocution as a fallback method if lethal injection drugs are not

death sentence can be imposed only in a case of "aggravated" first degree murder upon a "balancing" of statutorily defined aggravating circumstances[28] proven by the prosecution and any mitigating circumstances presented by the defense.[29] The Tennessee Supreme Court is statutorily required to review each death sentence "to determine whether (A) the sentence of death was imposed in any arbitrary fashion; (B) the evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) the evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[30] The Court's consideration of whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases" is referred to as "comparative proportionality review."

III. AGGRAVATORS AND THE EXPANDED CLASS OF DEATH-ELIGIBLE DEFENDANTS

The thesis of this article is that Tennessee's capital punishment system operates as a capricious lottery. To put into proper context the lottery metaphor and recent trends in Tennessee's capital sentencing, it is important to understand how the Tennessee General Assembly and the Tennessee Supreme Court have gradually expanded the class of death-eligible

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available. Tenn. Code Ann. § 40-23-114. Additionally, over the years the General Assembly has broadened the class of death-eligible defendants by adding and changing the definition of certain aggravating circumstances, discussed in Part III below.

[28] Aggravating circumstances are defined in Tenn. Code Ann. § 39-13-104(i).

[29] *See* Tenn. Code Ann. § 39-13-204(g) (to impose a death sentence, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; if a single juror votes for life or life without parole, then the death sentence cannot be imposed).

[30] Tenn. Code Ann. § 39-13-206(c)(1).

defendants. The expansion of this class has correspondingly broadened the range of discretion for prosecutors in deciding whether to seek death, and for juries in making capital sentencing decisions at trial. This in turn has increased the potential for arbitrariness.[31]

A fundamental feature of the capital sentencing scheme approved in Gregg, and adopted by Tennessee, is the narrowing of the class of first degree murder defendants who are eligible for the death penalty, by requiring proof of the existence of one or more statutorily defined "aggravating circumstances" that characterize the crime and/or the defendant. As the Court in Gregg explained, "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[32] A central part of the majority opinion in Gregg specifically addressed whether the statutory aggravating circumstances in that case effectively limited the range of discretion in the capital sentencing decision.[33] The Court has repeatedly stressed that a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"[34]

In addition to defining the class of death eligible defendants, aggravating circumstances also provide the prosecution with a means of persuading the jury to impose a death sentence.

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[31] This phenomenon – the expansion over time of the class of death-eligible defendants – has occurred in a number of states and is sometimes referred to as "aggravator creep." *See* Edwin Colfax, Fairness in the Application of the Death Penalty, 80 Ind. L.J. 35, 35 (2005).

[32] Gregg, 428 U.S. at 189.

[33] Id. at 200-04.

[34] Lowenfied v. Philps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

At sentencing, the jury is called upon to "weigh" the aggravating circumstances against the mitigating circumstances, and if the jury finds that the aggravators outweigh the mitigators, then the sentence "shall be death."[35] The more aggravators the prosecution can prove, the more likely the jury will give greater weight to the aggravators and return a death verdict. Moreover, along with expanding the number and definitional range of aggravators, the Court and the legislature have also expanded the range of evidence that the prosecution can present to the jury at the sentencing hearing, which also enhances the prosecution's case for death.[36]

The Tennessee statute enacted in 1977 defined eleven aggravating circumstances that set the boundary around the class of death-eligible defendants.[37] Over the years, the Tennessee

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[35] Tenn. Code Ann. § 39-13-204(g)(1).

[36] Tenn. Code Ann. § 39-13-204(c) allows the prosecution to introduce, among other things, evidence relating to "the nature and circumstances of the crime" or "the defendant's character and background." The Court has broadly interpreted this provision by holding that this kind of evidence "is admissible regardless of its relevance to any aggravating or mitigating circumstance." State v. Sims, 45 S.W.3d 1, 13 (Tenn. 2001). The legislature also amended § 39-13-204(c) to allow introduction of evidence relating to a defendant's prior violent felony conviction, which is discussed below in connection with the (i)(2) aggravator. Additionally, following Payne v. Tennessee, 501 U.S. 808 (1991), the legislature amended § 39-13-204(c) to permit victim impact testimony in the sentencing hearing. *See* State v. Nesbit, 978 S.W.2d 872, 887-94 (Tenn. 1998).

[37] The original version of the sentencing statute, Tenn .Code Ann. § 39-2404(i) (1997), defined the eleven aggravating circumstances as follows:

> (1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.
> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.
> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
> (4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny,

General Assembly has added six aggravators to the original list, bringing the total number to 17, and it has amended other aggravators to further expand the class of death eligible defendants.[38]

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kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.
(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.
(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

See, Houston v. State, 593 S.W.2d 267, 274 n.1 (Tenn. 1980).

[38] Tenn. Code Ann. § 39-13-204(h) (2017) now defines the aggravators as follows (the important changes from the 1977 version are italicized);

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older;
(2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, *whose statutory elements* involve the use of violence to the person;
(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;
(5) The murder was especially heinous, atrocious, or cruel, in that it involved torture or *serious physical abuse beyond that necessary to produce death*;
(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
(7) The murder was *knowingly* committed, *solicited, directed, or aided by the defendant,* while the defendant *had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit,* any first degree murder, arson, rape, robbery, burglary, *theft,* kidnapping, *aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child,* aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
(8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;
(9) The murder was committed against any *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker,*

While the Tennessee legislature's expansion of aggravators is significant, it is perhaps more significant that the Tennessee Supreme Court has interpreted a number of the most frequently used aggravators in a broad fashion. The important interpretations are as follows:

(i)(2) Aggravator – Prior Violent Felony Conviction

In a large number of murder cases, the defendant was previously convicted of a violent felony, and prosecutors frequently use the prior violent felony conviction as an aggravator in seeking death sentences. The Tennessee Supreme Court has broadened the application of this aggravator in a number of ways.

First, notwithstanding the plain language of the statute as amended, which requires that the "statutory elements" of the prior conviction involve the use of violence to the person, it is not necessary for the statutory elements of the prior crime to explicitly involve the use of

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emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that the victim was a *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic* or firefighter engaged in the performance of official duties;
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general, due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;
(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;
(12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period;
(13) The defendant knowingly mutilated the body of the victim after death;
(14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability;
(15) The murder was committed in the course of an act of terrorism;
(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant; or
(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.

violence. Instead, according to the Court, in cases involving a prior crime which statutorily may or may not involve the use of violence, it is only necessary for the prosecution to prove to the judge (not the jury), based upon the record of the prior conviction, that as a factual matter the prior crime actually did involve the defendant's use of violence to another person.[39]

Thus, for example, in State v. Cole the defendant had been convicted of robbery and other crimes for which "the statutory elements of each of the crimes may or may not involve the use of violence, depending on the facts of the underlying conviction."[40] The Court sustained the use of the prior violent felony aggravator upon the trial judge's determination that the evidence underlying the prior convictions established that in fact the crimes involved the defendant's use of violence.[41]

Second, the Court has held that the "prior conviction" need not relate to a crime that occurred before the alleged capital murder; it is only necessary that the defendant be "convicted" of that crime before his capital murder trial.[42] The "prior convicted" crime may have occurred after the murder for which the prosecution seeks the death penalty. It is not unusual for the prosecution to obtain a conviction for a more recent crime in order to create an aggravator for use in the capital trial on a prior murder.

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[39] State v. Ivy, 188 S.W.2d 132, 151 (Tenn. 2006) (holding that the prior conviction may be used as an aggravator if the element of "violence to the person" was set forth in "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, [or] any explicit factual finding by the trial judge to which the defendant assented") (quoting Shepard v. United States, 544 U.S. 3, 16 (2005)).

[40] 155 S.W.3d 885, 899 (2005).

[41] Id. at 899-905. Arguably the procedure by which the trial judge made the finding of violence to the person was modified by the Court in Ivy, *supra* note 39.

[42] State v. Allen, 69 S.W.3d 181, 186 (Tenn. 2002); State v. Fitz, 19 S.W.3d 213, 214 (Tenn. 2000).

Third, a prior conviction of a violent felony that occurred when the defendant was a juvenile, if he was tried as an adult, can qualify as an aggravator to support a death sentence for a murder that occurred later when the defendant was an adult,[43] even though juvenile offenders are not eligible for the death penalty.[44]

Additionally, in 1998 the legislature expanded the range of permissible evidence the prosecution can introduce relating to a prior violent felony conviction. The 1998 amendment permits introduction of evidence "concerning the facts or circumstances of the prior conviction" to "be used by the jury in determining the weight to be accorded the aggravating factor."[45] The amendment gives the prosecution extremely broad license to use such evidence because "[s]uch evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party."[46]

(i)(5) Aggravator – Heinous, Atrocious or Cruel

A murder defendant is eligible for the death penalty if "[t]he murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death"[47] – often referred to as the "HAC aggravator." Any murder, by definition, is a heinous crime that can evoke in a normal juror a strong, visceral negative reaction. In most premeditated murder cases the prosecution can allege the HAC aggravator.

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[43] State v. Davis, 141 S.W.3d 600, 616-18 (Tenn. 2004).

[44] Roper v. Simmons, 543 U.S. 551 (2005).

[45] Tenn. Code Ann. § 39-13-204(c).

[46] Id.

[47] Tenn. Code Ann. § 39-13-204(c).

But under Furman and Gregg, most murder cases should not be eligible for capital punishment. The challenge is to create a meaningful, rational, and consistently applied distinction between first degree murder cases in general, all of which are "heinous" in some sense of the term, and the supposedly few murders that are "especially heinous, atrocious or cruel" justifying a death sentence, in order for this aggravator to serve the function of meaningfully narrowing the class of death eligible defendants.

What constitutes an "especially heinous, atrocious or cruel" murder is ultimately a subjective determination without clearly delineated criteria. In the early period following Furman, the United States Supreme Court struck down similar kinds of aggravators as unconstitutionally vague.[48] The Tennessee Supreme Court responded to those cases by applying a "narrowing construction" of the statutory language, stipulating that the HAC aggravator is "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[49] In Cone v. Bell a Sixth Circuit panel declared Tennessee's HAC aggravator to be unconstitutionally vague.[50] The Supreme Court, however, reversed the Sixth Circuit and upheld Tennessee's version based upon the narrowing construction.[51] Although the Supreme Court

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[48] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980) (invalidating Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravator); Maynard v. Cartwright, 486 U.S. 356 (1988) (invalidating Oklahoma's "especially heinous, atrocious or cruel" aggravator).

[49] State v. Dicks, 615 S.W.2d 126 (Tenn. 1981); State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982). The Court's narrowing construction included language purportedly defining the term "torturous." The Tennessee legislature followed suit by amending the language of the HAC aggravator to provide that it must involve "torture or serious physical abuse beyond that necessary to produce death."

[50] Cone v. Bell, 359 F.3d 785, 794-97 (2004).

[51] Bell v. Cone, 543 U.S. 447 (2005) (*per curiam*).

upheld Tennessee's HAC aggravator, it was a close call, and the criteria for its application remains subjective.

Even with its narrowing construction in response to early U.S. Supreme Court decisions, the Tennessee Supreme Court manages to give the HAC aggravator a very broad definition. The Court's fullest description of this aggravator can be found in State v. Keen, where the Court explained:

> The "especially heinous, atrocious or cruel" aggravating circumstance "may be proved under either of two prongs: torture or serious physical abuse." This Court has defined "torture" as the "infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." The phrase "serious physical abuse beyond that necessary to produce death," on the other hand, is "self-explanatory; the abuse must be physical rather than mental in nature." The word 'serious' alludes to a matter of degree," and the term "abuse" is defined as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'"
>
> Our case law is clear that '[t]he anticipation of physical harm to oneself is torturous" so as to establish this aggravating circumstance. Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within the meaning of the statute."[52]

The Court has also held that although the HAC aggravator now contains two prongs – "torture" or "serious physical abuse" – jurors "do not need to agree on which prong makes the murder 'especially heinous, atrocious, or cruel.'"[53]

The case of State v. Rollins[54] illustrates the broad scope of the Court's definition of the HAC aggravator. The defendant was found guilty of stabbing the victim multiple times. In the guilt phase the medical examiner testified to the cause of death, describing in detail the multiple stab wounds. In the sentencing hearing, the medical examiner testified again, largely repeating

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[52] 31 S.W.3d 196, 206-07 (Tenn. 2000) (internal citations omitted).

[53] Id. at 208-09. *See also* State v. Davidson, 509 S.W.3d 156, 219 (Tenn. 2016).

[54] 188 S.W.3d 553, 572 (Tenn. 2006).

his evocative guilt-phase testimony and further describing some of the stab wounds as "defensive," meaning that the victim was conscious and experienced physical and mental suffering during the assault. According to the Court, this evidence was sufficient to establish the HAC aggravator. It follows that, in any murder case in which the victim was aware of what was happening and/or suffered physical pain during the assault, it may be possible to find the existence of the HAC aggravator. Certainly the prosecution can allege it in a wide range of cases. With the Court's nebulous definition, it is difficult to see how the HAC aggravator meaningfully narrows the class of death eligible defendants.

(i)(6) Aggravator – Avoiding Arrest or Prosecution

The (i)(6) aggravator applies when "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." This aggravator can be alleged in any case in which the murder occurred during the commission of another crime, because in any such case the prosecution can argue that a motivating factor in the murder was to eliminate the victim as a witness. As with other aggravators, the Tennessee Supreme Court has broadly defined this aggravator.

Although this aggravator addresses the defendant's motivation, not much is required to prove it. While "t]he defendant's desire to avoid arrest or prosecution must motivate the defendant to kill, [] it does not have to be the only motivation. Nor does it have to be the dominant motivation. The aggravating circumstance is not limited to the killings of eyewitnesses or those witnesses who know or can identify the defendant."[55]

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[55] Penny J. White, Tennessee Capital Case Handbook, at 15.43 (Tennessee Association of Criminal Defense Attorneys, 2010) (citing Terry v. State, 46 S.W.3d 147, 162 (Tenn. 2001); State v. Bush, 942 S.W.2d 489, 529 (Tenn. 1997); State v. Evans, 838 S.W.2d 185 (Tenn. 1992); State v. Ivy, 188 S.W.3d 132, 144 (Tenn. 2006); and State v. Hall, 976 S.W.2d 121, 133 (Tenn. 1998)).

As one scholar has explained, "When applied broadly to any victim who could have possibly identified the defendant, this aggravating circumstance applies to almost all murders, in violation of the narrowing principle."[56]

Aggravator (i)(7) – Felony Murder

Many murders are committed during the commission of another crime, and a "felony murder" can be prosecuted as first degree murder even if the defendant was not the assailant and lacked any intent to kill.[57] Also a defendant who caused the victim's death during the commission of another felony can be guilty of felony murder even if the defendant neither premeditated nor intended the victim's death.[58] If the defendant is guilty of felony murder, then the prosecution can allege and potentially prove the (i)(7) aggravator.[59]

In the felony murder case of State v. Middlebrooks, 840 S.W.2d 317, 341 (Tenn. 1992), the Court invalidated the earlier version of this aggravator, because there was no distinction between the elements of the crime of felony murder and the felony murder aggravator. The Court held that in such a case, the felony murder aggravator was unconstitutional because, by merely duplicating the elements of the underlying felony murder, it did not sufficiently narrow the class of death eligible defendants.

The legislature responded by amending the statute in 1995 to add two elements to the felony murder aggravator: that the murder was "knowingly" committed, solicited, directed, or

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[56] Id. at 15.45.

[57] *See* Tenn. Code Ann. § 39-13-202(a) for the elements of first degree premeditated murder and first degree felony murder.

[58] State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013).

[59] The other felonies that support this aggravator are "first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb[.]" 39 Tenn. Code Ann. § 39-13-204(i)(7).

aided by the defendant; and that the defendant had a "substantial role" in the underlying felony while the murder was committed.[60] In State v. Banks, the Court upheld the amended felony murder aggravator because its elements did not merely duplicate the elements of felony murder, and therefore, according to the Court, the aggravator satisfied the constitutional requirement to narrow the class of death eligible defendants.[61]

Although the legislature amended the (i)(7) felony murder aggravator in response to the Middlebrooks problem, it is not clear how this amendment created a practical difference in the statutory definition. The "knowing" and "substantial role" elements in the amended statute are relatively easy to prove and potentially could apply to virtually every felony murder, and these elements do not effectively perform a narrowing function.[62]

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Because the Court and legislature have expanded the number and meaning of aggravating circumstances that could support a death sentence, we submit that a large majority of first degree murder cases are now death eligible. It is hard to imagine a case in which the prosecution could not allege and potentially prove the existence of an aggravator. With this development, it is especially significant that, as discussed in Part VI below, Tennessee has experienced a sharp decline in sustained death sentences over the past ten to twenty years, notwithstanding the availability of death as a sentencing option in a larger number of first

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[60] Tenn. Code Ann. § 39-13-204(i)(7) (1995).

[61] 271 S.W.3d 90, 152 (Tenn. 2008). *See also* Carter v. State, 958 S.W.2d 620, 624 (Tenn. 1997) (upholding the aggravator when defendant was charged with both premeditated and felony murder relating to the same murder); State v. Robinson, 146 S.W.3d 469, 501 (Tenn. 2004) (upholding felony murder aggravator when the defendant did not kill the victim).

[62] *See, e.g.*, State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013) (upholding felony murder aggravator when, although defendant caused victim's death during a carjacking, there was no proof that he intended the death or knew that death would ensue).

degree murder cases. This not only implicates the problem of arbitrariness, it also strongly indicates that Tennessee's evolving standard of decency is moving away from the death penalty.

IV. COMPARATIVE PROPORTIONALITY REVIEW AND RULE 12

Another important development in Tennessee's death penalty jurisprudence has been the evisceration of any kind of meaningful "comparative proportionality review" of death sentences by the Tennessee Supreme Court.

As noted above, in an effort to protect against the "arbitrary and capricious" imposition of the death penalty, and following Georgia's lead, the Tennessee scheme requires the Tennessee Supreme Court to conduct a "comparative proportionality review" in every capital case. Tenn. Code Ann. § 39-13-206(c)(1)(D) provides that the Court shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." According to the Court, the statute's purpose is to ensure "rationality and consistency in the imposition of the death penalty."[63] Justice Aldolpho A. Birch, Jr., explained, "The principle underlying comparative proportionality review is that it is unjust to impose a death sentence upon one defendant when other defendants, convicted of similar crimes with similar facts, receive sentences of life imprisonment (with or without parole). ... Thus, proportionality review serves a crucial role as an 'additional safeguard against arbitrary or capricious sentencing.'"[64] This follows from the

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[63] *See, e.g.,* State v. Barber, 753 S.W.2d 659, 665-66 (Tenn. 1988).

[64] State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001) (Birch, J., concurring and dissenting).

principle that a State's "capital sentencing scheme ... must reasonably justify the imposition of a more severe sentence on the defendant *compared to others found guilty of murder.*"[65]

To facilitate comparative proportionality review, the Court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47) in 1978, requiring that "in all cases ... in which the defendant is convicted of first-degree murder," the trial judge shall complete and file so-called Rule 12 reports to include information about each of the cases.[66] Rule 12 was intended to create a database of first-degree murder cases for use in comparative proportionality review in capital cases. In State v. Adkins,[67] the Court stated that "our proportionality review of death penalty cases ... has been predicated largely on those reports *and has never been limited to the cases that have come before us on appeal.*" (Emphasis added.) On January 1, 1999, the Court issued a press release announcing the use of CD-ROMS to store copies of Rule 12 forms, in which then Chief Justice Riley Anderson was quoted as saying, "The court's primary interest in the database is for comparative proportionality review in [capital] cases, which is required by court rule and state law, ... The Supreme Court reviews the data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process."[68]

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[65] Lowenfield v. Phelps, 484 U.S. 321, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)) (emphasis added).

[66] As of June 30, 2017, the Rule 12 report included 67 detailed questions plus sub-questions divided into six parts, as follows: A. Data Concerning the Trial of the Offense (12 questions); B. Data Concerning the Defendant (17 questions); C. Data Concerning Victims, Co-Defendants, and Accomplices (15 questions); D. Representation of the Defendant (10 questions); E. General Considerations (3 questions); and E. Chronology of Case (10 questions). Additionally, the prosecutor and the defense attorney are given the opportunity to submit comments to be appended to the report.

[67] 725 S.W.2d 660, 663 (Tenn. 1987).

[68] Available at http://tncourts.gov/press/1999/01/01/court-provides-high-tech-tool-legal-research-murder-cases (last visited 11/17/17).

The collection of Rule 12 data for comparative proportionality review was based on the idea, derived from Furman, that capital cases must be distinguishable in a meaningful way from non-capital first-degree murder cases. If there is no meaningful and reliable way to distinguish between capital and non-capital first-degree murder cases, then the capital punishment system operates arbitrarily, contrary to constitutional principles and modern notions of human decency.

Under this concept of arbitrariness, Rule 12 data collection can make sense. By gathering and analyzing this kind of data, we can begin to see statistically whether our judicial system is consistently and reliably applying appropriate criteria or standards for selecting only the "worst of the bad" defendants for capital punishment,[69] or whether there are other inappropriate criteria (such as race, poverty, geographic location, prosecutorial whim, or other factors) that play an untoward influence in capital sentencing decisions.

Unfortunately, the history of the Court's comparative proportionality review, and of Rule 12, has been problematic.[70] Rule 12 data has rarely, if ever, entered into the Court's comparative proportionality analysis. There was no effort by the Court or any other public agency to organize or quantify Rule 12 data in any comprehensive way. All we have now are CD-ROMS with copies of more than a thousand Rule 12 reports that have been filed, with no indices, summaries, or sorting of information. There exist no reported Tennessee appellate court opinions that cite or use any statistical data compiled from the Rule 12 reports. And

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[69] Members of the Tennessee Supreme Court have used the term "worst of the bad" in reference to the proposition that the death penalty should be reserved only for the very worst cases. *See* State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994); State v. Howell, 868 S.W.2d 238, 265 (Tenn. 1993) (Reid, C.J., concurring); State v. Middlebrooks, 840 S.W.2d 317, 350 (Tenn. 1992) (Drowota, J., concurring and dissenting).

[70] In only one case has the Tennessee Supreme Court set aside a death sentence based on comparative proportionality review. *See* State v. Godsey, 60 S.W.3d 759 (Tenn. 2001).

perhaps most significantly, in more than one-third of first degree murder cases, trial judges have failed to file Rule 12 reports, leaving a huge gap in the data.[71]

In the 1990's, Tennessee Supreme Court Justices Lyle Reid[72] and Adolpho A. Birch, Jr.[73] began dissenting from the Court's decisions affirming death sentences because of what they perceived to be inadequate comparative proportionality review. Justice Reid criticized the majority for conducting comparative proportionality review "without a structured review process."[74]

Then in 1997, the Court decided State v. Bland,[75] which dramatically changed the Court's purported methodology for conducting a comparative proportionality review. Among other things, the Court narrowed the pool of cases to be compared in the analysis. Under Bland, the Court now compares the capital case under review only with other capital cases it has previously reviewed, and not with the broader pool of all first degree murder cases, including those that resulted in sentences of life or life without parole. Justices Reid and Birch dissented in Bland. Justice Reid repeated his earlier complaints that the Court's comparative proportionality review analysis lacks proper standards.[76] Justice Birch agreed with Justice Reid

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[71] See discussion of H.E. Miller, Jr.'s survey in Part VI, below. A copy of Mr. Miller's report is attached as Appendix 1.

[72] Justice Reid retired from the bench in 1998.

[73] Justice Birch retired from the bench in 2006.

[74] State v. Hodges, 944 S.W.2d 346, 363 (Tenn. 1997) (Reid, J., dissenting).

[75] 958 S.W.2d 651 (Tenn. 1997).

[76] Id. at 674-79.

and further dissented from the Court's decision to narrow the pool of cases to be considered.[77] Thereafter Justice Birch repeatedly dissented from the Court's decisions affirming death sentences, on the ground that the Court's comparative proportionality analysis was essentially meaningless.[78] Justice Birch stated: "I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective."[79]

More recently, in the 2014 decision of State v. Pruitt, Justices William C. Koch, Jr.[80] and Sharon G. Lee dissented from the Court's comparative proportionality methodology.[81] Justice Koch pointed out the problems with Bland as follows:

> [T]he Bland majority changed the proportionality analysis in a way that deviates not only from the language of Tenn. Code Ann. § 39-13-206(c)(1)(D) but also from the relevant decisions of the United States Supreme Court.
>
> First, the Court narrowed the pool of cases to be considered in a proportionality analysis. Rather than considering all cases that resulted in a conviction for first-degree murder (as the Court had done from 1977 to 1997), the Court limited the pool to "only those cases in which a capital sentencing hearing was actually conducted... regardless of the sentence actually imposed." State v. Bland, 958 S.W.2d at 666. By narrowly construing "similar cases" in Tenn. Code Ann. § 39-13-206(c)(1)(D), the Court limited

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[77] *Id. at 679.* Because of the meaningless of the Court's comparative proportionality analysis, Justice Birch consistently dissented when the Court affirmed death sentences. *See, e.g.*, State v. Leach, 148 S.W.3d 42, (Tenn. 2004) (Birch, J., concurring and dissenting) ("I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in State v. Bland. [Case citations omitted.] As previously discussed, I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.")

[78] *See* State v. Davis, 141 S.W.3d 600, 632-33 (Tenn. 2004) (Birch, J., concurring and dissenting), in which Justice Birch presented a list of such cases.

[79] Id. at 633.

[80] Justice Koch retired from the bench in 2014.

[81] State v. Pruitt, 415 S.W.3d 180, 225 (Tenn. 2013) (Koch, J., concurring and dissenting).

proportionality review to only a small subset of Tennessee's murder cases – the small minority of cases in which a prosecutor actually sought the death penalty.

The second limiting feature of the State v. Bland proportionality analysis is found in the Court's change in the standard of review. The majority opinion held that a death sentence could be found disproportionate only when "the case, taken as a whole, is *plainly lacking* in circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Bland, 958 S.W.2d at 665 (emphasis added). This change prevents the reviewing courts from determining whether the case under review exhibits the same level of shocking despicability that characterizes the bulk of our death penalty cases or, instead, whether it more closely resembles cases that resulted in lesser sentences.

The third limiting feature of the State v. Bland analysis is the seeming conflation of the consideration of the circumstances in Tenn. Code Ann. § 39-13-206(c)(1)(B) and Tenn. Code Ann. § 39-13-206(c)(1)(C) with the circumstance in Tenn. Code Ann. § 39-13-206(c)(1)(D). When reviewing a sentence of death for first-degree murder, the courts must separately address whether "[t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances;" whether '[t]he evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances;" and whether '[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."

As applied since 1997, State v. Bland has tipped the scales in favor of focusing on the evidentiary support for the aggravating circumstances found by the jury and on whether these circumstances outweigh the mitigating circumstances. Instead of independently addressing the evidence regarding "the nature of the crime and the defendant," Bland's analysis has prompted reviewing courts to uphold a death sentence as long as the evidence substantiates the aggravating circumstance or circumstances found by the jury, as well as the jury's decision that the aggravating circumstance or circumstances outweigh any mitigating circumstances.[82]

In an earlier case, Justice Birch pointedly summarized the problem with the Court's comparative proportionality jurisprudence: "Because our current comparative proportionality review system lacks objective standards, comparative proportionality analysis seems to be little more than a 'rubber stamp' to affirm whatever decision the jury reaches at the trial level."[83]

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[82] Id. at 227-28.

[83] State v. Chalmers, 28 S.W.3d 913, 924 (Tenn. 2000) (Birch, J., concurring and dissenting).

V. SIMPLIFYING THE LOTTERY: A TALE OF TWO CASES

As the legislature and the Court have expanded the opportunity for arbitrariness by expanding the class of death eligible defendants, and as the Court has removed a check against arbitrariness by declining to conduct meaningful comparative proportionality review, it is time to ask how Tennessee's capital punishment system operates in fact. Returning to the lottery scenario, let us simplify the problem by considering just two cases and asking two questions: (i) which of the two cases is more deserving of capital punishment? and, (ii) which of the two cases actually resulted in a death sentence?[84]

Case #1

The two defendants were both convicted of six counts of first degree premeditated murder. They shot a man and a woman in the head. They strangled to death two women, one of whom was pregnant, thus also killing her unborn child. They also "stomped" a 16-month old child to death.

Both of the defendants had previously served time in jail or prison. When one of the defendants was released from prison, the two of them got together and dealt drugs including marijuana, cocaine, crack cocaine, and pills. Their drug business was successful, progressing from selling to "crack heads" and addicts to selling to other dealers. One of the defendants, the apparent leader of the two, was described as intelligent.

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[84] The description of Case #1 is a summary of the facts described in State v. Moss, No. 2014-00746-CCA-R3-CD (Tenn. Crim. App. 2016); and Burrell v. State, No. M2015-2115-CCA-R3-PC (Tenn. Crim. App. 2017). The description of Case #2 is a summary of the facts described in State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013).

The defendants planned to rob WC, a male who also dealt drugs. On the night of the crime, WC and AM, a female, went to WC's mother's house. The defendants were together in Huntsville, Alabama, and one of them telephoned WC. After receiving the call, WC and AM left WC's mother's house and went to pick up the defendants. The four of them left Huntsville with one of the defendants driving the car, WC sitting in the front passenger seat, the other defendant sitting behind WC, and AM sitting behind the driver. They drove to a house where the defendants kept their drugs. When the car pulled into the garage, the defendant in the back seat shot WC in the back of the head three times. The killer then shot AM in the head. The defendants pulled AM out of the back seat, dragged her into the utility room and put a piece of plywood over the doorway to conceal her body.

The defendants then went inside the house and found CC, a pregnant woman. They bound her hands behind her back and dunked her head in a bathtub to force her to reveal where WC kept his drugs and money. When CC was unwilling or unable to tell them, they strangled her to death. When the defendants killed CC, they also killed her unborn child. After killing CC and her unborn child, they stomped to death the sixteen-month-old child who was also in the house.

The defendants then drove to another house where WC kept drugs. WC's body was still in the car. They found JB, a woman who was inside the house, and strangled her to death in the same manner that they had killed CC. After killing JB, the defendants ransacked the house, looking for money and drugs. They took drugs from one or both houses, and they took WC's AK-47s from the second house. According to the

prosecution's theory, the defendants intended to "pin" the killing on WC, so they spared the lives of his two children and disposed of his body in the woods.

The aggravators that would support death sentences in these cases included: (i)(1) (murder against a person less than twelve years old); (i)(5) (the murders were heinous, atrocious or cruel); (i)(6) (the murders were committed for the purpose of avoiding arrest or prosecution); (i)(7) (the murders were committed while the defendants were committing other felonies including first degree murder, robbery, burglary, theft, kidnapping, and aggravated child abuse); (i)(12) (mass murder); and (i)(16) (one of the victims was pregnant).

Case #2

Defendant was convicted of first degree felony murder for causing the death of an elderly man in the course of carjacking the victim's car. There was no evidence that the defendant intended the victim's death.

The defendant had prior convictions for aggravated burglary, robbery, criminal intent to commit robbery, and theft over $500. His I.Q was tested at 66 and 68, in the intellectual disability range; but the court found that he was not sufficiently deficient in adaptive behavior to meet the legal definition of intellectual disability that would have exempted him from the death penalty.[85]

Defendant planned to rob a car. He went to the Apple Market and stood outside the store's door. An older man, the victim, came out of the market with groceries in his arms and walked to his car. As the man reached the driver's side door, defendant ran up behind him, and there ensued a short scuffle lasting about 15 seconds. The defendant

[85] See Adkins v. Virginia, 536 U.S. 304 (2002) (disqualifying the intellectually disabled from the death penalty); Tenn. Code Ann. § 39-13-203 (same).

threw the man into the car and/or pavement, causing severe injuries including brain trauma, fractured bones, and internal bleeding. Defendant slammed the car door and drove away. The man was taken to the hospital where he died of his head injuries the following day.

The aggravators that would support a death sentence in this case were: (i)(2) (prior violent felonies); (i)(7) (felony murder); and (i)(14) (victim over 70 years old).

We submit that the majority of persons presented with these two case scenarios, without any further information about the operation of Tennessee's death penalty system, would choose Case #1 as the more appropriate and likely candidate for the death penalty. In fact, however, in Case #1 neither defendant received a death sentence - one received six consecutive life sentences, and the other received four concurrent and two consecutive life sentences. On the other hand, the defendant in Case #2, who did not premeditate or intend the victim's death, was sentenced to death.

These cases are not comparable. How could the single felony murder case result in a death sentence while the premeditated multi-murder case resulted in life sentences? They are both fairly recent cases. The multi-victim premeditated murder case was in a rural county in the Middle Grand Division of the State, where no death sentences have been imposed since 2001. By contrast, the single-victim felony murder case, involving a borderline intellectually disabled defendant, was in Shelby County which has accounted for 52% of all new Tennessee death sentences since mid-2001, of which 86% involved black defendants. These may not be the only factors that could explain the disparity between these cases, but they stand out.

These cases may represent an extreme comparison – although 90% of all multi-murder cases resulted in life or LWOP sentences – but this comparison most clearly illustrates a

problem with our death penalty system. Geographic location, differing prosecutorial attitudes, and the prejudicial influences of defendants' mental impairments are arbitrary factors that, along with other arbitrary factors discussed below, too often determine the application of capital punishment. In the next part, we review Mr. Miller's survey of first degree murder cases since 1977, which we believe supports the proposition that arbitrariness permeates the entire system.

VI. MR. MILLER'S SURVEY OF FIRST DEGREE MURDER CASES

A. The Survey Process

Given the Tennessee Supreme Court's abandonment of the original purpose behind Rule 12 data collection, how can we systematically evaluate the manner by which Tennessee has selected, out of more than two thousand convicted first degree murderers, only 86 defendants to sentence to death – and only six defendants to execute – during the 40 years the system has been in place? Is there a meaningful distinction between death-sentenced and life-sentenced defendants? Are we imposing the death penalty only upon those criminals who are the "worst of the bad"? Does our system meet the constitutional demand for heightened reliability, consistency, and fairness? Or is our system governed by arbitrary factors that should not enter into the sentencing decision?

To test the degree of arbitrariness in Tennessee's death penalty system, attorney H. E. Miller, Jr., undertook a survey of all Tennessee first-degree murder cases decided during the 40-year period beginning July 1, 1977, when the current system was installed. Mr. Miller devoted

thousands of hours over several years in conducting his survey. His Report is attached as Appendix 1.[86]

Mr. Miller began his survey by reviewing the filed Rule 12 reports. He soon discovered, however, that in close to one-half of first-degree murder cases, trial judges failed to file Rule 12 reports – and for those cases, there is no centralized data collection system. Further, many of the filed Rule 12 reports were incomplete or contained errors.[87]

Mr. Miller found that Rule 12 reports were filed in 1,348 adult first-degree murder cases. He has identified an additional 1,166 first-degree murder cases for which Rule 12 reports were not filed, bringing the total of adult first degree murder cases that he has been able to find to 2,514.[88] Thus, trial judges failed to comply with Rule 12 in at least 46% of adult first degree murder cases.[89] This astounding statistic is perhaps explainable by the fact that Rule 12 data has never been used by the Court in a meaningful way and has become virtually obsolete since

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[86] The appendices to Mr. Miller's Report, which include all of the data he collected, are not included in the attachment to this article but are available on request.

[87] In 2004, the Tennessee Comptroller of the Treasury noted: "Office of Research staff identified a number of cases where defendants convicted of first-degree murder did not have a Rule 12 report, as required by law. ... Rule 12 reports are paper documents, which are scanned and maintained on CD-ROM. The format does not permit data analysis." John G. Morgan, Tennessee's Death Penalty: Costs and Consequences (Comptroller of the Treasury Office of Research, July 2004) (found at https://deathpenaltyinfo.org/documents/deathpenalty.pdf, last visited 11/17/17). The situation with Rule 12 reports has not improved since the Comptroller's report.

[88] There undoubtedly exist additional first-degree murder cases, for which Rule 12 reports were not filed, that Mr. Miller did not find. For example, some cases are settled at the trial court level and are never taken up on appeal; and without filed Rule 12 reports, these cases are extremely difficult to find. Certainly a fair number of recent cases were not found because of the time it takes for a case to proceed from trial to the Court of Criminal Appeals before an appellate court record is created. It also is possible that cases decided on appeal were inadvertently overlooked, despite great effort to be thorough. To the extent there are additional first degree murder cases that were not found, statistics including those cases would more strongly support the infrequency of death sentences and the capricious nature of our death penalty lottery.

[89] The Rule 12 noncompliance rate is 50% in juvenile first degree murder cases.

Bland v. State[90] when the Tennessee Supreme Court decided to limit its comparative proportionality review only to other capital cases that it had previously reviewed.[91]

Because of problems with the Rule 12 reports, Mr. Miller found it necessary to greatly broaden his research to find and review the first degree murder cases for which Rule 12 reports were not filed, and to verify and correct information contained in the Rule 12 reports that were filed. As described in his Report, Mr. Miller researched numerous sources of information including cases reported in various websites, Tennessee Department of Correction records, Tennessee Administrative Office of the Courts reports, and original court records, among other sources.

Mr. Miller compiled information about each case, to the extent available, including: name, gender, age and race of defendant; date of conviction; county of conviction; number of victims; gender, age and race of victims (to the extent this information was available); and results of appeals and post-conviction proceedings – information that should have been included in Rule 12 reports.

B. Factors Contributing to Arbitrariness

Mr. Miller's survey reveals that Tennessee's capital sentencing scheme fails to fulfill Furman's basic requirement to avoid arbitrariness in imposing the ultimate penalty. Capital sentencing in Tennessee is not "regularized" or "rationalized." The statistics, and the

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[90] *See* notes 75-77, *supra*, and accompanying text.

[91] The perpetuation of Rule 12 on the books gives rise to two unfortunate problems. First, Rule 12 creates a false impression of meaningful data collection, which clearly is not the case when we realize the 46% noncompliance rate and the lack of evidence that Rule 12 data has served any purpose under the current system. Second, the 46% noncompliance rate among trial judges who preside over first degree murder cases tends to undermine an appearance of integrity. We should expect judges to follow the Court's rules.

experience of attorneys who practice in this area, demonstrate a number of factors that contribute to system's capriciousness.

(1) Infrequency & downward trend

As pointed out above, frequency of application is the most important factor in assessing the constitutionality of the death penalty. As the death penalty becomes less frequently applied, there is an increased chance that capital punishment becomes "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[92] Infrequency of application sets the foundation for analysis of the system.

Since July 1, 1977, among the 2,514 Tennessee defendants who were convicted of first-degree murder, only 192 of those defendants received death sentences. Among those 192 defendants, only 86 defendants' death sentences had been sustained as of June 30, 2017, while the death sentences imposed on 106 defendants had been vacated or reversed. Accordingly, over the span of the past 40 years only approximately 3.4% of convicted first degree murderers have received sustained death sentences – and most of those cases are still under review. Of those 86 defendants whose death sentences have been sustained, only six were actually executed, representing less than 0.2% of all first degree murder cases – or less than one out of every 400 cases. In other words, the probability that a defendant who commits first degree murder is arrested, found guilty, sentenced to death, and executed is miniscule. Even if Tennessee were to hurriedly execute the approximately dozen death row defendants who are

[92] Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring).

currently eligible for execution dates,[93] the percentage of executed defendants as compared to all first-degree murder cases would remain extremely small.

Additionally, over the past twenty years there has been a sharp decline in the frequency of capital cases. Table 23 from Mr. Miller's Report tells the story:

[93] Tennessee Supreme Court Rule 12.4 provides that an execution date will not be set until the defendant's case has completed the "standard three tiers" of review (direct appeal, post-conviction, and federal habeas corpus), which occurs when the defendant's initial habeas corpus proceeding has run its full course through the U.S. Supreme Court. The Tennessee Administrative Office of the Courts lists eleven "capital cases that have, at one point, neared their execution date." http://www.tsc.state.tn.us/media/capital-cases (last visited 11/17/2017).

FREQUENCY OF TENNESSEE DEATH SENTENCES
FREQUENCY OF TENNESSEE DEATH SENTENCES IN 4-YEAR INCREMENTS

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[94]	Ave. New Death Sentences per Year	1st Degree Murder Cases[95]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25 per year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25 per year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00 per year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25 per year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45 per year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00 per year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00 per year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00 per year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50 per year	284	2%	1.7%
7/1/13 – 6/30/17	3	1	1	0.25 per year	Incomplete Data[96]	Incomplete Data	Incomplete Data
TOTALS	**221**	**195[97]**	**89[98]**	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

[94] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.

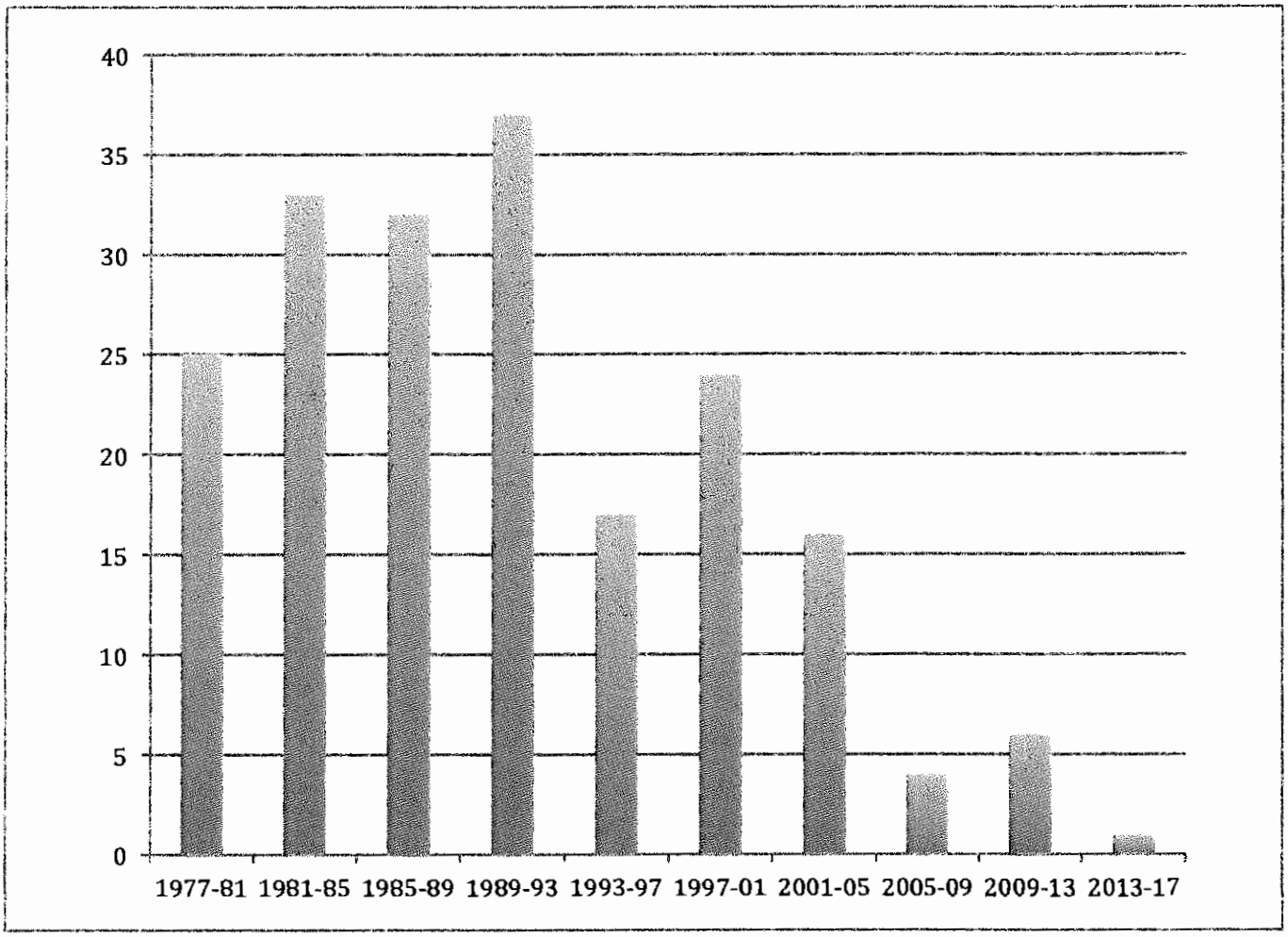
[95] Counted by defendants, not murder victims.

[96] Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to T.B.I. statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See* Table 25.

[97] One defendant had 3 separate "new" trials each resulting in "new" and "sustained" death sentences; another defendant had 2 such trials. *See* footnote 1, *supra*. Accordingly, there were 195 "new" trials involving a total of 192 defendants, and 89 "sustained" death sentences involving a total of 86 defendants.

[98] See note 96. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

GRAPH OF NEW DEATH SENTENCES[99]
IN TENNESSEE
BY 4-YEAR INCREMENTS



As we can see, disregarding cases that were subsequently reversed or vacated, the frequency of new death sentences has fallen from a high of 9.25 per year from 1989 to 1993, to a low of 0.25 per year during the most recent 4-year period of 2013 to 2017 – a 97% reduction in the rate of new death sentences. Moreover, no new death sentence was imposed in Tennessee over the three-year period from July 2014 through June 2017; and over the 16-year period from February 2001 through June 2017, no death sentence had been imposed in the

[99] This graph includes all original capital trials resulting in "new" death sentences, including those that were subsequently reversed or vacated.

Middle Grand Division of the State (which includes Nashville-Davidson County and 40 other counties, representing more than one-third of the State's population).[100]

Mr. Miller broke down the statistics into two groups – cases originally tried during the first 24 years, before June 30 2001; and those originally tried during the most recent 16 years, through June 30, 2017. Mr. Miller used 2001 as a dividing line because it was during the period leading up to that year when Tennessee began experiencing its steep decline in the frequency of new death sentences. Also, 2001 was the year when the Office of the District Attorney General for Davidson County issued its *Death Penalty Guidelines*,[101] setting forth the procedure and criteria that Office would use in determining when to seek a death sentence.

During the initial 24-year period, Tennessee imposed sustained death sentences on 5.8% of the defendants convicted of first-degree murder, at the average rate of 4 sustained death sentences per year. Since 2001, the percentage of first degree murder cases resulting in death sentences has dropped to less than 2%, at a rate of less than 1 sustained death sentence per year.

At this level of infrequency, it is impossible to conceive how Tennessee's death penalty system is serving any legitimate penological purpose. No reasonable scholar could maintain that there is any deterrence value to the death penalty when it is imposed with such infrequency.[102] And there is minimal retributive value when the overwhelming percentage of

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[100] *See* Appendix 2, *Chart of Tennessee Capital Trials.*

[101] A copy of these Guidelines is on file with the authors and available upon request. The current Davidson County District Attorney confirmed to one of the authors that the Guidelines remain in effect. Based on our inquiries, no other district attorney general office has adopted written guidelines or standards for deciding when to seek death.

[102] Although a small minority of studies have purported to document a deterrent effect, none have documented such an effect in a state like Tennessee where the vast majority of killers get Life or LWOP

first degree murder cases (now more than 98%) end up with Life or LWOP.[103] Any residual deterrent or retributive value in Tennessee's sentencing system is further diluted to the point of non-existence by the other factors of arbitrariness listed below. As Justice White stated in Furman, "[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[104]

The decline in the frequency of new death sentences in Tennessee also evidences Tennessee's evolved standard of decency away from capital punishment. As further explained below, in the vast majority of Tennessee Counties, including all counties within the Middle Grand Division, the death penalty is essentially dead.[105]

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sentences, and where those who do receive death sentences long survive their sentencing date, usually until they die of natural causes, and are rarely executed. In fact, "the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate." D. Beschle, Why Do People Support Capital Punishment? The Death Penalty as Community Ritual, 33 Conn. L. Rev. 765, 768 (2001). *See, e.g.*, National Research Council of the National Academies, Deterrence and the Death Penalty 2 (2012) ("[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.")

[103] The role of retribution in our criminal justice system is a debatable issue. "Retribution is no longer the dominant objective of the criminal law." Williams v. New York,, 337 U.S. 241, 248 (1949). Over time, "our society has moved away from public and painful retribution toward ever more humane forms of punishment." Baze v. Rees, 553 U.S. 35, ___ (2008) (Stevens, J., concurring in the judgment). The United States Supreme Court has cautioned that, of the valid justifications for punishment, "retribution ... most often can contradict the law's own ends. This is of particular concern ... in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 554 U.S. 407, ___ (2008).

[104] 408 U.S. at 311.

[105] The decline in new death sentences in Tennessee mirrors a nationwide trend. According to the Death Penalty Information Center, the nationwide number of death sentences has declined from a total of 295 in 1998 to a total of just 31 in 2016 – a 90% decline. https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited 11/13/2017).

(2) Geographic disparity

Death sentences are not evenly distributed throughout the state. Whether it is a function of differing crime rates, political environment, racial tensions, the attitude of prosecutors, the availability of resources, the competency of defense counsel, or the characteristics of typical juries, a few counties have zealously pursued the death penalty in the past, while others have avoided it altogether. Over the 40-year period, only 48 of Tennessee's 95 counties (roughly one-half), have conducted trials resulting in death sentences,[106] but as indicated above, the majority of death sentences were reversed or vacated. More significantly, only 28 counties, representing 64% of Tennessee's population, have imposed sustained death sentences;[107] and since 2001, only eight counties, representing just 34% of Tennessee's population, have imposed sustained death sentences.[108] In the most recent five-year period, from July 1, 2012, to June 30, 2017, Shelby County was the only county to impose death sentences.

The decline in the number of counties resorting to the death penalty is illustrated by the following table taken from Mr. Miller's report, which gives the number of counties that conducted capital trials (*i.e.*, trials resulting in death sentences) during each of the ten four-year increments during the 40-year period:[109]

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[106] *See* Appendix 2, *Chart of Tennessee Capital Trials.*

[107] Appendix 1, *Miller Report,* Table 21.

[108] Id., Table 22. *See also* Appendix 2, *Chart of Tennessee Capital Trials* 8.

[109] Id., Table 24.

4-Year Period	Number of Counties Conducting Capital Trials[110] During the Indicated 4-Year Period
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11
7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

It is costly to maintain a capital punishment system.[111] As the number of counties that impose the death penalty declines, an increasing majority of Tennessee's taxpayers are subsidizing the system that is not being used on their behalf, but instead is being used only by a diminishingly small number of Tennessee's counties.

Shelby County stands at one end of the spectrum. Since 1977, it has accounted for 37% of all sustained death sentences; over the past 10 years, it has accounted for 57% of Tennessee

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[110] These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.

[111] There has been no study of the of Tennessee's system. *See* Tennessee's Death Penalty Costs and Consequences, *supra* note 87, at i-iv (concluding that capital cases are substantially more expensive than non-capital cases, but itemizing reasons why the Comptroller was unable to determine the total cost of Tennessee's capital punishment system). Studies from other states, however, have concluded that maintaining a death penalty system is quite expensive, costing millions of dollars per year. For a general discussion of costs, see Brandon L. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, 95-100 (Harvard University Press, 2017) (citing studies from several states). The Death Penalty Information Center website lists and describes a number of cost studies at https://deathpenaltyinfo.org/costs-death-penalty (last visited 11/15/2017).

death sentences during that period; and, as mentioned above, it has accounted for all of Tennessee's death sentences during the most recent 5-year period.[112]

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County over the past 39 years, there have been ten first-degree murder cases involving eleven defendants and 22 victims (an average of 2.2 victims per case). No death sentences were imposed, even in two mass murder cases. For example, in the recent case of State v. Moss,[113] discussed in Part V above, the defendant and his co-defendant were each convicted of six counts of first-degree premeditated murder; the murders were egregious; but the defendants received life sentences, not death. According to the Rule 12 reports, in another Lincoln County case, State v. Jacob Shaffer, on July 22, 2011, the defendant, who had committed a prior murder in Alabama, was convicted of five counts of first-degree murder and was sentenced to LWOP, not death.

Indeed, in the entire Middle Grand Division, over the past 25 years, since January 1, 1992, only six defendants received sustained death sentences – a rate of only one case every four years, and no cases since February 2001.

There is a statistically significant disparity between the geographic distribution of first-degree murder cases, on the one hand, and the geographic distribution of capital cases, on the other. Mere geographic location of a case makes a difference, contributing an indisputable element of arbitrariness to the system.

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[112] Appendix 2, *Chart of Tennessee Capital Trials* 8.

[113] No. 2013-CR-63 (Tenn. Crim. App., Sep. 21, 2016).

(3) Timing and natural death

To the consternation of many, capital cases take years to work through the three tiers of review – from trial and direct appeal through post-conviction and federal habeas – and further litigation beyond that. Perhaps that is as it should be, given the heightened need for reliability in capital cases and the exceedingly high capital sentencing reversal rate due to trial errors, as discussed below. But the long duration of capital cases, combined with natural death rates among death row defendants, contributes an additional form of arbitrariness in determining which defendants are ultimately executed.

As of June 30, 2017, among the 56 surviving defendants on death row, the average length of time they had lived on death row was more than 21 years, and this average is increasing as the death row population ages while fewer new defendants are entering the population.[114] Only ten new defendants were placed on death row during the most recent 10 years, equal in number to the ten surviving defendants who had been on death row for over 30 years. One surviving defendant had been on death row for more than 35 years. Mr. Miller's Report breaks down the surviving defendants' length of time on death row as follows:[115]

Length of Time on Death Row	Number of Defendants (as of 6/30/2017)
> 30 Years	10
20 – 30 Years	20
10 – 20 Years	16
< 10 Years	10

[114] Appendix 1, *Miller Report* 17.

[115] Id., Table 20.

Of the six whom Tennessee has executed, their average length of time on death row was 20 years, and one had been on death row for close to 29 years.[116]

The length of time defendants serve on death row facing possible execution further diminishes any arguable penological purpose in capital punishment to the point of nothingness. With the passage of time, the force of deterrence disappears, and the meaning of retribution is lost.[117]

Moreover, during the 40-year period, 24 condemned defendants died of natural causes on death row. This means that, so far at least, a defendant with a sustained death sentence is four times more likely to die of natural causes than from an execution. Even if Tennessee hurriedly executes the approximately dozen death-sentenced defendants who have completed their "three tiers" of review,[118] with the constantly aging death row population the number of natural deaths will continue to substantially exceed deaths by execution.

Given the way the system operates, a high percentage of natural deaths among the death row population is an actuarial fact affecting the carrying out of the death penalty. Consequently, the timing of a case during the 40-year period, along with the health of the defendant, is an arbitrary factor determining not only whether a defendant will be sentenced to death, but also whether he will ever be executed. Furthermore, if a death-sentenced defendant

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[116] This includes Daryl Holton who waived his post-conviction proceedings and was executed in 1999 when he had been on death row only 8 years.

[117] *See* Johnson v. Bredesen, 130 S.Ct. 541, 543 (2009) (Stevens, J., dissenting from denial of certiorari immediately before Tennessee's execution of Cecil Johnson, who had been on death row for close to 29 years) ("[D]elaying an execution does not does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death.").

[118] *See* note 92, *supra*.

is four times more likely to die of natural causes than by execution, then the death penalty loses any possible deterrent or retributive effect for that reason as well.

(4) Error rates

Of the 192 Tennessee defendants who received death sentences during the 40-year period, 106 defendants had seen their sentences or convictions vacated because of trial error, and only 86 defendants had sustained death sentences (of whom 56 were still living as of June 30, 2017) – and most of their cases are still under review.[119] This means that during the 40-year period the death sentence reversal rate was 55%. Among those reversals, three defendants were exonerated of the crime, and a fourth was released upon the strength of new evidence that he was actually innocent.[120]

If 55% of General Motors automobiles over the past 40 years had to be recalled because of manufacturing defects, consumers and shareholders would be outraged, the government would investigate, and the company certainly would go out of business. One of the fundamental principles under the Eighth Amendment is that our death penalty system must be reliable.[121] With a 55% reversal rate, reliability is lacking.

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[119] During the 40-year period 24 defendants died of natural causes while their death sentences were pending. These are counted as "sustained" death sentences, along with the six defendants who were executed and the 56 defendants on death row as of June 30, 2017.

[120] *See* Appendix 1, *Miller Report*, at 16.

[121] *See, e.g.,* Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("[M]any of the limits this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.").

The existence of error in capital cases and the prospect of reversal is a random factor that introduces a substantial element of arbitrariness into the system. Two causes of error, ineffective assistance of counsel and prosecutorial misconduct, are discussed below.[122]

(5) Quality of defense representation

We have identified 45 defendants whose death sentences or convictions were vacated by state or federal courts on grounds of ineffective assistance of counsel.[123] In other words, courts have found that 23% of the Tennessee defendants sentenced to death were deprived of their constitutional right to effective legal representation. This is an astounding figure, especially given the difficulty in proving both the "deficiency" and "prejudice" prongs under the Strickland standard for determining ineffective assistance of counsel under the Sixth Amendment.[124] In two additional cases affirmed by the courts, Governor Bredesen commuted the death sentences based, in part, on his determination that the defendants suffered from "grossly inadequate defense representation" at trial and/or during the post-conviction process.[125] These are findings of legal malpractice.[126] If a law firm were judicially found to have committed

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[122] Other reversible errors have included unconstitutional aggravators, erroneous evidentiary rulings, improper jury instructions, insufficient evidence to support the verdict, among other grounds for reversed. *See* The Tennessee Justice Project, Tennessee Death Penalty Cases Since 1977 (Oct 2007) (copy on file with the authors and available upon request).

[123] These cases are listed in Appendix 3, *List of Capital IAC Cases.*

[124] Strickland v. Washington, 466 U.S. 668 (1984). The difficulty of proving ineffective assistance of counsel is embodied in the following oft-quoted passage from Strickland: "Judicial scrutiny of counsel's performance must be highly deferential.... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; ..." Id. at 689 .

[125] See Appendix 1, *Miller Report* 16.

[126] There are additional capital cases in which courts have vacated death sentences on grounds of ineffective assistance of counsel, only to be reversed on appeal. See, *e.g.*, Abdur'Rahman v. Bell, 226 F.3d

malpractice in more than 23% of their cases over the past 40 years, the firm would incur substantial liability and dissolve. How can we tolerate a capital punishment system that yields these results?

The reasons for deficient defense representation in capital cases are not hard to locate. The problem begins with the general inadequacy of resources available to fund the defense in indigent cases. In a recently published report, the Tennessee Indigent Defense Task Force, appointed by the Tennessee Supreme Court, found:

> There is a strongly held belief in the legal community that attorneys do not receive reasonable compensation when representing clients as counsel appointed by the State. The Task Force was repeatedly reminded that, in almost every trial situation, the attorney for the defendant will be paid less than every other person with the trial associated in a professional capacity – less than the testifying experts, the investigators,, and interpreters.
>
> Attorneys and judges from across the state, in a variety of different roles and stages of their careers, as well as other officials and experts in the field were overwhelmingly in favor of increasing the compensation for attorneys in appointed cases. Concern regarding compensation is not new.[127]

According to the Task Force, there is a general consensus among lawyers and judges that "the current rates for paying certain experts ... are below market rate."[128]

Virtually all defendants in capital cases are indigent and must rely upon appointed counsel for their defense.[129] A typical capital defendant has no role in choosing the defense

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696 (6th Cir. 2000) (affirming deficient performance finding, but reversing on the prejudice prong); Morris v. Carpenter, 802 F.3d 825 (6th Cir. 2015) (reversing by applying a strict standard of reviewing state court decisions). These cases illustrate differing judicial viewpoints on capital punishment, which is another arbitrary factor discussed below.

[127] Indigent Representation Task Force, Liberty & Justice for All: Providing Right to Counsel Services in Tennessee 35 (Apr2017) (the "Task Force Report") (available at http://tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf, last visited on 11/18/17).

[128] Id. at 52.

attorneys who will represent him. Capital cases are unique in many respects and place peculiar demands on the defense, involving mitigation investigation, extensive use of experts, "death qualification" and "life qualification" in jury selection, and the sentencing phase trial – the only kind of trial in the Tennessee criminal justice system in which a jury makes the sentencing decision. Thus, capital defense representation is regarded as a highly specialized area of law practice.[130] As noted by the American Bar Association:

> [D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases. ...
>
> > Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[131]

Handling a death case is all consuming, requiring extraordinary hours and nerves. It is difficult for a private attorney to build and maintain a successful law practice while effectively

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[129] See note 142 , *infra*.

[130] Tenn. S. Ct. R. 13, Section 3, acknowledges the specialized nature of capital defense representation by imposing special training requirements on appointed capital defense attorneys. This is the only area of law in which the Tennessee Supreme Court imposes such a requirement. Unfortunately, the Tennessee training requirements for capital defense attorneys is inadequate. *Cf.* William P. Redick, Jr., et al., Pretend Justice – Defense Representation in Tennessee Death Penalty Cases, Mem. L. Rev. 303, 328-33 2008).

[131] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition), 31 Hofstra L. Rev. 913, 923 (2003) (quoting Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329, 357-58 (1995)) (hereinafter referred to as the ABA Guidelines).

defending a capital case at billing rates that do not cover overhead.[132] Most public defender offices have excessive caseloads without having to take on capital cases.[133] For these and other reasons, capital defense litigation is a surpassingly difficult, highly specialized field of law, requiring extensive training and experience and the right frame of mind – as well as sufficient time and resources. In Tennessee, especially with the sharp decline in the frequency of capital cases, few attorneys have acquired any meaningful experience in actually trying capital cases through the sentencing phase, and the training is sparse. Moreover, given the constraints on compensation and funds for expert services, Tennessee offers inadequate resources to properly defend a capital case, or to attract the better lawyers to the field.[134]

On the other hand, some highly effective attorneys, willing to suffer the harsh economics and emotional stress of capital cases, do handle these kinds of cases, often with great success and at great personal and financial sacrifice.[135] Unfortunately, there simply are not enough of these kinds of lawyers to go around.

With a reversal rate based on inadequate defense representation exceeding 23%, Tennessee's experience confirms the conclusion reached by the American Bar Association several years ago:

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[132] *See* Tenn. S. Ct. R. 13, Section 3(k) (setting maximum billing rates for appointed counsel and funding for investigators and experts).

[133] *See* Task Force Report, *supra* note 126, at 40-43.

[134] For a thorough discussion of the problems with capital defense representation in Tennessee, *see* Pretend Justice, *supra* note 129.

[135] Effective capital defense representation requires defense counsel to expend their own funds to cover investigative services, because funding provided under Tenn. S. Ct. R. 13, Section 3(k) is grossly inadequate.

> Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." As Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings" of the death penalty system as a whole.[136]

It goes without saying that the quality of defense representation can make a difference in the outcome of a case. A defendant's life should not turn on his luck of the draw in the lawyers appointed to his case, but we know that it does – yet another source of arbitrariness in the system.

(6) Prosecutorial discretion and misconduct

Prosecutors vary in their attitude towards the death penalty. Some strongly pursue it, while others avoid it. In more sparsely populated districts, the costs and burdens of prosecuting a capital case may be prohibitive. In other districts (such as Shelby County), the political environment and other factors may encourage the aggressive pursuit of the death penalty.[137] In a 2004 report on the death penalty, Tennessee's Comptroller of the Treasury concluded:

> Prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme

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[136] ABA Guidelines, *supra* note 130, at 928-29 (internal citations omitted).

[137] Although we have not collected the data on this issue, it is well known among the defense bar that in Shelby County, in a significant percentage of capital trials juries do not return verdicts of first-degree murder, suggesting a tendency on the part of the prosecution to over-charge. In Davidson County, by contrast, in capital trials juries always return guilty verdicts for first-degree murder, although they also are known occasionally (especially in recent years) to return Life or LWOP sentences.

> cases, or the "worst of the worst." However, prosecutors in other jurisdictions make it a standard practice on every first-degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a bargaining chip to secure plea bargains for lesser sentences. Many prosecutors also indicated that they consider the wishes of the victim's family when making decisions about the death penalty.[138]

In 2001, the Office of the District Attorney General for Davidson County, Tennessee, issued a set of Guidelines that Office would follow in deciding whether to seek the death penalty in any case.[139] Unfortunately, other district attorneys have not followed suit as they resist any written limitations in the exercise of their prosecutorial discretion. There are no uniformly applied standards or procedures among the different district attorneys in deciding whether to seek capital punishment. The lack of uniform standards, combined with the differing attitudes towards the death penalty among the various district attorneys throughout the state, injects a substantial degree of arbitrariness in the sentencing system.

In addition to the vagaries of prosecutorial discretion, the occurrence of prosecutorial misconduct adds another element of capriciousness. Prosecutorial misconduct is a thorn in the flesh of the death penalty system that can influence outcomes.[140] Sixth Circuit Judge Gilbert Merritt has written: "[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance – an old, widespread, and persistent habit. The Supreme

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[138] Note 87, *supra*, at 13.

[139] *See* note 100, *supra*.

[140] For a discussion of the prevalence of prosecutorial misconduct throughout the country, *see* Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson* (March 2016) (available at https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf, last visited on 11/14/17). In a recent study, the Fair Punishment Project found that the Shelby County district attorney's office had the highest rate of prosecutorial misconduct findings in the nation. Fair Punishment Project, The Recidivists: New Report on Rates of Prosecutorial Misconduct (July 2017) (available at http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/, last visited on 11/14/2017).

Court and the lower federal courts are constantly confronted with these so-called *Brady* exculpatory and mitigating evidence cases. ... In capital cases, this malfeasance violates both due process and the Eighth Amendment."[141]

We have located at least eight Tennessee capital cases in which either convictions or death sentences were set aside because of prosecutorial misconduct, and at least three other cases in which courts found prosecutorial misconduct but affirmed the death sentences notwithstanding.[142] Presumably capital cases are handled by the most experienced and qualified prosecutors, so there is no excuse for this level of judicially found misconduct. And we can reasonably assume that undetected misconduct, potentially affecting convictions and sentences, has occurred in other cases. Suppressed evidence is not always discovered. Although inexcusable, some degree of misconduct is explainable, because prosecutors are elected officials, and capital cases are fraught with emotion and often highly publicized. These kinds of circumstances can lead to excessive zeal.

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[141] *See* Judge Gilbert Stroud Merritt, Jr., Prosecutorial Error in Death Penalty Cases, 76 Tenn. L. Rev. 677 (2008-2009) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); other internal citations omitted).

[142] See State v. Buck, 670 S.W.2d 600 (Tenn. 1984) (improper closing argument and *Brady* violation); State v. Smith, 755 S.W.2d 757 (Tenn. 1988) (improper closing argument); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (improper closing argument); Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) (*Brady* violation); Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) (improper closing argument); House v. Bell, 2007 WL 4568444 (E.D. Tenn. 2007) (*Brady* violation); Christopher A. Davis v. State, Davidson County No. 96-B-866 (April 6, 2010) (*Brady* violation); Gdongalay Berry v. State, Davidson County No. 96-B-866 (April 6, 2010)(*Brady* violation). There are other cases of Brady violations which did not serve as grounds for reversal. See, e.g., Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1088-1090 (1998) (*Brady* violations found not material, sentence vacated on IAC grounds, reversed by the 6th Cir.); Rimmer v. State, Shelby Co. 98-010134, 97-02817, 98-01003 (Oct. 12, 2012) (while the prosecution suppressed evidence, the conviction was vacated on IAC grounds); Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017) (*Brady* violation).

(7) Defendants' impairments

From our personal experiences, combined with our research, we submit that the vast majority of capital defendants are impaired due to mental illness and/or intellectual disability.[143] On the one hand, these kinds of impairments can serve as powerful mitigating circumstances that reduce culpability in support of a life instead of death sentence, although too frequently defendants' impairments are inadequately investigated and presented to the sentencing jury by defense counsel. On the other hand, a defendant's impairments can create obstacles in effective defense representation and can further create, in subtle ways, an unfavorable appearance to the jury during the trial. Too often, a defendant's impairments can unjustly aggravate the jurors' and the court's attitude towards the defendant, which is another factor contributing to the arbitrariness of the system.

(i) Mental illness

Mental illness is rampant among criminal defendants. A study published in 2006 by the United States Department of Justice, Bureau of Justice Statistics, found that, nationwide, 56% of state prisoners, 45% of federal prisoners, and 64% of those incarcerated in local jails, suffered from a serious mental health problem.[144] Other studies indicate that the percentage of mentally

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[143] Poverty is another cause of mental impairment, which unfortunately is not discussed in the case law. According to a 2007 report, every Tennessee death-sentenced defendant who was tried since early 1990 was declared indigent at the time of trial and had to rely on court-appointed defense counsel; and a large majority of those who were tried before then were also declared indigent. The Tennessee Justice Project, Tennessee Death Penalty Cases Since 1977, note120 *supra*. There is a growing body of social science research demonstrating the adverse psychological and cognitive effects of poverty. *See, e.g.,* William Julius Wilson, When Work Disappears (Vintage Books, 1997); Sendhil Mullainathan & Eldar Shafir, Scarcity: The New Science of Having Less and How It Defines Our Lives (Picador, 2013).

[144] Doris J. James and Lauren E. Glaze, Mental Health Problems of Prison and Jail Inmates (Bureau of Justice Statistics Special Report, September 2006) (found at https://www.bjs.gov/content/pub/pdf/mhppji.pdf, last visited 11/15/2017).

ill inmates is particularly high on death row. For example, one study found "that of the 28 people executed in 2015, seven suffered from serious mental illness, and another seven suffered from serious intellectual impairment or brain injury."[145] Another study concluded: "Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of severe mental illness."[146]

From examining Tennessee capital post-conviction cases, where evidence of mental illness among death-sentenced defendants is often investigated and developed in support of claims of ineffective assistance of counsel, we can conclude that a significant number of defendants on Tennessee's death row suffer from severe mental disorders. The following cases illustrate the issue.

> Cooper v. State,[147] was the first Tennessee case in which a death sentence was vacated on grounds of ineffective assistance of counsel. Trial counsel inadequately investigated the defendant's social history and mental condition. In post-conviction, expert testimony was presented that the defendant suffered from an affective disorder with recurrent major depression over long periods of time, and at the time of the homicide his condition had deteriorated to a full active phase of a major depressive episode.

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[145] Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses*, n. 9 (June 14, 2016) (citing Death Penalty Information Center, *Report: 75% of 2015 Executions Raised Serious Concerns About Menatl Health or Innocence*, archived at https://perma-archives.org/warc/QQJ8-DDQD/http://www.deathpenaltyinfo.org/category/categories/issues/mental-illness (last visited 12/15/17).

[146] Id. (citing Robert J. Smith, et al., *The Failure of Mitigation?*, 65 Hastins L.J. 1221, 1245 (2014).

[147] 847 S.W.2d 521 (Tenn. Crim. App. 1992).

In Wilcoxson v. State,[148] the defendant had been diagnosed at different times with schizophrenia, schizo-affective disorder, and bipolar disorder. The Court of Criminal Appeals found trial counsel's performance to be deficient in failing to raise the issue of the defendant's competency to stand trial, and in failing to present evidence of the defendant's psychiatric problems to the jury as mitigating evidence in sentencing. While the Court found that post-conviction counsel failed to carry their burden of retrospectively proving the defendant's incompetency to stand trial, the Court vacated the death sentence on grounds of ineffective assistance of counsel for their failure to present social history and mental health mitigation evidence at sentencing.

In Taylor v. State,[149] the post-conviction court set aside the defendant's conviction and death sentence on the ground that his trial counsel were deficient in their investigation and presentation of defendant's psychiatric disorders pre-trial, in connection with his competency to stand trial, and during the trial, in connection with his insanity defense and his sentencing hearing. The evidence included an assessment by a forensic psychiatrist for the state, who was not discovered by defense counsel and therefore did not testify at trial, that the defendant was psychotic.

In Carter v. Bell,[150] according to expert testimony presented in federal habeas, the defendant suffered from psychotic symptoms involving hallucinations, paranoid delusions and thought disorders consistent with paranoid schizophrenia or an organic delusional disorder. His death sentence was vacated on grounds of ineffective assistance

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[148] 22 S.W.3d 289 (Tenn. Crim. App. 1999).

[149] 1999 WL 512149 (Tenn. Crim. App. 1999).

[150] 218 F.3d 581 (6th Cir. 2000).

of counsel because his trial lawyers failed to investigate his social and psychiatric history.

In Harries v. Bell,[151] the federal habeas court found that the defendant's trial counsel failed to investigate and develop evidence of the defendant's abusive childhood background; his frontal lobe brain damage, which impaired his mental executive functions; and his mental illness, which had been variously diagnosed as bipolar mood disorder, anxiety disorder, and post-traumatic stress disorder. The federal court vacated the death sentence on the basis of ineffective assistance of counsel.

Adverse childhood experiences and severe mental illness can profoundly affect cognition, judgment, impulse control, mood and decision-making. Unfortunately, these cases are typical in the death penalty arena.[152] A defendant's mental illness, if not fully realized by defense counsel, and if not properly presented and explained to the jury at trial, can prejudice the defendant both in his relationship with his defense counsel, and in his demeanor before the jury.[153]

Regarding the effect of mental illness on the attorney-client relationship, the ABA Guidelines explain:

> Many capital defendants are ... severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they

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[151] 417 F.3d 631 (6th Cir. 2005).

[152] One of the authors, Mr. MacLean, has worked on a number of capital cases in state post-conviction and federal habeas proceedings. In every case he has worked on, the defendant has been diagnosed with a severe mental disorder.

[153] For a discussion of the potential effects of a defendant's impairments on his legal representation, see Bradley A. MacLean, Effective Capital Defense Representation and the Difficult Client, 76 Tenn. L. Rev. 661 (2009).

> may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired." [154]

Regarding the potential effect of a defendant's mental illness at trial, Justice Kennedy's comment in Riggins v. Nevada,[155] involving the side-effects of antipsychotic medication in a capital case, is instructive:

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, ..., his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights.[156]

(ii) Intellectual disability

In Atkins v. Virginia, decided in 2000,[157] the United States Supreme Court declared that if a defendant fits a proper definition of intellectual disability (or mental retardation, as the term was used at the time), he is ineligible for the death penalty under the Eighth Amendment Cruel and Unusual Punishments Clause. The Court left it to the states to formulate an appropriate definition and procedure for determining intellectual disability.

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[154] ABA Guidelines, *supra* note 130, at 1007-08 (quoting Rick Kammen & Lee Norton, Plea Agreements: Working with Capital Defendants, The Advocate, Mar 2000, at 31).

[155] Riggins v. Nevada, 504 U.S. 127 (1992).

[156] Id. at 142.

[157] Atkins v. Virginia, 536 U.S. 304 (2002); Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014).

Before Atkins was decided, in 1991 the Tennessee General Assembly enacted Tenn. Code Ann. § 39-13-203 to exempt from the death penalty those defendants who fit the statutory definition of "mental retardation." The statute has since been amended to change the label from "retardation" to "intellectual disability," but the three statutory elements to the definition remain the same: "(1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age."[158] Many Tennessee capital defendants have low intellectual functioning, and a number of them can make viable arguments that they fit within the statutory definition of intellectual disability and therefore should be exempt from capital punishment, although often they do not prevail on this issue.[159]

A defendant's low intellectual functioning can lead to two additional avenues of arbitrariness in Tennessee's capital punishment system.

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[158] State v. Pruitt, 415 S.W.3d 180, 202 (Tenn 2013) (quoting Tenn. Code Ann. § 39-13-203(a). *See also* Van Tran v. Colson, 764 F.3d 594, 605 (6th Cir. 2014).

[159] A number of capital defendants have reported I.Q.'s in the borderline range of intellectual disability, even if many of them did not qualify for the intellectual disability exemption. *See, e.g.,* Nesbit v. State, 452 S.W.3d 779, 794 (Tenn. 2014) (reported I.Q. of 74); State v. Pruitt, 415 S.W.3d 180, 202 (Tenn. 2013) (reported I.Q. of 66 and 68); Keen v. State, 398 S.W.3d 594, 617 (Tenn. 2012) (Wade, J., dissenting) (reported I.Q. of 67); Cribbs v. State, 2009 WL 1905454, at *17 (Tenn. Crim. App. 2009) (reported I.Q. of 73); State v. Strode, 232 S.W.3d 1, 5 (Tenn. 2007) (reported I.Q. of 69); State v. Rice, 184 S.W.3d 646, 661 (Tenn. 2006) (reported I.Q. of 79); Howell v. State, 151 S.W.3d 450, 459 (Tenn. 2004) (reported I.Q. of between 62 and 73, with a high score of 91); State v. Carter, 114 S.W.3d 895, 900 (Tenn. 2003) (reported I.Q. of 78); State v. Dellinger, 79 S.W.3d 458, 465-66 (Tenn. 2002) (reported I.Q. of between 72 and 83); Van Tran v. State, 66 S.W.3d 790, 793 (Tenn. 2001) (reported I.Q. of between 65 and 72); State v. Blanton, 975 S.W.2d 269, 278 (Tenn. 1998) (reported I.Q. of 74); State v. Smith, 893 S.W.2d 908, 912 (Tenn. 1994) (reported I.Q. ranging from 54 to 88); Cooper v. State, 847 S.W.2d 521, 525 (Tenn. Crim. App. 1992) (I.Q. in the "sixties and seventies"); State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (reported I.Q. of 76); State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990) (reported I.Q. of 78 to 82).

First, the statutory category of intellectual disability is arbitrarily and vaguely defined. Intellectual disability is determined on a multi-dimensional set of sliding or graduated scales, and the condition can manifest itself in a multitude of ways. How are we to measure those scales, and how are we to draw a fine line in identifying those who fall within the category of defendants who shall be exempted from capital punishment? For example, what is the practical difference between a functional I.Q. of 71 versus 69? In many cases, the defendant has been administered several I.Q. tests at different points in his life yielding different scores. How are those scores to be reconciled? Moreover, the measure of each scale cannot be ascertained strictly from raw test scores but requires the application of an expert witness's "clinical judgment."[160] In a battle of testifying experts, whose clinical judgment are we to trust? As the Tennessee Supreme Court has acknowledged, "Without question, mental retardation is a difficult condition to define. The U.S. Supreme Court, in Atkins v. Virginia, admitted as much, stating: '[t]o the extent there is serious disagreement about the execution of the mentally retarded offenders, it is in determining which offenders are in fact retarded.'"[161] With reference to the I.Q. element of the statutory definition, the Howell Court went on to say, "The statute does not provide a clear directive regarding which particular test or testing method is to be used."[162] Consequently, the proper interpretation of the definition, and its application to

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[160] In Coleman v. State, 341 S.W.3d 221, 221 (Tenn. 2011), the Court held that the statutory definition "does not require that raw scores on I.Q. tests be accepted at their face value and [] the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q."

[161] Howell v. State, 151 S.W.3d, at 547 (quoting Atkins, 536 U.S., at 317).

[162] Id. at 459.

specific cases, has generated considerable litigation.[163] These cases involve a battle of the experts, and whether a defendant is found to be intellectually disabled under the statutory definition and therefore exempt from the death penalty may well depend on the quality of his defense counsel, the personality and persuasiveness of the expert testimony, and the disposition and receptivity of the judge making the ultimate determination. In close cases, the issue has a markedly subjective aspect, leaving room for arbitrary decision-making.

The second factor contributing to arbitrariness relates to one of the reasons for disqualifying the intellectually disabled from capital punishment – their reduced capacity to assist in their defense. In Atkins, the United States Supreme Court explained:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. ... [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[164]

In this respect, intellectual disability and mental illness similarly affect the reliability of capital sentencing, by impairing, through no fault of the defendant, both the defendant's

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[163] *See, e.g.*, Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017) (reflecting years of litigation in a case involving a broad range of I.Q. scores); Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014) (after years of litigation, vacating the state court's judgment and ruling that defendant was intellectually disabled and therefore exempt from execution); Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) (discussing a line of Tennessee intellectual disability cases illustrating the Court's struggle in interpreting the meaning of the statutory elements).

[164] 536 U.S. at 320-21.

capacity to work with defense counsel and the defendant's capacity to present himself to the court and the jury in a favorable way.

With regard to sentencing, this problem may be partially resolved when the defendant is found to fall within the statutory definition of intellectual disability. But there are several other cases in which the defendant's intellectual functioning is compromised but the defendant is not declared intellectually disabled. Too often it is simply a matter of degree and subjective evaluation by the judge in the face of conflicting expert testimony. Even if a defendant is held not to be exempt from capital punishment, his reduced intellectual functioning can nevertheless impair his capacity to assist in his defense and to present himself in the courtroom, which contributes to the arbitrariness of the system.

(8) Race

African Americans represent 17% of Tennessee's population, according to the U.S. Census Bureau, but they represent 44% of Tennessee's current death row population. [165] (Only 51% of the current death row population is non-Hispanic White.) While a number of factors may account for this discrepancy, it cannot be ignored, and it suggests a pernicious form of arbitrariness.

No one can doubt the existence of implicit racial bias in our criminal justice system, and this bias inevitably infects the capital punishment system.[166] The exercise of discretion

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[165] Appendix 1, *Miller Report*, at 10.

[166] For general discussions of implicit racial bias, *see, e.g.*, Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969 (2006); Jennifer L. Eberhardt, *et al.*, Seeing Black: Race, Crime, and Visual Processing, 87 Journal of Personality and Social Psychology 876 (2004). The presence of racial bias in our criminal justice system – whether explicit or implicit – has been well established. *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (The New Press 2010); Samuel R. Gross, *et al.*, Race and Wrongful Convictions (National Registry of Exonerations, Mar 7, 2017). *See also* United States Sentencing Commission, Demographic Differences in Sentencing (Nov

permeates a capital case – from the time of arrest through the charging decision, the district attorney's decision to seek the death penalty, innumerable decisions by all of the parties and the judiciary throughout the proceedings, and the ultimate jury decision of life versus death. Where there is discretion, there is room for implicit racial bias.

In 1997 the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness issued its Final Report at the conclusion of its two-year review of the State's judicial system.[167] Among other things, the Commission concluded that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] ..., institutionalized bias is relentlessly at work."[168] While our society continually attempts to eradicate the effects of implicit bias from our institutions, there is no indication that it has been eliminated from our capital sentencing system.

The American Bar Association commissioned a study of racial bias in Tennessee's capital punishment system that was published in 2007.[169] The study concluded that the race of the

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2017) (based on several studies, concluding that "black male offenders continue[] to receive longer sentences than similarly situated Black offenders" by a substantial margin) (available at https://www.ussc.gov/research/research-reports/demographic-differences-sentencing, last visited 11/18/2017).

[167] Final Report of the Tennessee Commission on Racial and Ethnic Fairness to the Supreme Court of Tennessee (1997) (available at http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial_ethnic_fairness.pdf, last visited 11/17/17).

[168] Id. at 5.

[169] Glenn Pierce, at al., Race and Death Sentencing in Tennessee: 1981-2000, Appendix 1 to The Tennessee Death Penalty Assessment Report, note 181, *infra*.

defendant and the victim influences who receives the death sentence, "even after the level of homicide aggravation is statistically controlled."[170]

The recent trend regarding race is disturbing. Over the past ten years, from July 1, 2007 to June 30, 2017, there were nine trials resulting in new death sentences; in all but one of those cases (*i.e.*, in 89% of the cases), the defendant was African American.[171] It appears that as the death penalty becomes less frequently imposed, in an increasing percentage of cases it is imposed on African Americans.

(9) Judicial disparity

While judges are presumed to be objective and impartial, from our experience in capital cases we know that different judges view these cases differently, and the predisposition of a judge can influence his or her decisions in capital cases. We can begin by looking at the deeply divided death penalty opinions issued by the Supreme Court on a yearly basis, from the nine differing opinions issued in Furman v. Georgia in 1972 through the five conflicting opinions issued in Glossip v. Gross in 2015,[172] and in cases since then. For example, Justices Brennan and Marshall categorically opposed the death penalty and always voted to reverse or vacate death sentences, while Justices Rehnquist and Scalia consistently voted to uphold death sentences, and this split continues with the current members of the Court.

We see similarly opposing views expressed on the United States Court of Appeals for the Sixth Circuit. These judges, persons of integrity and intelligence, acting in good faith, and looking at the same cases involving the same legal principles, often come to opposing

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[170] Id. at Q.

[171] See Appendix 2, *Chart of Tennessee Capital Trials.* These numbers exclude retrials.

[172] 576 U.S. ___, 135 S.Ct. 2726 (2015).

conclusions about what the proper outcomes should be. Among the defense bar, and probably within the Attorney General's office, we know that in many federal habeas cases, the judge or panel that we draw will likely determine the outcome of the case.

Our review of the voting records of Sixth Circuit judges in capital habeas cases arising out of Tennessee emphasizes the point. The *Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases,* attached as Appendix 4, breaks down the Sixth Circuit votes according to political party affiliation – *i.e.,* according to whether the judges were appointed by Republican or Democrat administrations. We found 37 Sixth Circuit decisions in which the Court finally disposed of capital habeas cases from Tennessee. In those cases, Republican-appointed judges cast 88% of their votes to deny relief and only 12% of their votes to grant relief. By contrast, Democrat-appointed judges cast only 22% of their votes to deny relief, and 78% of their votes to grant relief. In other words, the voting records for Republican-appointed judges were the opposite from the voting records for Democrat-appointed judges; Republican-appointed judges were significantly more favorable to the prosecution, whereas Democrat-appointed judges were significantly more favorable to the defense.[173]

The political skewing of the voting records is greater in the twenty cases that were decided by split votes, which represent a majority of the Sixth Circuit cases. In those cases, Republican-appointees voted against the defendant 93% of the time, and for defendant only 7% of the time; whereas Democrat-appointees voted exactly the opposite way - against the defendant only 7% of the time, and for the defendant 93% of the time. Similarly, in the six Tennessee capital cases that were decided by the full *en banc* Court, Republican-appointed judges cast 91% of their votes against the defendants, whereas Democrat-appointed judges cast

[173] Appendix 4, *Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases,* at. 1-5.

97% of their votes in favor of the defendants. In five of the six *en banc* cases, the Court's decision was determined strictly along party lines.[174]

Without pointing to individual members of the Tennessee judiciary, it is reasonable to believe that different state court judges also differ in their exercise of judgment in these kinds of cases. All practicing attorneys know that a judge's worldview can shape his or her attitude towards the death penalty, and towards criminal defendants and the criminal justice system in general. These attitudes can affect decisions ranging from the final judgment in a post-conviction case to rulings on evidentiary and procedural issues during the course of pre-trial and trial proceedings.

That is to be expected in the highly controversial and emotionally charged arena of capital punishment. It is human nature. Everyone approaches these kinds of issues with certain cognitive biases shaped by differing worldviews.[175] Trial judges are elected officials, and we know from the experience of Justice Penny White that the politics of the death penalty can even influence the Court's composition.[176] It goes without saying that liberal judges tend to

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[174] Id. at 5-6.

[175] For interesting discussions of how different cognitive styles deal with controversial social issues in different ways, *see, e.g.*, Richard A. Posner, How Judges Think (Harvard University Press) (2008); Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 Emory L. Rev. 312 (2008); and Dan M. Kahan & Donald Bramam, Cultural Cognition and Public Policy, 24 Yale Law & Policy Rev. 147 (2006). For studies of judicial bias based on differing political perspectives, *see, e.g.*, Max M. Schanzenbach and Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Emperical Evidence, and Reform, 75 U. Chi. L. Rev. 715 (2008); Chris Guthrie, *Misjudging*, 7 Nev. L. J. 420 (2007).

[176] In 1996 Justice White became the only Tennessee Supreme Court Justice who was removed from office in a retention election. She was the political victim of a campaign to remove her from the Court because of her concurring vote to reverse the death sentence in a single death penalty case – *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Justice White's experience was discussed in a recent study regarding the effects of political judicial elections on judicial decision-making in capital cases. *See* Reuters Investigates, Uneven Justice: In states with elected high court judges, a harder line on capital

be somewhat more sympathetic to defense arguments, and conservative judges tend to be somewhat more sympathetic to prosecution arguments. This is not necessarily a criticism, for in our society diversity of viewpoint is a good thing. But in highly charged death penalty cases, where divergent points of view are more likely to come to the fore, and where arbitrariness is not to be tolerated, differences in judicial disposition contribute to the capriciousness of the capital punishment system. From our study, this is obviously true to a remarkable degree in the federal court system, and there is good reason to believe it is true at least to some degree in the state court system as well.

C. Comparative Disproportionality: Single vs. Multi-Murder Cases

It is beyond the scope of this article to identify the many extremely egregious cases resulting in Life or LWOP sentences, or to compare them to the many significantly less egregious cases leading to death sentences or executions. But the statistics concerning one simple metric make the point – number of victims. Mr. Miller has identified 339 defendants convicted of multiple counts of first-degree murder since 1977. Of those, only 33 (or 10%) received sustained death sentences, whereas 306 (or 90%) received Life or LWOP.[177] Several in the Life/LWOP category were convicted of three or more murders. These numbers can be broken down as follows:

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punishment (Sept 22, 2015) (found at http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/, last visited on 11/15/2017).

[177] Appendix 1, *Miller Report*, at 12.

Multi-Murder Cases - Breakdown By Number of Victims & Sentences[178]

Number of Victims	Life or LWOP Sentences	Sustained Death Sentences	Totals
2	259 (92% of 2-Victim cases)	24 (8% of 2-Victim cases)	283
3	32 (82% of 3-Victim cases)	7 (18% of 3-Victim cases)	39
4	11 (92% of 4-Victim cases)	1 (8% of 4-Victim cases)	12
5	1 (100% of 5-Victim cases)	0 (0% of 5-Victim cases)	1
6	3 (75% of 6-Victim cases)	1 (25% of 6-Victim cases)	4
TOTALS	306 (90% of Multi-Murder Cases)	33 (10% of Multi-Murder Cases)	339

Virtually all of these defendants were found guilty of premeditated murder (as opposed to felony murder). Thus, from these statistics, if a defendant deliberately killed two or more victims, he was nine times more likely to be sentenced to Life or LWOP than death; and the sentence he received most likely depended on extraneous factors such as the geographic location of the crime, the prosecutor, quality of defense counsel, timing of the case, and the other factors described above.

On the other hand, compared to the 306 multiple murder defendants who were sentenced to life or LWOP instead of death, a majority of the defendants with sustained death

[178] Table 13A, *Miller Report.*

sentences (53 out of a total of 86, or 62%) committed single murders, and several of them were found guilty of felony murder and not premeditated murder.[179]

This comparative disproportionality demonstrates a lack of rationality in Tennessee's system. The evidence of such inconsistent results, of sentencing decisions that cannot be explained solely on the basis of individual culpability, indicates that the system operates arbitrarily, contrary to the requirements of the Eighth Amendment.

VII. CONCLUSION

A. U.S. Supreme Court Dissenting Opinions

We are not alone in claiming that the historical record shows that capital sentencing systems like Tennessee's fail Furman's commandment against arbitrariness and capriciousness. The death penalty has hung by a thin thread since it was reinstated in Gregg. The vote to uphold the guided discretion scheme in Gregg was seven-to-two. Justices Powell, Blackmun and Stevens were among the seven in the majority. However, after years of observing the application of guided discretion sentencing schemes in the real world, each of these Justices changed his mind. These three Justices, combined with the dissenting Justices in Gregg,[180] would have constituted a majority going the other way.

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[179] We have identified ten cases resulting in sustained death sentences in which the defendants were convicted of felony murder and not premeditated murder: State v. Barnes, 703 S.W.2d 611 (Tenn. 1985); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Carter, 988 S.W.2d 145 (Tenn. 1999); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000); State v. Powers, 101S.W.3d 383 (Tenn. 2003); State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013); State v. Bell, 480 S.W.3d 486 (Tenn. 2015).

[180] Justices Brennan and Marshall cast the dissenting votes.

Justice Powell dissented in Furman, voting to uphold discretionary death penalty statutes, and also authored the Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), which upheld Georgia's death penalty against a challenge based upon demonstrated racial bias. Shortly after his retirement, however, his biographer published the following colloquy:

> In a conversation with the author [John C. Jeffries Jr.] in the summer of 1991, Powell was asked if he would change his vote in any case:
>
> > "Yes, *McCleskey v. Kemp*."
> > "Do you mean you would now accept the argument from statistics?"
> > "No, I would vote the other way in any capital case."
> > "In *any* capital case?"
> > "Yes."
> > "Even in *Furman v. Georgia*?"
> > "Yes, I have come to think that capital punishment should be abolished."
>
> Capital punishment, Powell added, "serves no useful purpose." The United States was "unique among the industrialized nations of the West in maintaining the death penalty," and it was enforced so rarely that it could not deter.[181]

Justice Blackmun, who also dissented in Furman and voted to uphold discretionary sentencing statutes, and voted with the majority in Gregg, first expressed his changed view in 1992:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see Furman v. Georgia, 408 U.S. 238 (1972), and, despite the effort of the States and the Court to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[182]

Justice Stevens, who was relatively new to the Court when he joined the Gregg majority, followed suit fourteen years later in 2008:

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[181] John C. Jeffries Jr., Justice Lewis F. Powell Jr.: A Biography, at 451-52 (Charles Scribner's Sons, 1994).

[182] Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

> I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman, 408 U.S. at 312 (White, J., concurring).[183]

With reference to current Justices who were not on the Court when Gregg was decided, in the case of Glossip v. Gross, Justices Breyer and Ginsburg recently looked at the historical record. In a careful analysis, they explained why a system such as Tennessee's can no longer be sustained. They summarized their analysis as follows:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.[184]

The Glossip dissent is significant because it represents a shifting view and eloquently reflects on the failed effort over forty years to apply guided discretion capital sentencing schemes that were supposed to address the problem of arbitrariness. The historical record in Tennessee, as well as in other states that have attempted to maintain capital sentencing systems, speaks to how this kind of system simply has not been able to accomplish that goal.

B. Opinions from the ALI and the ABA Tennessee Assessment Team

The opinions of the dissenting Supreme Court Justices are echoed by other leading authorities.

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[183] Baze v. Rees, 128 S.Ct. 1520, 1549-51 (2008) (Stevens, J., concurring in result).

[184] Glossip v. Gross, 576 U.S. ___, ___, 135 S.Ct. 2726, ___ (2015) (Breyer, J., dissenting).

As mentioned above, Tennessee's capital punishment scheme was patterned after the Georgia scheme approved in Gregg, which in turn was patterned in part after the American Law Institute Model Penal Code §210.6 (1962). In 2009, the American Law Institute (ALI) withdrew §210.6 from the Model Penal Code because of its concerns about whether death penalty systems can be made fair.[185] In recommending withdrawal of this section from the Model Penal Code, the ALI Council issued a Report to its membership stating, "Section 201.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it.... [O]n the whole the section has not withstood the tests of time and experience."[186] The Report went on to describe the ALI Council's reasons for its concerns about fairness in death penalty systems, as follows:

> These [concerns] include (a) the tension between clear statutory identification of which murder should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where – even though nearly all state judges perform their tasks conscientiously – candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.[187]

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[185] *See* American Law Institute, Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty (April 15, 2009) (available at https://www.ali.org/media/filer_pubic/3f/ae/3fae71fl-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf), last visited 11/17/17).

[186] Id. at 4.

[187] Id. at 5. The American Law Institute reported an "overwhelming[]" vote for withdrawal of §210.6. https://www.ali.org/publications/show/model-penal-code.

In a similar vein and focusing on Tennessee, the American Bar Association appointed a Tennessee Death Penalty Assessment Team to assess fairness and accuracy in Tennessee's death penalty system.[188] The Assessment Team conducted an extensive study of Tennessee's system and issued its lengthy report in March 2007.[189] The Team concluded that "Tennessee's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures."[190] The Report identified the following areas "as most in need of reform":

- Inadequate procedures to address innocence claims;
- Excessive caseloads of defense counsel;
- Inadequate access to experts and investigators;
- Inadequate qualification and performance standards for defense counsel;
- Lack of meaningful proportionality review;
- Lack of transparency in the clemency process;
- Significant juror confusion;
- Racial disparities in Tennessee's sentencing;
- Geographical disparities in Tennessee's capital sentencing; and
- Death sentences imposed on people with severe mental disability.[191]

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[188] The members of the Assessment Team were Professor Dwight L. Aarons, Chair; W.J. Michael Cody, former Tennessee Attorney General; Kathryn reed Edge, former President of the Tennessee Bar Association; Jeffrey S. Henry, Executive Director of the Tennessee District Public Defenders Conference, Judge Gilbert S. Merritt, former Chief Judge of the United States Court of Appeals for the Sixth Circuit; attorney Bradley A. MacLean; and attorney William T. Ramsey.

[189] The Tennessee Death Penalty Assessment Report: An Analysis of Tennessee's Death Penalty Laws, Procedures, and Practices (March 2007) (available at https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf, last visited 11/13/2017).

[190] Id, at iii.

[191] Id. at iii – vi.

C. Final Remarks

It is clear from the statistics and our experience over the past 40 years that Tennessee's death penalty system "fails to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences."[192] The system is riddled with arbitrariness.

A person of compassion and empathy cannot deny that the death penalty is cruel. "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."[193] "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity."[194]

When over the past 40 years we have executed fewer than one out of every 400 defendants (less than ¼ of 1%) convicted of first degree murder; when we sentence 90% of multiple murderers to life or life without parole and only 10% to death; when the majority of capital cases are reversed or vacated because of trial error; when the courts have found that in over 23% of capital cases, defense counsel's performance was constitutionally deficient; when the number of death row defendants who die of natural causes is four times greater than the number Tennessee actually executed; when we have not seen a new capital case in Tennessee since mid-2014; when we haven't seen any death sentences in the Grand Middle Division since

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[192] Woodson, 428 U.S. at 302.

[193] Spaziano v. Florida, 468 U.S. at 469 n. 3 (Stevens, J., concurring).

[194] Furman, 408 U.S., at 306 (Stewart, J., concurring).

early 2001 – then, it must also be said that the death penalty is an "unusual" and unfair punishment. The statistics make clear that Tennessee's system is at least as arbitrary and capricious as the systems declared unconstitutional in Furman – and that is without accounting for the exorbitant delays and costs inherent in Tennessee's system, which far exceed the delays and costs inherent in the pre-Furman era.

The lack of proportionality and rationality in our selection of the few whom we decide to kill is breathtakingly indifferent to fairness, without justification by any legitimate penological purpose. The death penalty system as it has operated in Tennessee over the past 40 years, and especially over the past ten years, is but a cruel lottery, entrenching the very problems that Furman sought to eradicate.

Appendix 2
Tennessee Trials In Which Death Sentences Were Imposed During The Period 7/1/1977 through 6/30/2017

This chart identifies in chronological order, by defendant's name, each "Capital Trial " that resulted in the imposition of one or more death sentences. For purposes of this chart, the term Capital Trial includes a resentencing hearing.

The county listed is where the murder allegedly occurred, not necessarily where the case was tried.

A number in parentheses immediately following the defendant's name in a multi-murder case indicates the number of murder victims for which death sentences were imposed.

Asterisks indicate cases that have had two or more Capital Trials arising from the same charges. A single asterisk indicates the result of the defendant's first Capital Trial, a double asterisk indicates the result of the defendant's second trial for the same murder(s), etc. The other Capital Trials involving the same defendant and charges are cross-referenced in the far right column.

A Capital Trial is "Pending" if it has not been reversed or vacated – *i.e.*, if the defendant is still under a sentence of death from that Capital Trial. Because capital cases typically are challenged until a defendant is executed, a case remains Pending as long as the defendant is alive.

If a case is ultimately resolved by plea agreement or by the prosecution's withdrawal of the death notice (*e.g.*, while the defendant is awaiting retrial or resentencing), that fact is not reflected in the chart.

Capital Trial No.	Defendant	County Where Offense Occurred	Sentence Date (of instant sentencing proceeding)	Defendant's Race and Gender	Type of Relief (AR) = Awaiting Retrial	Other Capital Trial(s) for Same Defendant
1	Richard Hale Austin*	Shelby	10/22/77	White/Male	Sentence Relief	No. 169
2	Ronald Eugene Rickman	Shelby	03/04/78	White/Male	Conviction Relief	
3	William Edward Groseclose	Shelby	03/04/78	White/Male	Conviction Relief	
4	Larry Charles Ransom	Shelby	04/07/78	Black/Male	Sentence Relief	
5	Ralph Robert Cozzolino	Hamilton	04/22/78	White/Male	Sentence Relief	
6	Russell Keith Berry	Greene	08/28/78	White/Male	Conviction Relief	
7	Donald Wayne Strouth	Sullivan	09/04/78	White/Male	DECEASED	
8	Richard Houston	Knox	11/03/78	Black/Male	Conviction Relief	
9	Donald Michael Moore	Shelby	11/10/78	White/Male	Sentence Relief	
10	Jeffrey Stuart Dicks	Sullivan	02/10/79	White/Male	DECEASED	
11	Luther Terry Pritchett	Marion	08/16/79	White/Male	Sentence Relief	
12	Michael Angelo Coleman	Shelby	04/19/80	Black/Male	Sentence Relief	
13	Carl Wayne Adkins*	Washington	01/29/80	White/Male	Sentence Relief	Nos. 52, 62
14	Loshie Pitts Harrington	Dickson	06/01/80	White/Male	Sentence Relief	
15	Stephen Allen Adams	Shelby	06/20/80	Black/Male	Sentence Relief	

16	Richard Weldon Simon	Montgomery	06/26/80	Black/Male	Sentence Relief	
17	Raymond Eugene Teague*	Hamilton	11/22/80	White/Male	Sentence Relief	No. 44
18	Hugh Warren Melson	Madison	12/05/80	White/Male	DECEASED	
19	Cecil C. Johnson, Jr. (3)	Davidson	01/20/81	Black/Male	EXECUTED	
20	Joseph Glenn Buck	Smith	01/24/81	White/Male	Sentence Relief	
21	Robert Glen Coe	Weakley	02/28/81	White/Male	EXECUTED	
22	Walter Keith Johnson*	Hamilton	03/25/81	White/Male	Sentence Relief	No. 47
23	Hubert Loyd Sheffield	Shelby	03/26/81	White/Male	Sentence Relief	
24	Timothy Eugene Morris	Greene	04/09/81	White/Male	Sentence Relief	
25	Thomas Gerald Laney	Sullivan	04/11/81	White/Male	Sentence Relief	
26	Ronald Richard Harries	Sullivan	08/08/81	White/Male	Sentence Relief	
27	Stephen Leon Williams	Hawkins	10/16/81	White/Male	Sentence Relief	
28	Laron Ronald Williams (2)	Shelby	11/06/81	Black/Male	DECEASED	
29	Laron Ronald Williams	Madison	12/14/81	Black/Male	DECEASED	
30	David Earl Miller*	Knox	03/17/82	White/Male	Sentence Relief	No. 76
31	Kenneth Wayne Campbell	Washington	03/26/82	White/Male	Sentence Relief	
32	Phillip Ray Workman	Shelby	03/31/82	White/Male	EXECUTED	
33	Michael David Matson	Hamilton	04/22/82	White/Male	Sentence Relief	
34	Gary Bradford Cone (2)	Shelby	04/23/82	White/Male	DECEASED	
35	Michael Eugene Sample (2)	Shelby	11/02/82	Black/Male	PENDING	
36	Larry McKay (2)	Shelby	11/02/82	Black/Male	PENDING	
37	Tommy Lee King	Maury	11/13/82	Black/Male	Sentence Relief	
38	Richard Caldwell	Henderson	12/04/82	White/Male	Conviction Relief	
39	Walter Lee Caruthers	Knox	02/08/83	Black/Male	Sentence Relief (AR)[1]	
40	David Carl Duncan	Sumner	04/01/83	Black/Male	Sentence Relief (AR)	
41	Richard Carlton Taylor*	Hickman	05/07/83	White/Male	Conviction Relief	No. 198
42	Willie James Martin	Shelby	06/24/83	Black/Male	Conviction Relief	
43	Charles Edward Hartman*	Montgomery	05/23/83	White/Male	Sentence Relief	No. 153
44	Raymond Eugene Teague**	Hamilton	08/25/83	White/Male	Sentence Relief	No. 17
45	Ricky Goldie Smith	Shelby	02/10/84	Black/Male	Sentence Relief	
46	Edmund George Zagorski (2)	Robertson	03/02/84	White/Male	PENDING	

[1] Died while awaiting Retrial.

47	Walter Keith Johnson**	Hamilton	03/08/84	White/Male	Sentence Relief	No. 22
48	William Wesley Goad	Sumner	03/22/84	White/Male	Sentence Relief	
49	Willie Claybrook	Crockett	06/06/84	Black/Male	Conviction Relief	
50	David Lee McNish	Carter	08/15/84	White/Male	Sentence Relief (AR)[2]	
51	James William Barnes	Washington	09/14/84	White/Male	DECEASED	
52	Carl Wayne Adkins**	Washington	10/01/84	White/Male	Sentence Relief	Nos. 13, 62
53	Edward Jerome Harbison	Hamilton	10/05/84	Black/Male	Sentence Relief (Commutation)	
54	James David Carter	Hamblen	11/14/84	White/Male	Sentence Relief	
55	Willie Sparks	Hamilton	11/14/84	Black/Male	Sentence Relief	
56	Kenneth Wayne O'Guinn	Madison	01/22/85	White/Male	DECEASED	
57	Terry Lynn King	Knox	02/06/85	White/Male	PENDING	
58	Vernon Franklin Cooper	Hamilton	02/15/85	White/Male	Sentence Relief	
59	Tony Lorenzo Bobo	Shelby	02/22/85	Black/Male	Sentence Relief	
60	Leonard Edward Smith*	Sullivan	03/20/85	White/Male	Conviction Relief	Nos. 97, 143
61	Charles Walton Wright (2)	Davidson	04/05/85	Black/Male	PENDING	
62	Carl Wayne Adkins***	Washington	06/28/85	White/Male	Sentence Relief	Nos. 13, 52
63	Rocky Lee Coker	Sequatchie	07/11/85	White/Male	Sentence Relief	
64	Thomas Lee Crouch	Williamson	08/08/85	White/Male	DECEASED	
65	Gregory S. Thompson	Coffee	08/22/85	Black/Male	DECEASED	
66	Donnie Edward Johnson	Shelby	10/04/85	White/Male	PENDING	
67	Erskine Leroy Johnson	Shelby	12/07/85	Black/Male	Conviction Relief	
68	Anthony Darrell Hines*	Cheatham	01/10/86	White/Male	Sentence Relief	No. 96
69	Sidney Porterfield	Shelby	01/15/86	Black/Male	DECEASED	
70	Gaile K. Owens	Shelby	01/15/86	White/Female	Sentence Relief (Commutation)	
71	Paul Gregory House	Union	02/08/86	White/Male	Conviction Relief (Exonerated)	
72	Steve Morris Henley* (2)	Jackson	02/28/86	White/Male	Sentence Relief	No. 161
73	Roger Morris Bell	Hamilton	05/23/86	Black/Male	Sentence Relief	
74	Terry Dwight Barber	Lake	08/18/86	White/Male	DECEASED	
75	Billy Ray Irick	Knox	11/3/86	White/Male	PENDING	
76	David Earl Miller**	Knox	02/12/87	White/Male	PENDING	No. 30

[2] Died while awaiting Retrial.

77	Bobby Randall Wilcoxson	Hamilton	02/13/87	White/Male	Sentence Relief	
78	Sedley Alley	Shelby	03/18/87	White/Male	EXECUTED	
79	Stephen Michael West (2)	Union	03/25/87	White/Male	PENDING	
80	David Scott Poe	Montgomery	03/28/87	White/Male	Sentence Relief	
81	Darrell Wayne Taylor	Shelby	04/24/87	Black/Male	Sentence Relief	
82	Nicholas Todd Sutton (2)	Morgan	03/04/86	White/Male	PENDING	
83	Wayne Lee Bates	Coffee	05/21/87	White/Male	Sentence Relief	
84	James Lee Jones, Jr. (*aka Abu-Ali Abdur'Rahman*)	Davidson	07/15/87	Black/Male	PENDING	
85	Homer Bouldin Teel	Marion	08/31/87	White/Male	Sentence Relief	
86	Michael Lee McCormick	Hamilton	01/15/88	White/Male	Conviction Relief (Exonerated)	
87	Pervis Tyrone Payne (2)	Shelby	02/27/88	Black/Male	PENDING	
88	Michael Boyd (*aka Mikaeel Abdullah Abdus-Samud*)	Shelby	03/10/88	Black/Male	Sentence Relief (Commutation)	
89	Ronald Michael Cauthern*(2)	Montgomery	03/18/88	White/Male	Sentence Relief	No. 140
90	J.B. McCord	Warren	05/01/88	White/Male	Conviction Relief	
91	Edward Leroy Harris (2)	Sevier	05/13/88	White/Male	Sentence Relief	
92	John David Terry*	Davidson	09/22/88	White/Male	Sentence Relief	No. 157
93	Byron Lewis Black (3)	Davidson	03/10/89	Black/Male	PENDING	
94	Mack Edward Brown	Knox	05/22/89	White/Male	Conviction Relief	
95	Heck Van Tran (3)	Shelby	06/23/89	Asian/Male	Sentence Relief (AR)	
96	Anthony Darrell Hines**	Cheatham	06/27/89	White/Male	PENDING	No. 68
97	Leonard Edward Smith**	Sullivan	08/25/89	White/Male	Sentence Relief	Nos. 60, 143
98	Donald Ray Middlebrooks*	Davidson	09/22/89	White/Male	Sentence Relief	No. 144
99	Michael Wayne Howell	Shelby	10/26/89	Native Am/ Male	DECEASED	
100	Thomas Daniel Eugene Hale	Washington	11/18/89	Black/Male	Conviction Relief	
101	Jonathan Vaughn Evans	Hamblen	12/16/89	Black/Male	Sentence Relief	
102	Gary June Caughron	Sevier	02/03/90	White/Male	Sentence Relief	
103	John Michael Bane*	Shelby	02/23/90	White/Male	Sentence Relief	No. 156
104	Danny Branam	Knox	05/04/90	White/Male	Sentence Relief	
105	Harold Wayne Nichols	Hamilton	05/12/90	White/Male	PENDING	
106	Tommy Joe Walker	Knox	05/14/90	White/Male	Sentence Relief	
107	Randy Duane Hurley	Cocke	05/23/90	White/Male	Sentence Relief	

108	Oscar Franklin Smith (3)	Davidson	07/26/90	White/Male	PENDING	
109	David M. Keen*	Shelby	8/15/90	White/Male	Sentence Relief	No. 158
110	Victor James Cazes	Shelby	11/01/90	White/Male	DECEASED	
111	Jonathan Wesley Stephenson*	Cocke	10/19/90	White/Male	Sentence Relief	No. 194
112	Olen Edward Hutchison	Campbell	01/18/91	White/Male	DECEASED	
113	Kenneth Patterson Bondurant*	Giles	02/09/91	White/Male	Conviction Relief	No. 201
114	David Allen Brimmer	Anderson	03/02/91	White/Male	Sentence Relief	
115	Roosevelt Bigbee	Sumner	03/15/91	Black/Male	Sentence Relief	
116	Joseph Arlin Shepherd	Monroe	04/04/91	White/Male	Sentence Relief	
117	Ricky Eugene Estes	Shelby	06/26/91	White/Male	Conviction Relief	
118	James Blanton (2)	Stewart	07/27/91	White/Male	DECEASED	
119	Sylvester Smith	Shelby	09/27/91	Black/Male	Sentence Relief	
120	Millard Curnutt	Campbell	11/22/91	White/Male	DECEASED	
121	William Eugene Hall (2)	Stewart	12/04/91	White/Male	PENDING	
122	Derrick Desmond Quintero (2)	Stewart	12/04/91	Latino/Male	PENDING	
123	Henry Eugene Hodges	Davidson	01/28/92	White/Male	PENDING	
124	Craig Thompson	Shelby	02/29/92	Black/Male	Sentence Relief	
125	Timothy Dewayne Harris	Shelby	03/04/92	Black/Male	Sentence Relief	
126	Leroy Hall, Jr.	Hamilton	03/11/92	White/Male	PENDING	
127	Ricky Thompson*	McMinn	04/04/92	White/Male	Conviction Relief	182
128	Derrick Johnson	Shelby	04/22/92	Black/Male	Sentence Relief	
129	Robert Williams	Hamilton	06/19/92	Black/Male	Sentence Relief	
130	Richard Odom*	Shelby	10/15/92	White/Male	Sentence Relief	Nos. 177, 210
131	William Arnold Murphy	Shelby	11/20/92	White/Male	Sentence Relief	
132	Michael Dean Bush	Putnam	02/22/93	White/Male	Sentence Relief	
133	Gary Wayne Sutton	Blount	02/24/93	White/Male	PENDING	
134	James Anderson Dellinger (2)	Blount	02/24/93	White/Male	PENDING	
135	Fredrick Sledge	Shelby	11/04/93	Black/Male	Sentence Relief	
136	Christopher Scott Beckham	Shelby	11/17/93	White/Male	Sentence Relief	
137	Andre S. Bland	Shelby	02/14/94	Black/Male	PENDING	
138	Glen Bernard Mann	Dyer	07/19/94	Black/Male	DECEASED	
139	Gussie Willis Vann	McMinn	08/10/94	White/Male	Conviction Relief (Exonerated)	

140	Perry A. Cribbs	Shelby	11/16/94	Black/Male	Sentence Relief	
141	Preston Carter* (*aka Akil Jahi*) (2)	Shelby	01/25/95	Black/Male	Sentence Relief	No. 179
142	Ronald Michael Cauthern**(2)	Montgomery	01/25/95	White/Male	Sentence Relief	No. 89
143	Clarence C. Nesbit	Shelby	02/24/95	Black/Male	Sentence Relief (AR)	
144	Kevin B. Burns (2)	Shelby	09/23/95	Black/Male	PENDING	
145	Leonard Edward Smith***	Sullivan	09/27/95	White/Male	Sentence Relief	Nos. 60, 97
146	Donald Ray Middlebrooks**	Davidson	10/12/95	White/Male	PENDING	No. 98
147	Christa Gail Pike	Knox	03/30/96	White/Female	PENDING	
148	Tony V. Carruthers (3)	Shelby	04/26/96	Black/Male	PENDING	
149	James Montgomery (3)	Shelby	04/26/96	Black/Male	Conviction Relief	
150	Jon D. Hall	Henderson	02/05/97	White/Male	PENDING	
151	Farris Genner Morris, Jr. (2)	Madison	04/01/97	Black/Male	PENDING	
152	Bobby Gene Godsey, Jr.	Sullivan	04/25/97	White/Male	Sentence Relief	
153	Charles Edward Hartman**	Montgomery	08/01/97	White/Male	Sentence Relief	No. 43
154	Roy E. Keough	Shelby	05/09/97	White/Male	Sentence Relief	
155	Tyrone L. Chalmers	Shelby	06/19/97	Black/Male	PENDING	
156	John Michael Bane**	Shelby	07/18/97	White/Male	PENDING	No. 103
157	John David Terry**	Davidson	08/07/97	White/Male	DECEASED	No. 92
158	David M. Keen**	Shelby	08/15/97	White/Male	PENDING	No. 109
159	Jerry Ray Davidson	Dickson	09/03/97	White/Male	Sentence Relief	
160	Dennis Wade Suttles	Knox	11/04/97	White/Male	PENDING	
161	Steve Morris Henley** (2)	Jackson	12/15/97	White/Male	EXECUTED	No. 72
162	James Patrick Stout	Shelby	03/03/98	Black/Male	Sentence Relief	
163	Vincent C. Sims	Shelby	05/01/98	Black/Male	PENDING	
164	Kennath Artez Henderson	Fayette	07/13/98	Black/Male	PENDING	
165	Michael Dale Rimmer*	Shelby	11/09/98	White/Male	Sentence Relief	Nos. 200, 221
166	Gregory Robinson	Shelby	11/23/98	Black/Male	PENDING	
167	Gerald Lee Powers	Shelby	12/14/98	Asian/Male	PENDING	
168	William Pierre Torres	Knox	02/25/99	Latino/Male	Sentence Relief	
169	Richard Hale Austin**	Shelby	03/05/99	White/Male	DECEASED	No. 1
170	James A. Mellon	Knox	03/05/99	White/Male	Conviction Relief	
171	Paul Dennis Reid (2)	Davidson	04/20/99	White/Male	DECEASED	

172	Daryl Keith Holton (4)	Bedford	06/15/99	White/Male	EXECUTED	
173	Christopher A. Davis (2)	Davidson	06/17/99	Black/Male	Sentence Relief	
174	Timothy Terrell McKinney	Shelby	07/16/99	Black/Male	Conviction Relief	
175	William Richard Stevens (2)	Davidson	07/23/99	White/Male	DECEASED	
176	Paul Dennis Reid (2)	Montgomery	09/22/99	White/Male	DECEASED	
177	Richard Odom**	Shelby	10/01/99	White/Male	Sentence Relief	Nos. 130, 210
178	William Glenn Rogers	Montgomery	01/21/00	White/Male	PENDING	
179	Preston Carter** (*aka Akil Jahi*) (2)	Shelby	02/17/00	Black/Male	PENDING	No. 139
180	G'Dongalay Parlo Berry (2)	Davidson	05/25/00	Black/Male	Sentence Relief	
181	Paul Dennis Reid (3)	Davidson	05/27/00	White/Male	DECEASED	
182	Ricky Thompson**	McMinn	06/13/00	White/Male	Sentence Relief	No. 127
183	Arthur Todd Copeland	Blount	07/24/00	Black/Male	Conviction Relief	
184	David Lee Smith (2)	Bradley	11/06/00	White/Male	DECEASED	
185	Robert Lee Leach, Jr. (2)	Davidson	02/16/01	White/Male	DECEASED	
186	Robert Faulkner	Shelby	03/10/01	Black/Male	Conviction Relief (AR)	
187	Hubert Glenn Sexton (2)	Scott	06/30/01	White/Male	Sentence Relief	
188	Charles Edward Rice	Shelby	01/14/02	Black/Male	PENDING	
189	Steven Ray Thacker	Dyer	02/08/02	White/Male	DECEASED	
190	John Patrick Henretta	Bradley	04/06/02	White/Male	Sentence Relief	
191	Detrick Deangelo Cole	Shelby	04/19/02	Black/Male	Sentence Relief	
192	Leonard Jasper Young	Shelby	08/24/02	White/Male	Sentence Relief (AR)	
193	Andrew Thomas	Shelby	09/26/02	Black/Male	Conviction Relief (AR)	
194	Jonathan Wesley Stephenson**	Cocke	10/05/02	White/Male	PENDING	No. 111
195	David Ivy	Shelby	01/11/03	Black/Male	PENDING	
196	Steven James Rollins	Sullivan	06/21/03	White/Male	Conviction Relief	
197	Stephen L. Hugueley	Hardeman	09/16/03	White/Male	PENDING	
198	Richard Carlton Taylor**	Hickman	10/16/03	White/Male	Sentence Relief	No. 41
199	Marlan Duane Kiser	Hamilton	11/20/03	White/Male	PENDING	
200	Michael Dale Rimmer**	Shelby	01/13/04	White/Male	Conviction Relief	Nos. 165, 221
201	Kenneth Patterson Bondurant**	Giles	01/20/04	White/Male	Sentence Relief	No. 113
202	Robert Hood	Shelby	05/06/04	Black/Male	Sentence Relief	
203	Joel Schmeiderer	Wayne	05/15/04	White/Male	Sentence Relief	

204	James Riels (2)	Shelby	08/13/04	White/Male	Sentence Relief	
205	Franklin Fitch	Shelby	10/29/04	Black/Male	Sentence Relief	
206	Harold Hester	McMinn	03/12/05	White/Male	Sentence Relief	
207	Devin Banks	Shelby	04/11/05	Black/Male	Sentence Relief	
208	David Lynn Jordan (3)	Madison	09/25/06	White/Male	PENDING	
209	Nickolus Johnson	Sullivan	04/27/07	Black/Male	PENDING	
210	Richard Odom***	Shelby	12/08/07	White/Male	PENDING	Nos. 130, 177
211	Corinio Pruitt	Shelby	03/01/08	Black/Male	PENDING	
212	Henry Lee Jones (2)*	Shelby	05/14/09	Black/Male	Conviction Relief	No. 220
213	Lemaricus Davidson (2)	Knox	10/30/09	Black/Male	PENDING	
214	Howard Hawk Willis (2)	Washington	06/21/10	White/Male	PENDING	
215	Jessie Dotson (6)	Shelby	10/12/10	Black/Male	PENDING	
216	John Freeland	Chester	05/23/11	Black/Male	Sentence Relief	
217	James Hawkins	Shelby	06/11/11	Black/Male	PENDING	
218	Rickey Bell	Tipton	03/30/12	Black/Male	PENDING	
219	Sedrick Clayton (3)	Shelby	06/15/14	Black/Male	PENDING	
220	Henry Lee Jones (2)**	Shelby	05/16/15	Black/Male	PENDING	No. 212
221	Michael Dale Rimmer***	Shelby	05/07/16	White/Male	PENDING	Nos. 165, 221

Appendix 3

List of Tennessee Capital Cases Granted Relief on Grounds of Ineffective Assistance of Counsel During the 40-Year Period 7/1/1977 – 6/30/2017

Tennessee capital cases granted relief in state court for IAC:

1. *State v. Ransom,* Shelby County Criminal Court No. B57716 (January 1, 1983) (sentence relief) (settled for life)

2. *Teague v. State*, 772 S.W.2d 915 (Tenn. Crim. App. 1988) (sentence relief) (settled for life)

3. *Cooper v. State*, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (grant of sentence relief from pc court aff'd) (resentenced to less than death)

4. *Johnson v. State*, 1992 WL 210576 (Ct. Crim. App. 1992) (sentence relief) (released in 2012 on *Alford* plea)

5. *Campbell v. State*, 1993 WL 122057 (Tenn. Crim. App. 1993) (sentence relief) (settled for life sentence/subsequently paroled)

6. *Adkins v. State*, 911 S.W.2d 334 (Tenn. Crim. App. 1994) (sentence relief) (resentenced to less than death)

7. *Teel v. State,* Marion County Circuit Court No. 1460 (April 12, 1995) (sentence relief) (settled for life)

8. *Bell v. State*, 1995 WL 113420 (Tenn. Crim. App. 1995) (sentence relief) (resentenced to less than death)

9. *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (sentence relief) (resentenced to life)

10. *Coker v. State,* Sequatchie County Circuit Court No. 4778 (April 22, 1996) (sentence relief) (resentenced to life)

11. *Brimmer v. State*, 29 S.W.3d 497 (Tenn. Crim. App. 1998) (sentence relief) (resentenced to less than death)

12. *Smith v. State*, 1998 WL 899362 (Tenn. Crim. App. 1998) (conviction relief) (settled for life)

13. *Hurley v. State*, Cocke County Circuit Court No. 4802 (December 12, 1998) (sentence relief) (settled for life)

14. *Richard Taylor v. State*, 1999 WL 512149 (Tenn. Crim. App. 1999) (conviction relief) (settled for life)

15. *Darrell Wayne Taylor v. State*, Shelby County Criminal Court, Case No. P – 7864, Trial No. 86—03704 (settled for life; paroled)

16. *McCormick v State*, 1999 WL 394935 (Tenn. Crim. App. 1999) (conviction relief) (acquitted on retrial – exoneration)

17. *Wilcoxson v. State*, 22 S.W.3d 289 (Tenn. Crim. App. 1999) (sentence relief) (resentenced to less than death)

18. *Caughron v. State*, 1999 WL 49906 (Tenn. Crim. App. 1999) (sentence relief) (resentenced to less than death)

19. *State v. Bush*, Cumberland County Circuit Court No. 84–411 (March 7, 2002) (sentence relief) (settled for life)

20. *Vann v. State*, McMinn Co. Post–Conviction No. 99–312 (May 29, 2008) (conviction relief) (charges dismissed – exoneration)

21. *Nesbit v. State*, Shelby Co. P–21818 (July 9, 2009) (sentence relief)

22. *Cribbs v. State*, 2009 WL 1905454 (Tenn. Crim. App. 2009) (sentence relief) (settled for life)

23. *McKinney v State*, 2010 WL 796939 (Tenn. Crim. App. 2010) (conviction relief) (after 2 subsequent mistrials [hung juries], pled to 2d degree murder and released)

24. *Cole v. State*, 2011 WL 1090152 (Tenn. Crim. App. 2011) (sentence relief) (settled for life without parole)

25. *Young v. State*, Shelby County No. 00–04018 (March 28, 2011) (sentence relief)

26. *Banks v. State*, Shelby County No. 03–01956 (September 13, 2011) (sentence relief) (settled for LWOP)

27. *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (sentence relief) (settled for life)

28. *Stout v. State*, Shelby Co., 2012 WL 3612530 (Tenn. Crim. App. 2012) (sentence relief) (sentenced to life)

29. *Rollins v. State*, Sullivan Co., 2012 WL 3776696 (Tenn. Crim. App. 2012) (sentence relief by trial P.C. court; conviction relief on appeal) (settled for life)

30. *Rimmer v. State*, Shelby Co. 98–01034, 97–02817, 98–01033 (October 12, 2012) (conviction relief) (retried, convicted, sentenced to death again after mitigation waiver)

31. *Hester v. State*, McMinn Co. 00–115 (May 20, 2013) (settled for LWOP without PC hearing; at the plea hearing, State acknowledged IAC/mitigation)

32. *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) (sentence relief) (settled for LWOP)

33. *Schmeiderer v. State*, Maury Co. 14488 (December 22, 2014) (settled for LWOP without PC hearing; agreed disposition order references IAC/mitigation)

Tennessee capital cases granted relief in federal court for IAC:

1. *Richard Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) (sentence relief) (resentenced to death)

2. *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (conviction relief) (resentenced to life)

3. *Groseclose v. Bell*, 131 F.3d 1161 (6th Cir. 1997) (conviction relief) (resentenced to life)

4. *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (sentence relief) (settled for life)

5. *Caruthers v. Carpenter*, 3:91–CV–0031 Docket (Doc) #287 and #288 (June 6, 2001) (order granting sentencing relief) (on appeal)

6. *Timothy Morris v. Bell*, E. D. Tenn. No. 2:99–CD–00424 (May 16, 2002) (sentence relief) (settled for life)

7. *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (sentence relief) (settled for life)

8. *King v. Bell*, M.D. Tenn. No. 1:00–cv–00017 (July 13, 2007) (sentence relief) (resentenced to life)

9. *House v. Bell*, 2007 WL 4568444 (E.D. Tenn. 2007) (conviction relief) (charges dismissed in 2009 - exoneration)

10. *Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013) (sentence relief) (sentenced to life)

11. *Duncan v. Carpenter*, No. 3:88-00992 (M.D. Tenn. Mar. 4, 2015) (sentence relief)

12. *McNish v. Westbrooks*, 2016 WL 755634 (E.D. Tenn. Feb. 25, 2016), No.: 2:00–CV–095–PLR–CLC (sentence relief)

Appendix 4

CHART OF SIXTH CIRCUIT VOTING IN TENNESSEE CAPITAL HABEAS CASES

Republican Appointed Judges

REPUBLICAN APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF (or remand)
Batchelder	1991	8	1
Boggs	1986	12	1
Cook	2003	10	1
Gibbons	2002	4	1
Griffin	2005	3	0
Guy	1985	0	1
Kethledge	2008	1	0
McKeague	2005	2	0
Nelson	1985	2	0
Norris	1986	7	0
Rogers	2002	6	0
Ryan	1985	3	3
Siler	1991	11	0
Suhrheinrich	1990	4	1
Sutton	2003	4	0
White	2008	2	2
TOTALS		**79 (88%)**	**11 (12%)**

Democrat Appointed Judges

DEMOCRAT APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF
Clay	1997	3	8
Cole	1995	4	7
Daughtrey	1993	1	3
Donald	2011	0	1
Gilman	1997	2	4
Keith	1977	0	2
Martin	1979	0	5
Merritt	1979	0	9
Moore	1995	3	6
TOTALS		**13 (22%)**	**45 (78%)**

SIXTH CIRCUIT CAPITAL HABEAS CASES FROM TENNESSEE
FINAL DISPOSITIONS IN THE COURT OF APPEALS[1]

CASE	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF (or remand)
Houston v. Dutton 50 F.3d 381 (1995)		Guy (R) Merritt (D) Ryan (R)
Austin v. Bell 126 F.3d 843 (1997)		Martin (D) Merritt (D) Suhrheinrich (R)
Rickman v. Bell 131 F.3d 1150 (1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Groseclose v. Bell 130 F.3d 1161 (1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Coe v. Bell 161 F.3d 320 (1998)	Boggs (R) Norris (R)	Moore (D)
Carter v. Bell 218 F.3d 581 (2000)	Clay (D) Gilman (D) Nelson (R)	
Workman v. Bell 227 F.3d 331 (2000) (*en banc*)[2]	Batchelder (R) Boggs (R) Nelson (R) Norris (R) Ryan (R) Siler (R) Suhrheinrich (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore (D)
Abdur'Rahman v. Bell 226 F.2d 696 (2000)	Batchelder (R) Siler (R)	Cole (D)

[1] The cases included in this chart are the final Court of Appeals dispositions of Tennessee capital habeas cases. This chart does not include other decisions that addressed collateral issues or that were superseded by subsequent Court of Appeals decisions.

[2] In *Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), Judges Nelson, Ryan and Siler, all Republican appointees, voted to affirm the district court's denial of habeas relief. In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (*en banc*), the seven Democrat appointees voted to remand the case for further proceedings, while the seven Republican appointees voted to affirm the district court. Because the vote was evenly split, the district court's denial of habeas relief was affirmed. Mr. Workman was executed.

Caldwell v. Bell 288 F.3d 838 (2002)	Norris (R)	Clay (D) Merritt (D)
Hutchison v. Bell 303 F.3d 720 (2002)	Cole (D) Moore (D) Siler (R)	
Alley v. Bell 307 F.3d 380 (2002)	Batchelder (R) Boggs (R) Ryan (R)	
Thompson v. Bell 315 F.3d 566 (2003)	Moore (D) Suhrheinrich (R)	Clay (D)
Donnie Johnson v. Bell 344 F.3d 567 (2003)	Boggs (R) Norris (R)	Clay (D)
House v. Bell 386 F.3d 668 (2004) (*en banc*)[3]	Batchelder (R) Boggs (R) Cook (R) Gibbons (R) Norris (R) Rogers (R) Siler (R) Sutton (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore(D)
Bates v. Bell 402 F.3d 635 (2005)		Batchelder (R) Merritt (D) Moore (D)
Harbison v. Bell 408 F.3d 823 (2005)	Cook (R) Siler (R)	Clay (D)
Harries v. Bell 407 F.3d 631 (2005)		Boggs (R) Cook (R) Gibbons (R)
Payne v. Bell 418 F.3d 644 (2005)	Cook (R) Rogers (R) Sutton (R)	
Henley v. Bell 487 F.3d 379 (2007)	Cook (R) Siler (R)	Cole (D)

[3] The Supreme Court overturned the Sixth Circuit's *en banc* decision. *House v. Bell*, 547 U.S. 518 (2006). On remand from the Supreme Court, the district court granted relief on Mr. House's claims relating to actual innocence, and the state then dismissed the charges – resulting in Mr. House's exoneration.

Cone v. Bell 505 F.3d 610 (2007)[4]	Batchelder (R) Boggs (R) Cook (R) Griffin (R) McKeague (R) Norris (R) Rogers (R) Ryan (R) Sutton (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore (D)
Cecil Johnson v. Bell 525 F.3d 466 (2008)	Batchelder (R) Gibbons (R)	Cole (D)
Owens v. Guida 549 F.3d 399 (2008)	Boggs (R) Siler (R)	Merritt (D)
West v. Bell 550 F.3d 542 (2008)	Boggs (R) Norris (R)	Moore (D)
Irick v. Bell 565 F.3d 315 (2009)	Batchelder (R) Siler (R)	Gilman (D)
Smith v. Bell No. 05-6653 (2010)	Cole (D) Cook (R) Griffin (R)	
Wright v. Bell 619 F.3d 586 (2010)	Cole (D) McKeague (R) Rogers (R)	
Nicholus Sutton 645 F.3d 752 (2011)	Boggs (R) Daughtrey (D)	Martin (D)
Strouth v. Colson 680 F.3d 596 (2012)	Cook (R) Kethledge (R) Sutton (R)	
Cauthern v. Colson 726 F.3d 465 (2013)	Rogers (R)	Clay (D) Cole (D)
Hodges v. Colson 727 F.3d 517 (2013)	Batchelder (R) Cook (R)	White (R)

[4] In *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), Judges Norris (R), Merritt (D), and Ryan (R) voted unanimously to grant relief. The Supreme Court overturned that decision in *Cone v. Bell*, 535 U.S. 685 (2002). On remand, Judges Ryan and Merritt voted for relief, while Judge Norris (R) dissented. 359 F.3d 785 (6th Cir. 785). Again, the Supreme Court overturned the decision. 543 U.S. 447 (2005). Then on remand, Judges Norris and Ryan voted to deny habeas relief, while Judge Merritt dissented. 492 F.3d 743 (6th Cir. 2007). On Mr. Cone's petition for rehearing *en banc*, seven Democrat appointees dissented from the denial of rehearing *en banc*. 505 F.3d 610 (6th Cir. 2007). The remaining judges, all Republican appointees, either voted to deny rehearing *en banc* or acquiesced in the denial. (These opposing positions on the *en banc* petition are counted as votes in the chart.) Then again the Supreme Court overturned the Sixth Circuit, 556 U.S. 1769 (2009), and remanded the case to the district court. Mr. Cone died on death row while his case was pending.

Van Tran v. Colson 764 F.3d 594 (2014)	Cook (R) Rogers (R) White (R)	
Middlebrooks v. Bell 619 F.3d 526 (2010) Middlebrooks v. Carpenter 843 F.3d 1127 (2016)	Clay (D) Gilman (D) Moore (D) White (R)	
Miller v. Colson 694 F.3d 691 (2012)	Gibbons (R) Siler (R)	White (R)
Morris v. Carpenter 802 F.3d 825 (2015)	Boggs (R) Clay (D) Siler (R)	
Gary Wayne Sutton v. Carpenter No. 11-6180 (2015)	Boggs (R) Cook (R) Gibbons (R)	
Thomas v. Westbrooks 849 F.3d 659 (2017)	Siler (R)	Merritt (D) Donald (D)
Black v. Carpenter 866 F.3d 734 (6th Cir. 2017)	Boggs (R) Cole (D) Griffin (R)	

Further notes:

Split Decisions: Of the 37 cases charted above, 21 (or 57%) resulted in split decisions. In these split decision cases, 92% of the Republican appointee votes were against relief, while 92% of the Democrat appointee votes were for relief. The votes according to party affiliation of the judges were:

Republican Appointee Votes Against Relief = 50 (93%)
Republican Appointee Votes For Relief = 4 (7%)

Democrat Appointee Votes Against Relief = 3 (7%)
Democrat Appointee Votes For Relief = 37 (93%)

Since 2005, no Republican appointee majority has voted for relief.

***En Banc* Opinions**: We have identified six Sixth Circuit *en banc* opinions in capital cases from Tennessee. Three are included in the chart because those *en banc* decisions resulted in final disposition of the petitioners' habeas claims in the Court of Appeals. The other three are not included in the chart because they decided collateral issues that were not dispositive of the petitioners' habeas claims. The *en banc* opinions are as follows:

O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996) (*en banc*) (*per curiam*) (7 to 6 decision resulting in a remand to state court, in which 4 Democrat appointees and 3 Republican appointees voted favorably for the petitioner; while 5 Republican appointees and 1 Democrat appointee voted unfavorably against the petitioner) (not included in the chart);

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (*en banc*) (a tie 7 to 7 vote strictly along party lines, effectively denying habeas relief) (included in the chart);

Abdur'Rahman v. Bell, 392 F.3d 174 (2004) (*en banc*) (in a 7 to 6 decision on a habeas procedural issue, all 6 Democrat appointees and 1 Republican appointee voted in favor of the petitioner, and 6 Republican appointees and no Democrat appointees voted against the petitioner – *i.e.*, the single swing Republican appointee vote enabled the case to continue) (not included in the chart);

House v. Bell, 386 F.3d 668 (6th Cir. 2004) (*en banc*) (8 to 7 vote, strictly along party lines, denying habeas relief) (included in the chart);

Alley v. Little, 452 F.3d 620 (6th Cir. 2006) (en banc) (8 to 5 vote rejecting method-of-execution claim, in which 7 Republican appointees and 1 Democrat appointee voted against the petitioner, and 5 Democrat appointees voted for the petitioner) (not included in the chart);

Cone v. Bell, 505 F.3d 610 (6th Cir. 2007) (all 7 Democrat appointees dissented from denial of *en banc* review, while all 9 Republican appointees supported denial of *en banc* review – resulting in denial of habeas relief) (included in the chart).

Among these *en banc* opinions, Republican appointees cast 42 of their 46 votes (91%) against the petitioners, while Democrat appointees cast 36 of their 37 votes (97%) in favor of the petitioners.

Attachment 19

REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE CRIMINAL I COURT OF DAVIDSON COUNTY

FILED
JUL 18 1979
RAMSEY LEATHERS
CLERK
SUPREME COURT

STATE OF TENNESSEE

v.

JAMES E. LOONEY
(defendant)

Case No. C-903

Sentence of Death ( )
or
Life Imprisonment (XX)

A. DATA CONCERNING DEFENDANT

1. Name Looney (last) James (first) Elihue (middle) 2. Birth Date 2/ 10/ 50 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married ( ); Married ( ); Divorced (X); Spouse Deceased ( )

5. Children: Number of Children Three

Ages of Children: 1, 2, 3, 4, 5, (6)(7) 8, 9, 10, (11) 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes (XX No ( ) 7. Mother Living: Yes (XX) No ( )

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, (11) 12, 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (if known) Not Known
Low (IQ below 70) ( )
Medium (IQ 70 to 100) ( )
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed? Yes ( ) No (X)

11. If examined, were character or behavior disorders found? Yes ( ) No ( )

If yes, please explain Not Applicable

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

12. What other pertinent psychiatric (and psychological) information was found?

Not Applicable

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Laborer	3.45 /hr.	Aug.'77-Aug.'78	Arrested
b.	Combat Engineer (U.S.Army)		Feb.'68 -Mar.'70	Honorable Discharge
c.				
d.				
e.				

14. List any noteworthy physical characteristics of the defendant.

None

15. Defendant's Military History: Served as Combat Engineer in U. S. Army From Feb. 1968 thru March 1970. Honorable discharge held E-4 Rank. Served in Nuremberg, Germany.

16. Other Significant Data about the Defendant: None

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )
2. How did defendant plead? Guilty ( ) Not Guilty (X)
3. Did the defendant waive jury determination of punishment? Yes ( ) No (X)
4. What sentence was imposed? Death ( ) Life Imprisonment (X)
5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)
6. Other Significant Data about the Trial None

7. Were there any co-defendants in the trial? Yes ( ) No (X)

8. What conviction and sentence if any were imposed on co-defendants? Not Applicable

9. Any comments concerning co-defendants: None

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial?

Yes( ) No (X) If yes, list offenses:

2. If other separate offenses were tried and resulted in punishment, list punishment:

3. Statutory aggravating circumstances found: Yes ( ) No ( )

4. Which of the following statutory aggravating circumstances were instructed, and which were found?

Jury Instructions included all factors as requested by Defense Counsel.

	Instructed	Found
(a) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	(X)	( )
(b) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	(X)	( )
(c) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	(X)	( )
(d) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	(X)	( )
(e) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	(X)	( )
(f) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	(X)	( )

(g) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. (X) ( )

(h) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement. (X) ( )

(i) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties. (X) ( )

(j) The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office. (X) ( )

(k) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official. (X) ( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: _____

_____

_____

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes (X) No ( )

6. Which mitigating circumstances were in evidence?

		Yes	No
(a)	The defendant has no significant history of prior criminal activity;	( )	( )
(b)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(c)	The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; ( ) ( )

(f) The defendant acted under extreme duress or under the substantial domination of another person; ( ) ( )

(g) The youth or advanced age of the defendant at the time of the crime; ( ) ( )

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) ( )

(i) Other Defendant was honorably discharged, had three children, testimony of sociologist that it has never been proven that capital punishment deters crime, Testimony of minister that it is morally wrong to take another's life. Testimony of former warden that recidivism rate of convicted murderes is low and pleas of defendant's parents and family for mercy. ( ) ( )

Relate any significant facts about the mitigating circumstances that influence the punishment imposition.

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes ( ) No (XX)

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (XX) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship?

12. Was the victim an employer or employee of defendant?
No (XX)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No (XX)
Casual Acquaintance ( )
Friend ( )

14. Was the victim local resident or transient in the community? Resident (xx)
Transient ( )

15. Was the victim the same race as defendant? Yes ( ) No (xx)

16. Was the victim the same sex as the defendant? Yes (xx) No ( )

17. Was the victim held hostage during the crime? No (xx)
Yes - Less than an hour ( )
Yes - More than an hour ( )

18. Was the victim's reputation in the community: Good (xx)
Bad ( )
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (xx) No ( )

If yes, state extent of harm or torture: _____

Victim was killed by firearm

20. What was the age of the victim? approximately 26 years of age.

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	( )
Sharp instrument	( )
Firearm	(xx)
Other_____	( )

22. Does the defendant has a record of prior convictions? Yes (xx) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	Burg. 1st	Feb. '72	5-5 yrs.
	~~Burg. 1st~~	~~May '72~~	~~5-5 yrs. consec.~~
b.	Burg. 3rd	May '72	3-3 yrs. conc.
	~~Burg. 1st~~	~~March '72~~	~~5-5 yrs. conc.~~
c.	Burg. 1st	May '72	5-5 yrs. conc.
	~~Burg. 1st~~	~~May '72~~	~~5-5 yrs. conc.~~
d.	Escape	Dec. '72	1-1 yrs. conc.
e.	Above convictions were from McMinn County, Tennessee		

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (xx)

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (XX)

26. Was the defendant a local resident or transient in the community?

Resident (XX) Transient ( )

27. Other significant data about the offense: Defendant killed victim to avoid prosecution for Armed Robbery

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: Night that defendant was arrested

2. How was counsel secured? A. Retained by defendant (XX)
B. Appointed by court ( )
C. Public defender ( )

3. If counsel was appointed by court, was it because:

A. Defendant unable to afford counsel? ( )
B. Defendant refused to secure counsel? ( )
C. Other (explain)_____ ( )

4. How many years has counsel practiced law? A. 0 to 5 (XX)
B. 5 to 10 ( )
C. over 10 ( )

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General ( )
C. Mostly criminal (XX)

6. Did the same counsel serve throughout the trial? Yes (XX) No ( )

7. If not, explain in detail._____

8. Other significant data about defense representation._____
Defendant well represented

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No (XX)

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

2. Did race otherwise appear as an issue in the trial? Yes ( ) No (X)

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....(X)
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....( )
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? 1, 2, 3, (4,) 5, 6, 7, 8, 9, 10, 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence? _____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case: Jury verdict proper and just under facts of case and warranted life sentence. Deft. did not testify.

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense August 9, 1977	
2.	Date of arrest August 17, 1977	8 days
3.	Date trial began May 15, 1978	270 days
4.	Date sentence imposed May 22, 1978 (Mot. for New Trial)	7 days
5.	Date post-trial motions ruled on Nov. 3, 1978 Mot. for New Trial taken under advisement by request of State of Deft. on 10/13/78)	165 days

6. Date trial judge's report completed _____ July 17, 1979

7. *Date received by Supreme Court _____ _____

8. *Date sentence review completed _____ _____

9. *Total elapsed days _____

10. Other _____

_____

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	(X)	(X)
3. He has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

July 17, 1979
Date

Raymond H. Leathers
Judge, Criminal (Div. I) Court
of Davidson County

Attachment 20

REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE

v.

TERRY LYNN HOWARD
(defendant)

Case No. C-3629

Sentence of Death ( )
or
Life Imprisonment (X)

FILED
SEP 27 1979
RAMSEY LEATHERS
CLERK
SUPREME COURT

A. DATA CONCERNING DEFENDANT

1. Name HOWARD, TERRY LYNN (last, first, middle) 2. Birth Date 5/16/54 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married (X); Married ( ); Divorced ( ); Spouse Deceased ( )

5. Children: Number of Children None

Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes (X) No ( ) 7. Mother Living: Yes (X) No ( )

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, (11), 12, 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (if known)
Low (IQ below 70) ( )
Medium (IQ 70 to 100) (X)
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed? Yes ( ) No (X)

11. If examined, were character or behavior disorders found? Yes ( ) No ( )

If yes, please explain Not applicable - never tested

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

12. What other pertinent psychiatric (and psychological) information was found?

None

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Cook (Church's Chicken)	$2.80 hr.	7/79 - 8/4/79	Arrested
b.	Maintenance(Lipscomb)	$2.80 hr.	5/79 - 7/79	Got Another Job
c.	Construction	$5.00 hr.	3/78 - 11/78	Weather Bad
d.	Order filler (Coke Co.)	$2.80 hr.	Dates unknown	Discharged
e.				

14. List any noteworthy physical characteristics of the defendant.

None

15. Defendant's Military History: 1975 Stayed 3 months until they found Criminal Record, then discharged by U.S. Army

16. Other Significant Data about the Defendant: None

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )

2. How did defendant plead? Guilty ( ) Not Guilty (X)

3. Did the defendant waive jury determination of punishment? Yes ( ) No (X)

4. What sentence was imposed? Death ( ) Life Imprisonment (X)

5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)

6. Other Significant Data about the Trial None, other than various defense objections and motions.

7. Were there any co-defendants in the trial? Yes (X) No ( )

8. What conviction and sentence if any were imposed on co-defendants?
Severed and not tried yet

9. Any comments concerning co-defendants: None

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial?
Yes (X) No ( ) If yes, list offenses: Kidnapping and armed robbery

2. If other separate offenses were tried and resulted in punishment, list punishment:
Armed robbery - Life
Kidnapping - Life with parole

3. Statutory aggravating circumstances found: Yes (X) No ( )

4. Which of the following statutory aggravating circumstances were instructed, and which were found?

	Instructed	Found
(a) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(b) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	(X)	(X)
(c) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(d) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	(X)	(X)
(f) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )

(g)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	(X)	(X)
(h)	The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )
(i)	The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.	( )	( )
(j)	The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(k)	The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: Defendant had prior armed robbery conviction; further, the victim was stabbed several times & hit with a rock in the head.

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes (X) No ( )

6. Which mitigating circumstances were in evidence?

		Yes	No
(a)	The defendant has no significant history of prior criminal activity;	( )	( )
(b)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(c)	The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )

(e)	The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;	(X)	( )
(f)	The defendant acted under extreme duress or under the substantial domination of another person;	( )	( )
(g)	The youth or advanced age of the defendant at the time of the crime;	( )	( )
(h)	The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.	( )	( )
(i)	Other Defendant's relatives testified as to defendant's submissive character and that he was probably led into this crime by the co-defendant.	(X)	( )

Relate any significant facts about the mitigating circumstances that influence the punishment imposition. See (i) above, under question #2.

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes (X) No ( )

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (X) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship?

12. Was the victim an employer or employee of defendant?
No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No (X)
Casual Acquaintance ( )
Friend ( )

14. Was the victim local resident or transient in the community? Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes ( ) No (X)

16. Was the victim the same sex as the defendant? Yes (X) No ( )

17. Was the victim held hostage during the crime? No ( )
Yes - Less than an hour ( )
Yes - More than an hour (X)

18. Was the victim's reputation in the community: Good ( )
Bad ( )
Unknown (X)

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: Stabbed repeatedly and then hit in head with a rock.

20. What was the age of the victim? 51 years old

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	(X)
Sharp instrument	(X)
Firearm	( )
Other_____	( )

22. Does the defendant has a record of prior convictions? Yes (X) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	Case #A-9628 Armed Robbery, 5/72,	Convicted of robbery without use of a deadly weapon	5 yrs. min.-5 yrs. max. Penitentiary
b.	Case #A-9627 Assault w/ intent to commit armed robbery	5/72	5 yrs. min.-5 yrs. max. Penitentiary
c.	(THESE SENTENCES RAN CONCURRENT)		
d.			
e.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community?

Resident (X) Transient ( )

27. Other significant data about the offense: _____

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: 8/7/78 Preliminary hearing, appointed in General Sessions Court

2. How was counsel secured? A. Retained by defendant ( )
B. Appointed by court (X) Criminal Court 12/12/78
C. Public defender ( )

3. If counsel was appointed by court, was it because:

A. Defendant unable to afford counsel? (X)
B. Defendant refused to secure counsel? ( )
C. Other (explain) Conflict with the public defender's office (X)

4. How many years has counsel practiced law? A. 0 to 5 ( )
B. 5 to 10 (X)
C. over 10 ( )

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General (X)
C. Mostly criminal ( )

6. Did the same counsel serve throughout the trial? Yes (X) No ( )

7. If not, explain in detail. _____

8. Other significant data about defense representation. Defendant had excellent representation.

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes (X) No ( )

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

2. Did race otherwise appear as an issue in the trial? Yes ( ) No (X)

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....(X)
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....( )
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? 1, 2, 3, (4) 5, 6, 7, 8, 9, 10, 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence? _____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case: Jury verdict proper and just under facts of cases and warranted life sentence.

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense 7/14/78	
2.	Date of arrest 8/4/78	21
3.	Date trial began Jury Trial 6/18/79	318
4.	Date sentence imposed 6/23/79	4
5.	Date post-trial motions ruled on 9/21/79	90

6. Date trial judge's report completed 9/26/79

7. *Date received by Supreme Court

8. *Date sentence review completed

9. *Total elapsed days

10. Other None

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	(X)	(X)
3. He has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

Sept. 26, 1979
Date

Raymond H. Leathers
Judge, CRIMINAL Court
of DAVIDSON County

6. Date trial judge's report completed 9/26/79

7. *Date received by Supreme Court

8. *Date sentence review completed

9. *Total elapsed days

10. Other None

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	(X)	(X)
3. He has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

Sept. 26, 1979
Date

Raymond H. Leathers
Judge, CRIMINAL Court
of DAVIDSON County

Attachment 21

REPORT OF TRIAL JUDGE: CAPITAL CASES*

FILED

JAN 9 1980

JAMES A. SHEA, Jr., Clerk
BY _____ D.C.

IN THE CRIMINAL I COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE

v.

RAYMOND O. JACKSON
(defendant)

Case No. C-3629

Sentence of Death ( )
or
Life Imprisonment (X)

FILED
JAN 11 1980
RAMSEY LEATHERS
CLERK
Court of Criminal Appeals

A. DATA CONCERNING DEFENDANT

1. Name JACKSON, RAYMOND OTHA (last, first, middle) 2. Birth Date 6/15/52 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married ( ); Married (X); Divorced ( ); Spouse Deceased ( )

5. Children: Number of Children None

Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes (X) No ( ) 7. Mother Living: Yes (X) No ( )

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, (12), 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (if known)
Low (IQ below 70) ( )
Medium (IQ 70 to 100) (X)
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed? Yes ( ) No (X)

11. If examined, were character or behavior disorders found? Yes ( ) No ( )

If yes, please explain Not applicable

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

STATE OF TENNESSEE
TENTH JUDICIAL CIRCUIT
NASHVILLE, TENNESSEE 37201

RAYMOND H. LEATHERS, JUDGE
CRIMINAL COURT, DIVISION ONE

January 10, 1980

Honorable Ramsey Leathers, Clerk
Supreme Court
Supreme Court Building
Nashville, TN 37219

RE: State of Tennessee
VS. Raymond O. Jackson
Case NO. C-3629

Dear Mr. Leathers:

Enclosed please find your form entitled "Report of Trial Judge: Capital Cases" in the above captioned matter which has been completed.

With best regards, I am

Sincerely,

Raymond H. Leathers

RAYMOND H. LEATHERS, JUDGE
CRIMINAL COURT, DIVISION ONE

RHL/jjb

Enclosure

12. What other pertinent psychiatric (and psychological) information was found?

None

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Laborer	$4.00 per hr.	2/78-8/79	Arrested
b.	Laborer	$2.65 per hr.	'76-'78	Voluntarily Quit
c.				
d.				
e.				

14. List any noteworthy physical characteristics of the defendant.

None

15. Defendant's Military History: None

16. Other Significant Data about the Defendant: None

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )

2. How did defendant plead? Guilty ( ) Not Guilty (X)

3. Did the defendant waive jury determination of punishment? Yes ( ) No (X)

4. What sentence was imposed? Death ( ) Life Imprisonment (X)

5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)

6. Other Significant Data about the Trial Defendant did not testify.

7. Were there any co-defendants in the trial? Yes ( ) No (X)

8. What conviction and sentence if any were imposed on co-defendants? Co-defendant, Terry Lynn Howard, was tried by a separate jury following a severance by the State. Mr. Howard received a sentence of Life--Murder 1st, Life--Rob. w/ deadly weapon, and Life w/ poss. parole for Kidnapping for purpose of Armed Robbery. The Murder and Kidnapping sentences run concurrent

9. Any comments concerning co-defendants: Refused to testify at defendant's trial.

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial? Yes(X) No ( ) If yes, list offenses: Robbery w/ deadly weapon and Kidnapping for purpose of Armed Robbery.

2. If other separate offenses were tried and resulted in punishment, list punishment: Robbery w/ deadly weapon - Life

Kidnapping purpose of Armed Robbery - 50 years w/out possibility parole

3. Statutory aggravating circumstances found: Yes (X) No ( )

4. Which of the following statutory aggravating circumstances were instructed, and which were found?

		Instructed	Found
(a)	The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(b)	The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	( )	( )
(c)	The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(d)	The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e)	The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	(X)	(X)
(f)	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )

(g)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	(X)	(X)
(h)	The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )
(i)	The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.	( )	( )
(j)	The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(k)	The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: None found

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes ( ) No (X)

6. Which mitigating circumstances were in evidence?

		Yes	No
(a)	The defendant has no significant history of prior criminal activity;	( )	( )
(b)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(c)	The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; ( ) ( )

(f) The defendant acted under extreme duress or under the substantial domination of another person; ( ) ( )

(g) The youth or advanced age of the defendant at the time of the crime; ( ) ( )

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) ( )

(i) Other_____ ( ) ( )

_____

_____

_____

_____

Relate any significant facts about the mitigating circumstances that influence the punishment imposition. Not applicable

_____

_____

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes ( ) No (X)

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)_____

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (X) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship? Not applicable

12. Was the victim an employer or employee of defendant?
No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No (X)
Casual Acquaintance ( )
Friend ( )

14. Was the victim local resident or transient in the community? Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes ( ) No (X)

16. Was the victim the same sex as the defendant? Yes (X) No ( )

17. Was the victim held hostage during the crime? No ( )
Yes - Less than an hour ( )
Yes - More than an hour (X)

18. Was the victim's reputation in the community: Good (X)
Bad ( )
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: Victim was repeatedly stabbed and skull crushed with large rock.

20. What was the age of the victim? Approximately 50 years of age

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	( )
Sharp instrument	(X)
Firearm	( )
Other_____	( )

22. Does the defendant has a record of prior convictions? Yes (X) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	Poss. Contr. Sub. Poss. Contr. Sub. f/resale	7/76	11 months 29 days Simple possession
b.	Poss. Contr. Sub. Poss. Contr. Sub. f/resale	7/76	11 months 29 days Simple possession
c.			
d.			
e.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community?

Resident (X) Transient ( )

27. Other significant data about the offense: Not applicable

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: 12/14/78

2. How was counsel secured? A. Retained by defendant ( )
B. Appointed by court (X)
C. Public defender ( )

3. If counsel was appointed by court, was it because:

A. Defendant unable to afford counsel? (X)
B. Defendant refused to secure counsel? ( )
C. Other (explain)_____ ( )

4. How many years has counsel practiced law? A. 0 to 5 ( )
B. 5 to 10 ( )
C. over 10 (X)

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General ( )
C. Mostly criminal (X)

6. Did the same counsel serve throughout the trial? Yes (X) No ( )

7. If not, explain in detail._____

8. Other significant data about defense representation. None

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No (X)

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

2. Did race otherwise appear as an issue in the trial? Yes ( ) No (X)

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....(X)
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....( )
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? 1, 2, (3) 4, 5, 6, 7, 8, 9, 10, 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence? _____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case: Under proof in the case the Jury warranted in returning guilty verdicts.

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense 7/13/78	
2.	Date of arrest 8/4/78	
3.	Date trial began 11/5/79	
4.	Date sentence imposed 11/9/79	
5.	Date post-trial motions ruled on 12/13/79	

Attachment 22

26.04 REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE)
)
VS.)
)
DOUGLAS BELL)
(defendant)

Case No. D-1044

Sentence of Death ( )
or
Life Imprisonment (x)

A. DATA CONCERNING DEFENDANT

1. Name BELL (last) DOUGLAS (first) (middle)

2. Birth Date 2/20/28 (mo/day/yr)

3. Sex: M (X)
F ( )

4. Marital Status: Never Married ( ); Married ( ); Divorced (X); Spouse Deceased ( ).

5. Children: Number of Children 5.

Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, [Over 18] (Circle Age of Each Child)

6. Father Living: Yes (X) No ( )

7. Mother Living: Yes ( ) No (X)

8. Education: Highest Grade Completed: (Circle One) 1, 2, 3, 4, 5, 6, 7, [8] 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (If Known)
Low (IQ below 70) ( )
Medium (IQ 70 to 100) (X)**
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed?

Yes (X) No ( )

11. If examined, were character or behavior disorders found:

Yes (X) No ( )

If yes, please explain Mild to Moderate cerebral dysfunction (lateralizing to left hemisphere)

12. What other pertinent psychiatric (and psychological) information was found? Dysphoric state, Passive aggressive personailty, altered states of consciousness

NOTE: This form is identical in substance to that required under SRC 47, but has been retyped to conserve space.

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

** NOTE: Verbal IQ--66
Performance - 80
Full Scale - 72

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Mechanic - U.S. Army Corps of Engineers - last 33 years			
b.	Retired, January, 1983; salary approx. $18,000 at retirement;			
c.	also worked in own grass-cutting business			
d.				
e.				

14. List Any Noteworthy Physical Characteristics of the Defendant:

NONE

15. Defendant's Military History: NONE

16. Other Significant Date About the Defendant:

FIRST CRIMINAL CHARGE

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )
2. How did defendant plead? Guilty ( ) Not Guilty (X)
3. Did the defendant waive jury determination of punishment? Yes ( ) No (X)
4. What sentence was imposed? Death ( ) Life Imprisonment (X)
5. Was life imprisonment imposed as a result of a "hung jury?" Yes ( ) No (X)
6. Other significant data about the trial:
7. Were there any co-defendants in the trial? Yes ( ) No (X)
8. What conviction and sentence if any were imposed on co-defendants?
9. Any comments concerning co-defendants?

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial? Yes (X) No ( ) If yes, list offenses:

ASSAULT WITH INTENT TO COMMIT MURDER, FIRST DEGREE

2. If other separate offenses were tried and resulted in punishment, list punishment: assault with intent to commit murder, first degree - twenty years

3. Statutory aggravating circumstances found: Yes ( ) No (x)

4. Which of the following statutory aggravating circumstances were instructed, and which were found:

	Instructed	Found
(a) The murder was committed against a person less than 12 years of age and the defendant was 18 years of age, or older.	( )	( )
(b) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	( )	( )
(c) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	(x)	( )
(d) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	( )	( )
(f) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	(x)	( )
(g) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	(x)	( )
(h) The murder was committed by the defendant while he was in lawful custody of in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )

(i) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman engaged in the performance of his duties.	(x)	( )
(j) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(k) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )

Relate any significant aspects of the aggrevating circumstances that influence the punishment: _____

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes (x) No ( )

6. Which mitigating circumstances were in evidence?

	Yes	No
(a) The defendant has no significant criminal activity;	(x)	( )
(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	(x)	( )
(c) The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )
(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;	( )	( )

(f) The defendant acted under extreme duress or under the substantial domination of another person; (x) ( )

(g) The youth or advanced age of the defendant at the time of the crime; (x) ( )

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. (x) ( )

(i) Other _____ ( ) ( )

_____

_____

Relate any significant facts about the mitigating circumstances that influence the punishment imposition. _____

_____

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes (X) No ( )

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X) _____

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (X) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship? _____

12. Was the victim an employer or employee of defendant? No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant? No (X)
Casual Acquaintance ( )
Friend ( )

14. Was the victim local resident or transient in the community?
Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes ( ) No (X)

16. Was the victim the same sex as the defendent? Yes (X) No ( )

17. Was the victim held hostage during the crime? No (X)
Yes - Less than an hour ( )
Yes - More than an hour ( )

18. Was the victim's reputation in the community: Good (X)
Bad ( )
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: SHOT AND KILLED

20. What was the age of the victim? 28

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	( )
Sharp instrument	( )
Firearm	(X)
Other _____	( )

22. Does the defendant have a record of prior convictions?

Yes (X) No ( )

23. If answer is yes, list the offenses, the dates of the offenses and the sentence imposed:

	Offense	Date of Offense	Sentence Imposed
a.	RECKLESS DRIVING	6/60	$50 fine and costs
b.			
c.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

25. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community? Resident (X) Transient ( )

27. Other significant data about the offense: _____

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: September, 1982

2. How was counsel secured?

A.	Retained by defendant	(X)
B.	Appointed by court	( )
C.	Public defender	( )

3. If counsel was appointed by court, was it because?

A.	Defendant unable to afford counsel?	( )
B.	Defendant refused to secure counsel?	( )
C.	Other (explain) _____	( )

4. How many years has counsel practiced law?

A.	0 to 5	( )
B.	5 to 10	( )
C.	over 10	(X)

5. What is the nature of counsel's practice? A. Mostly civil ( )
   B. General (X)
   C. Mostly criminal ( )

   *If more than one counsel served, answer the above question as to each counsel and attach to this report.

6. Did the same counsel serve throughout the trial? Yes (X) No ( )

7. If not, explain in detail: _____

   _____

8. Other significant data about defense representation: _____

   _____

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial?
   Yes ( ) No (X)

2. Did race otherwise appear as an issue in the trial?
   Yes ( ) No (X)

3. What percentage of the population of your county is the same as the defendant?
   a. Under 10% ( )
   b. 10 to 25% (X)
   c. 25 to 50% ( )
   d. 50 to 75% ( )
   e. 75 to 90% ( )
   f. Over 90% ( )

4. Were members of defendant's race represented on the jury?
   Yes (X) No ( )

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No ( )

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity?
   Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence? _____

    _____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case? _____

_____

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense August 4, 1982	_____
2.	Date of arrest August 4, 1982	0
3.	Date trial began November 7, 1983	429
4.	Date sentence imposed December 16, 1983	39
5.	Date post-trial motions ruled on January 6, 1984	-21
6.	Date trial judge's report completed February 2, 1984	-27
7.	*Date received by Supreme Court _____	_____
8.	*Date sentence review completed _____	_____
9.	*Total elapsed days _____	_____
10.	Other _____	_____

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	(X)	(X)
2. He stated he had no comments	( )	( )
3. He has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

February 14, 1984
Date

A. A. BIRCH
Judge, Criminal Court
of Davidson County

OFFICE OF DISTRICT ATTORNEY-GENERAL
108 METROPOLITAN COURTHOUSE
NASHVILLE, TENNESSEE 37201
(615) 259-5501

TENTH JUDICIAL CIRCUIT
DAVIDSON COUNTY

DISTRICT ATTORNEY GENERAL
THOMAS H. SHRIVER

February 13, 1984

Honorable A. A. Birch
Judge
Division III Criminal Court
6th Floor Metro Courthouse
Nashville, TN 37201

RE: Douglas Bell

Dear Judge Birch:

In response to your letter of February 3rd and the accompanying report of trial judge in the above-styled case I would like to suggest that items 11 and 12 be altered by adding at the beginning of item 11 before the word"mild: The defendant's proof showed and after the word "hemisphere" add: the State's proof was that defendant had no psychiatric disorder. In umber 12 prior to the word "dysphoric" add: The defendant's proof showed and after the word "consciousness" add: the State's proof showed that the defendant had no psychiatric disorder. I think these changes are in order since the matter of defendant's sanity was hotly contested and that the jury found the defendant guilty thereby rejecting the insanity defense.

Yours truly,

Thomas H. Shriver
District Attorney General

THS/rw

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OF COUNSEL
LEROY J. ELLIS, III
OF COUNSEL
PITTS AND KETERSON
PATENTS, TRADEMARKS
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RELATED MATTERS
615/244-3889

February 9, 1984

The Honorable A. A. Birch
Tenth Judicial Circuit
Sixth Floor, Metropolitan Courthouse
Nashville, TN. 37201

RE: State of Tennessee
V.
Douglas Bell
Case No.: D-1044
Data concerning Defendant

Dear Judge Birch:

This is to acknowledge receipt of the 26.04 Report of Trial Judge in Capital Cases Form which you had filled out. Both Mr. Nimmo and I have reviewed it and feel that it accurately reflects the case. We, therefore, have no additional comments.

Sincerely,

James R. Omer

R. Price Nimmo

JRO/phh

Attachment 23

REPORT OF TRIAL JUDGE: CAPITAL CASES*

FILED
JAN 13 1988
A. B. NEIL, JR., CLERK

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE

v.

JAMES LEE JONES
(defendant)

Case No. 87-W-417

Sentence of Death (X)
or
Life Imprisonment ( )

A. DATA CONCERNING DEFENDANT

1. Name JONES, JAMES LEE (last, first, middle) 2. Birth Date 10-15-50 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married ( ); Married (X); Divorced ( ); Spouse Deceased ( )

5. Children: Number of Children 0

Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes ( ) No ( ) UNKNOWN 7. Mother Living: Yes ( ) No ( ) UNKNOWN

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, (12), 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (if known)

Low (IQ below 70)	( )
Medium (IQ 70 to 100)	(X)
High (IQ above 100)	( )

10. Was a psychiatric or psychological evaluation performed? Yes (X) No ( )

11. If examined, were character or behavior disorders found? Yes (X) No ( )

If yes, please explain some signs of psychosis, but found competent to stand trial and no evidence to support an insanity defense.

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

12. What other pertinent psychiatric (and psychological) information was found?

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	NASHVILLE BAPTIST PUBLISHING BOARD			
b.				
c.				
d.				
e.				

14. List any noteworthy physical characteristics of the defendant.

N/A

15. Defendant's Military History:

16. Other Significant Data about the Defendant:

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )

2. How did defendant plead? Guilty ( ) Not Guilty (X)

3. Did the defendant waive jury determination of punishment? Yes ( ) No (X)

4. What sentence was imposed? Death (X) Life Imprisonment ( )

5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)

6. Other Significant Data about the Trial

7. Were there any co-defendants in the trial? Yes ( ) No (X)

8. What conviction and sentence if any were imposed on co-defendants? N/A

9. Any comments concerning co-defendants: N/A

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial? Yes(X) No ( ) If yes, list offenses: ASSAULT WITH INTENT TO COMMIT MURDER FIRST DEGREE, ARMED ROBBERY

2. If other separate offenses were tried and resulted in punishment, list punishment:

Assault with Intent - Life

Armed Robbery - Life Consecutive

3. Statutory aggravating circumstances found: Yes (X) No ( )

4. Which of the following statutory aggravating circumstances were instructed, and which were found?

	Instructed	Found
(a) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(b) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	(X)	(X)
(c) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(d) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	(X)	(X)
(f) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )

(g)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	(X)	(X)
(h)	The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )
(i)	The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.	( )	( )
(j)	The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(k)	The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: NUMEROUS STAB WOUNDS

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes ( ) No (X)

6. Which mitigating circumstances were in evidence?

		Yes	No
(a)	The defendant has no significant history of prior criminal activity;	( )	(X)
(b)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	(X)
(c)	The victim was a participant in the defendant's conduct or consented to the act;	( )	(X)
(d)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	(X)

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; ( ) (X)

(f) The defendant acted under extreme duress or under the substantial domination of another person; ( ) (X)

(g) The youth or advanced age of the defendant at the time of the crime; ( ) (X)

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) (X)

(i) Other ANY ASPECT OF THE D'S CHARACTER OR RECORD OR ANY OF THE CIRCUMSTANCES OF THE OFFENSE FAVORABLE TO THE DEFENDANT WHICH IS SUPPORTED BY THE EVIDENCE. ( ) (X)

Relate any significant facts about the mitigating circumstances that influence the punishment imposition. N/A

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes (X) No ( )

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes ( ) No ( ) N/A

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship? N/A

12. Was the victim an employer or employee of defendant?
No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No ( )
Casual Acquaintance (X)
Friend ( )

14. Was the victim local resident or transient in the community? Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes (X) No ( )

16. Was the victim the same sex as the defendant? Yes (X) No ( )

17. Was the victim held hostage during the crime? No ( )
Yes - Less than an hour (X)
Yes - More than an hour ( )

18. Was the victim's reputation in the community: Good ( )
Bad (X)
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: 6 STAB WOUNDS. 4 TO THE HEART WHILE BOUND WITH DUCT TAPE; HANDS AND FEET: EYES AND MOUTH TAPED.

20. What was the age of the victim? 28

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	( )
Sharp instrument	(X) KNIFE
Firearm	( )
Other_____	( )

22. Does the defendant has a record of prior convictions? Yes (X) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	ASSAULT W/DANGEROUS WEAPON	JUNE, 1972	4-6 YEARS
b.	MURDER 2D DEGREE	DECEMBER, 1970	LIFE + 10 YRS
c.	BURGLARY 2D	MARCH, 1978	1-15 YRS ON CONC. W/FEDERAL
d.			
e.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community?

Resident (X) Transient ( )

27. Other significant data about the offense:_____

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: AUGUST 8, 1986 NEIL MCALPIN MCALPIN RELIEVED, & LIONEL BARRETT RETAINED MARCH 19, 1987. THEREFORE, THE FOLLOWING QUESTIONS ARE IN RELATION TO MR. BARRETT

2. How was counsel secured? A. Retained by defendant (X)
B. Appointed by court ( )
C. Public defender ( )

3. If counsel was appointed by court, was it because: N/A

A. Defendant unable to afford counsel? ( )
B. Defendant refused to secure counsel? ( )
C. Other (explain)_____ ( )

4. How many years has counsel practiced law? A. 0 to 5 ( )
B. 5 to 10 ( )
C. over 10 (X)

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General ( )
C. Mostly criminal (X)

6. Did the same counsel serve throughout the trial? Yes ( ) No (X)

7. If not, explain in detail. NEIL MCALPIN WAS ORIGINAL ATTORNEY, MR. MCALPIN WAS RELIEVED AND LIONEL BARRET RETAINED MARCH 19, 1987.

8. Other significant data about defense representation._____

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No (X)

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

6. Date trial judge's report completed JAN. 11, 1988

7. *Date received by Supreme Court _____

8. *Date sentence review completed _____

9. *Total elapsed days _____

10. Other _____

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	(X)	( )
3. He has not responded	( )	(X) *

* failed to respond after numerous requests

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

1/12/88
Date

Judge, FIFTH CIRCUIT Court

of DAVIDSON County

2. Did race otherwise appear as an issue in the trial? Yes (X) No ( )

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....(X)
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....( )
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? (1) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence? _____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case: APPROPRIATE

SEE JUDGE

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense FEB. 17, 1986	
2.	Date of arrest FEB. 19, 1986	2 DAYS.
3.	Date trial began JULY 6, 1987	
4.	Date sentence imposed JULY 15, 1987	
5.	Date post-trial motions ruled on OCTOBER 23, 1987	

Attachment 24

REPORT OF TRIAL JUDGE IN CAPITAL CASES*

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE Case No. 88-W-87

VS. Sentence of Death ( )
or
Life Imprisonment (X)

RALPH DAVID FRANTZREB
(Defendant)

A. DATA CONCERNING THE TRIAL OF THE OFFENSE

1. Brief summary of the facts of the homicide, including the means used to cause death:
The defendant, co-defendant and victim jointly shared a house. The defendant came home from work and learned the victim had spent money that defendant had contributed for the rent. Defendant become irate, confronted the victim about this and the fact that she was a transsexual, who had formerly been a man. Defendant then beat and kicked the victim until she ultimately died from the multiple injuries sustained. Defendant and co-defendant apparently tortured the victim which she languished prior to death. After the victim was dead, the defendant and co-defendant took the body to the Cumberland River, severed the head, hands, and feet, and disposed of it there.

2. How did the defendant plead? Guilty ( ) Not guilty (X)

3. Was guilt determined with or without a jury? With (X) Without ( )

4. Separate Offenses:
a. Were other offenses tried in the same trial? Yes (X) No ( )

b. If yes, list those offenses, disposition, and punishment:

Unlawful disposition of a dead human body - 3 years consecutive.

5. Co-Defendants:
a. Were there any co-defendants in the trial? Yes (X) No ( )
Co-defendant plead guilty.
b. If yes, what conviction and sentence were imposed on the co-defendants?

20 years - second degree murder

3 years - unlawful disposition of a dead human body

c. Nature of the co-defendants' role in offense:

See 6B

* A separate report must be submitted for each defendant convicted under T.C.A. 39-2-202 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

d. Any further comments concerning co-defendants:

None

6. Other Accomplices:
   a. Were there any persons not tried as co-defendants who the evidence showed participated in the commission of the offense with the defendant? Yes (x) No ( )

   b. If yes, state the nature of their participation, whether any criminal charges have been filed against such persons as a result of their participation and the disposition of such charges, if known:

   The district attorney handling the case did not consider the co-defendant, Kenneth Poole, to be as culpable as the defendant Ralph Frantzreb. Therefore the co-defendant was allowed to plead guilty to second degree murder and received a twenty year sentence along with a three year sentence for improperly disposing of a dead human body.

   c. Did the accomplice(s) testify at the defendant's trial?

   Yes ( ) No (X)

7a. Do you agree with the verdict of the jury as to guilt?

Yes (X) No ( )

b. If no, explain:

8. Did the defendant waive jury determination of punishment?

Yes ( ) No ( ) N/A

9. a. What sentence was imposed? Death ( ) Life Imprisonment (X)

   b. If life imprisonment, was it imposed as a result of a hung jury?

   Yes ( ) No (X)

10. Aggravating Circumstances, T.C.A. §39-2-203(i): N/A

   a. Were statutory aggravating circumstances found? Yes ( ) No ( )

   b. Which of the following statutory aggravating circumstances were instructed and which were found?

		Instructed	Found
(1)	The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(2)	The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	( )	( )
(3)	The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(4)	The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(5)	The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	( )	( )
(6)	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )
(7)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	( )	( )
(8)	The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )
(9)	The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.	( )	( )

(10)	The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(11)	The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )
(12)	The defendant committed "mass murder" which is defined as the murder of three or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment.

_____

_____

_____

c. Were the aggravating circumstances found supported by the evidence? Yes ( ) No ( )

11. Mitigating Circumstances, T.C.A. §39-2-203(j): N/A;

a. Were mitigating circumstances in evidence? Yes ( ) No ( )

b. If so, what mitigating circumstances were in evidence?

		Yes	No
(1)	The defendant has no significant history of prior criminal activity;	( )	( )
(2)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(3)	The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(4)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )
(5)	The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;	( )	( )

(6) The defendant acted under extreme duress or under the substantial domination of another person; ( ) ( )

(7) The youth or advanced age of the defendant at the time of the crime; ( ) ( )

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) ( )

(9) Other (explain):_____ ( ) ( )

_____

_____

_____

(c) Relate any significant facts about the mitigating circumstances that influence the punishment.

_____

_____

_____

(d) If tried with a jury, was the jury instructed to consider the circumstances indicated in 10(b) as mitigating circumstances? Yes ( ) No ( )

12. If the sentence was death, does the evidence show that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be employed? Yes ( ) No ( ) N/A

13. Was there evidence that at the time of the offense the defendant was under the influence of narcotics, dangerous drugs or alcohol which actually contributed to the offense? Yes ( ) No (X)

If yes, explain:_____

_____

_____

_____

14. General comments of the trial judge concerning the appropriateness of the sentence imposed in this case (may include consideration of sentences imposed in any similar cases the judge has tried):
The Court accepts the jury's verdict of guilty and thinks it was justified under the circumstances of the case.

B. DATA CONCERNING DEFENDANT

1. Name Frantzreb Ralph David (last first middle) 2. Birth Date 10-12-58 (mo./day/year)

3. Sex M 4. Marital Status: Never Married ____
5. Race W Married ____
6. Children: Number 2 Divorced X
Ages 4 & 3 Spouse Dec'd ____
Other Dependents: None
7. Parents: Father -- living? Yes ( ) No ( )
Mother -- living? Yes (X) No ( )
8. Education: Highest Grade or Level Completed: [illegible]
9. Intelligence Level
Low (IQ below 70) ____
Medium (IQ 70 to 100) X
High (IQ above 100) ____
Not Known ____

10 a. Was a psychiatric or psychological evaluation performed?
Yes (X) No ( )

b. If yes, summarize pertinent psychiatric or psychological information and/or diagnoses revealed by such evaluation.
Mr. Frantzreb was competent and an insanity defense could not be supported.

11. Brief impression of trial judge as to conduct of defendant at trial and sentencing: The defendant conducted himself in an appropriate manner at the trial and at the time of the sentence being imposed.

12. Prior Work Record of Defendant:

	Type of Job	Pay	Dates Held	Reason for Termination
a.	Army	1400/mo	1974-1982	resignation
b.	Tenn. D.O.C.	unknown	1982-1986	terminated
c.	construction	unknown	1986-1988	arrest
d.				
e.				

13. Defendant's Military History:

101st Airborne Division - Fort Campbell, KY (8 years) Stationed in Korea - decorated military service and honorable discharge.

14a. Does the defendant have a record of prior conviction?

Yes ( ) No (X)

b. If yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date	Sentence
1.			
2.			
3.			
4.			
5.			
6.			

15. Was the defendant a resident of the community where the homicide occurred? Yes (X) No ( ) - for only 6 months.

16. Noteworthy physical or mental characteristics or disabilities of defendant:

None

17. Other significant data about the defendant:

None

C. DATA CONCERNING VICTIM

1. Describe the relationship between the defendant and the victim (e.g., family member, employer, friend, etc.):

Victim and defendant had known each other for approximately 6 weeks and had cohabited a duplex for about 3-4- weeks.

2. Was the victim a resident of the community where the homicide occurred? Yes (X) No ( )

3. What was the victim's age? 29

4a. What was the victim's race? W

b. Was the victim the same race as defendant? Yes (X) No ( )

5a. What was the victim's sex? F

b. Was the victim the same sex as defendant? Yes ( ) No (X)

6. Was the victim held hostage during the crime?

_____ Yes -- Less than an hour

X Yes -- More than an hour

_____ No

If yes, give details: Victim was severly beaten and was unable to leave.

7a. Describe the physical harm and/or injuries inflicted on the victim:

Victim was beaten for 6 hours. Sustained 7 broken ribs, a broken backbone and sternum. Victim died as a result of her injuries, subsequently her feet, hands, and head were removed.

b. Was the victim tortured? Yes (X) No ( )

c. If yes, state the nature of the torture: A hot iron was placed to her breasts; dish soap was put in her mouth.

8. What was the victim's reputation in the community where he or she lived? Good ( ) Bad (x) Unknown ( )

D. REPRESENTATION OF DEFENDANT

1. How many attorneys represented defendant? One

[If more than one counsel served, answer the following questions as to each counsel and attach a copy for each to this report.]

2. Name of counsel: Patrick Timothy McNally

3. Date counsel secured: 2-18-88

4. How was counsel secured:
   A. Retained by defendant ( )
   B. Appointed by court ( )
   C. Public defender (x)

5. If counsel was appointed by court, was it because:
   A. Defendant unable to afford counsel? (x)
   B. Defendant refused to secure counsel? ( )
   C. Other (explain) _____

6. How many years has counsel practiced law?
   A. [illegible] to [illegible] ( )
   B. [illegible] to 10 (x)
   C. over 10 ( )

7. What is the nature of counsel's practice?
   A. Mostly civil ( )
   B. General ( )
   C. Mostly criminal (x)

8. Did counsel serve throughout the trial? Yes (x) No ( )

9. If not, explain in detail. _____

_____

_____

10. Other significant data about defense representation. _____

The Court is of the opinion that the defendant was represented by highly competent counsel in this case.

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial?

Yes ( ) No (X)

2. Did race otherwise appear as an issue in the trial?

Yes ( ) No (x)

3. What percentage of the population of your county is the same race as the defendant?

a.	Under 10%	( )
b.	10 to 25%	( )
c.	25 to 50%	( )
d.	50 to 75%	( )
e.	75 to 90%	(x)
f.	Over 90%	( )

4. Were members of defendant's race represented on the jury?

Yes (X) No ( )

How many of defendant's race were jurors? 10 ?

5a. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

b. If yes, what was that evidence? _____

_____

6. Was there extensive publicity in the community concerning this case? Yes (x) No ( )

7. Was the jury instructed to disregard such publicity?

Yes (x) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence?

Yes (x) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence?
Yes ( ) No (x)

10. If answer is yes, what was that evidence? _____

_____

_____

11a. Was a change of venue requested? Yes ( ) No (x)

b. If yes, was it granted? Yes ( ) No ( )

Reasons for change if granted: _____

_____

_____

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense 1-12-87/1-13-87	
2.	Date of arrest 3-28-87	
3.	Date trial began 9-12-88	
4.	Date sentence imposed 9-14-88	
5.	Date post-trial motions ruled on 11-21-88	
6.	Date trial judge's report completed 11-21-88	
*7.	Date received by Supreme Court	
*8.	Date sentence review completed	
*9.	Total elapsed days	
10.	Other	

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	( )	( )
3. He has not responded	(X)	(X)

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

11/21/88
Date

J. Randall Wyatt
Judge, Criminal
Court of Davidson
County

Attachment 25

REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE Fifth Circuit COURT OF Davidson COUNTY

STATE OF TENNESSEE

v.

WILLIE TOM ENSLEY
(defendant)

Case No. 85-W-584

Sentence of Death ( )
or
Life Imprisonment (X)

A. DATA CONCERNING DEFENDANT

1. Name ENSLEY, WILLIE TOM (last, first, middle) 2. Birth Date 9-1-59 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married ( ); Married ( ); Divorced (X); Spouse Deceased ( )

5. Children: Number of Children THREE

Ages of Children: (1 MONTH), 2, 3, (4), (5), 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes (X) No ( ) 7. Mother Living: Yes (X) No ( )

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, (12), 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (UNKNOWN) (if known)
Low (IQ below 70) ( )
Medium (IQ 70 to 100) ( )
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed? Yes ( ) No (X)

11. If examined, were character or behavior disorders found? Yes ( ) No ( )

If yes, please explain _____

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

12. What other pertinent psychiatric (and psychological) information was found?

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	TNT CONTRACTORS	$5.00/HR	3/85 - 6/5/85	Arrested for this offens
b.	NASHVILLE HUMANE SOCIETY	$3.50/HR.	2/85-3/85	Unknown
c.	SADLER & SON CONTRACT HAULER	$10.33/HR.	6/84-1/1/85	Due to accident and this offense
d.	GAMBLER CHASSIS CO.	$5.00/HR.	10/83-6/84	Left to work with Sadler & Son
e.	EASON MACHINE	$3.50/HR.	8/83-10/83	Co. went Bankrupt
f.	LITTLE HAWK TRUCKING	(UNKNOWN)	1982	Moved to Tennessee

14. List any noteworthy physical characteristics of the defendant.

15. Defendant's Military History: Defendant entered the U.S. Marines in 1977. Records from the District Attorney's Office indicate that the defendant went AWOL on 9/19/79, 8/12/80, 5/6/81, and 5/22/81. Additionally, charges were filed against him for failing to report to Camp Pendelton on 4/23/82 On 9/17/84, the defendant requested a discharge from the marines in lieu of a court martial and admitted to previous AWOLS. The defendant was released on the same date with other than an honorable discharge.

16. Other Significant Data about the Defendant:

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )

2. How did defendant plead? Guilty ( ) Not Guilty (X)

3. Did the defendant waive jury determination of punishment? Yes ( ) No ( ) N/A

4. What sentence was imposed? Death ( ) Life Imprisonment (X)

5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)

6. Other Significant Data about the Trial

7. Were there any co-defendants in the trial? Yes ( ) No (X)

8. What conviction and sentence if any were imposed on co-defendants?_____

_____

_____

9. Any comments concerning co-defendants:_____

_____

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial?

Yes(X) No ( ) If yes, list offenses: AGGRAVATED RAPE

_____

_____

_____

2. If other separate offenses were tried and resulted in punishment, list punishment:

Aggravated Rape, twenty-seven and one-half (27½) years to run

consecutive to Count One, Murder in the first degree.

_____

3. Statutory aggravating circumstances found: Yes ( ) No ( ) N/A

4. Which of the following statutory aggravating circumstances were instructed, and which were found? N/A

	Instructed	Found
(a) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(b) The defendant was previously convicted of one or more felonies, other than the present charge, which inhvolve the use or threat of violence to the person.	( )	( )
(c) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(d) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	( )	( )
(f) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )

(g) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. ( ) ( )

(h) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement. ( ) ( )

(i) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties. ( ) ( )

(j) The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office. ( ) ( )

(k) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official. ( ) ( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: _____

_____

_____

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes ( ) No ( ) N/A

6. Which mitigating circumstances were in evidence? N/A

	Yes	No
(a) The defendant has no significant history of prior criminal activity;	( )	( )
(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(c) The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; ( ) ( )

(f) The defendant acted under extreme duress or under the substantial domination of another person; ( ) ( )

(g) The youth or advanced age of the defendant at the time of the crime; ( ) ( )

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) ( )

(i) Other_____ ( ) ( )

_____

_____

_____

_____

Relate any significant facts about the mitigating circumstances that influence the punishment imposition._____

_____

_____

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes ( ) No ( ) N/A

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)_____

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (X) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship?_____

12. Was the victim an employer or employee of defendant?
No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No ( )
Casual Acquaintance ( )
Friend (X)

14. Was the victim local resident or transient in the community? Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes (X) No ( )

16. Was the victim the same sex as the defendant? Yes ( ) No (X)

17. Was the victim held hostage during the crime? No (X)
Yes - Less than an hour ( )
Yes - More than an hour ( )

18. Was the victim's reputation in the community: Good (X)
Bad ( )
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: multiple stab wounds, two to the chest by a knife.

20. What was the age of the victim? 28

21. If a weapon was used in commission of the crime, was it:

Poison	( )
Motor vehicle	( )
Blunt instrument	( )
Sharp instrument	(X)
Firearm	( )
Other_____	( )

22. Does the defendant has a record of prior convictions? Yes (X) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	Poss. W/Sell Amphetamine; Sell; Del. Amphetamine	(11/79 Jacksonville, N.C.)	$50.00 Fine & Costs
b.			
c.			
d.			
e.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes ( ) No (X)

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community?

Resident (X) Transient ( )

27. Other significant data about the offense: _____

_____

_____

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: November 19, 1984

2. How was counsel secured? A. Retained by defendant (X)
B. Appointed by court ( )
C. Public defender ( )

3. If counsel was appointed by court, was it because:

A. Defendant unable to afford counsel? ( )
B. Defendant refused to secure counsel? ( )
C. Other (explain)_____ ( )

_____

_____

4. How many years has counsel practiced law? A. 0 to 5 ( )
B. 5 to 10 ( )
C. over 10 (X)

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General ( )
C. Mostly criminal (X)

6. Did the same counsel serve throughout the trial? Yes (X) No ( )

7. If not, explain in detail._____

_____

_____

8. Other significant data about defense representation._____

_____

_____

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No (X)

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

2. Did race otherwise appear as an issue in the trial? Yes ( ) No (X)

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....( )
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....(X)
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? 1, 2, 3, 4, 5, 6, 7, 8, 9, (10) 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence?_____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case:_____

F. CHRONOLOGY OF CASE

		Elapsed Days
1. Date of offense	11-17-84	
2. Date of arrest	11-23-84	6 days.
3. Date trial began	1-13-86	1 yr 57 days
4. Date sentence imposed	2-7-86	1 yr 81 days
5. Date post-trial motions ruled on	2-28-86	1 yr 102 days

6. Date trial judge's report completed 4-16-86 — 1 yr 147 days

7. *Date received by Supreme Court _____ _____

8. *Date sentence review completed _____ _____

9. *Total elapsed days _____

10. Other _____

_____

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	(X)	( )
3. He has not responded	( )	(X)

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

4/17/86
Date

CIRCUIT Judge, Davidson Court

of _____ County

Attachment 26

REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY

STATE OF TENNESSEE

v.

LARRY WAYNE SHEFFIELD
(defendant)

Case No. 84-S-1181

Sentence of Death ( )
or
Life Imprisonment (X)

FILED
DEC 19 1985
RAMSEY LEATHERS, CLERK

A. DATA CONCERNING DEFENDANT

1. Name Larry Wayne Sheffield (last / first / middle) 2. Birth Date 9-29-64 (mo./day/yr.)

3. Sex: M (X) F ( ) 4. Marital Status: Never Married (X); Married ( ); Divorced ( ); Spouse Deceased ( )

5. Children: Number of Children None

Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes (x) No ( ) 7. Mother Living: Yes (x) No ( )

8. Education: Highest Grade Completed: (Circle One)

1, 2, 3, 4, 5, 6, 7, 8, (9) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: (if known)
Low (IQ below 70) ( )
Medium (IQ 70 to 100) (x)
High (IQ above 100) ( )

10. Was a psychiatric or psychological evaluation performed? Yes ( ) No (x)

11. If examined, were character or behavior disorders found? Yes ( ) No ( )

If yes, please explain N/A

*A separate report must be submitted for each defendant convicted under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977, irrespective of punishment.

12. What other pertinent psychiatric (and psychological) information was found?

N/A

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	SEARS	MINIMUM WAGE	1983 (2 MONTHS)	UNKNOWN
b.				
c.				
d.				
e.				

14. List any noteworthy physical characteristics of the defendant.

Tatoo on right wrist stating Wayne

15. Defendant's Military History: None

16. Other Significant Data about the Defendant:

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury? With (X) Without ( )

2. How did defendant plead? Guilty ( ) Not Guilty (X)

3. Did the defendant waive jury determination of punishment? Yes ( ) No ( ) N/A

4. What sentence was imposed? Death ( ) Life Imprisonment (X)

5. Was life imprisonment imposed as a result of a "hung jury"? Yes ( ) No (X)

6. Other Significant Data about the Trial Guilty Count 2, Armed Robbery, 50yrs, consecutive with life sentence, Count 1

The State did not seek the death penalty.

7. Were there any co-defendants in the trial? Yes (X) No ( )

8. What conviction and sentence if any were imposed on co-defendants? Guilty Accessory after the fact; 3 yrs and $1,000 fine.

9. Any comments concerning co-defendants: _____

C. OFFENSE-RELATED DATA

1. Were other separate (not lesser included) offenses tried in the same trial? Yes(X) No ( ) If yes, list offenses: Armed Robbery, Conspiracy

2. If other separate offenses were tried and resulted in punishment, list punishment: Armed Robbery - 50 yrs. consecutive to life sentence.

3. Statutory aggravating circumstances found: Yes ( ) No ( ) N/A

4. Which of the following statutory aggravating circumstances were instructed, and which were found? N/A

		Instructed	Found
(a)	The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
(b)	The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	( )	( )
(c)	The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	( )	( )
(d)	The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
(e)	The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	( )	( )
(f)	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )

(g)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	( )	( )
(h)	The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.	( )	( )
(i)	The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.	( )	( )
(j)	The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
(k)	The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment: _____

_____

_____

(T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977)

5. Were mitigating circumstances in evidence? Yes ( ) No ( ) N/A

6. Which mitigating circumstances were in evidence? N/A

		Yes	No
(a)	The defendant has no significant history of prior criminal activity;	( )	( )
(b)	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(c)	The victim was a participant in the defendant's conduct or consented to the act;	( )	( )
(d)	The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; ( ) ( )

(f) The defendant acted under extreme duress or under the substantial domination of another person; ( ) ( )

(g) The youth or advanced age of the defendant at the time of the crime; ( ) ( )

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. ( ) ( )

(i) Other_____ ( ) ( )

_____

_____

_____

_____

Relate any significant facts about the mitigating circumstances that influence the punishment imposition._____

_____

_____

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances? Yes ( ) No (X)

8. Does the defendant have any physical or mental conditions which are significant? Yes ( ) No (X)_____

9. Did you as "thirteenth juror" find that the defendant was guilty beyond a reasonable doubt? Yes (X) No ( )

10. Was the victim related by blood or marriage to the defendant? Yes ( ) No (X)

11. If answer is yes, what was the relationship? N/A

12. Was the victim an employer or employee of defendant?
No (X)
Employer ( )
Employee ( )

13. Was the victim acquainted with the defendant?
No ( )
Casual Acquaintance (X)
Friend ( )

14. Was the victim local resident or transient in the community? Resident (X)
Transient ( )

15. Was the victim the same race as defendant? Yes (X) No ( )

16. Was the victim the same sex as the defendant? Yes (X) No ( )

17. Was the victim held hostage during the crime? No (X)
Yes - Less than an hour ( )
Yes - More than an hour ( )

18. Was the victim's reputation in the community: Good (X)
Bad ( )
Unknown ( )

19. Was the victim physically harmed or tortured? Yes (X) No ( )

If yes, state extent of harm or torture: Manual strangulation, multiple stab wounds, and neck incision.

20. What was the age of the victim? 51 Yrs. old

21. If a weapon was used in commission of the crime, was it:

Poison	( )	
Motor vehicle	( )	
Blunt instrument	( )	
Sharp instrument	(X)	(Knife)
Firearm	( )	
Other_____	( )	

22. Does the defendant has a record of prior convictions? Yes (X) No ( )

23. If answer if yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
a.	Grand Larceny	2/83	25 days 16 months prob.7-1-83
b.	Poss. Cont. Sub.	6/83	30 days (S) 6-13-83
c.	Rec. Stolen Prop. under $200.00	9/83	2 Yrs. 11-4-83
d.	Parole Violation	6/11/84	Sent. Expired 9-28-85
e.			

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs which actually contributed to the offense? Yes (X) No ( )

25. Was there evidence the defendant was under the influence of alcohol which actually contributed to the offense? Yes ( ) No (X)

26. Was the defendant a local resident or transient in the community?

Resident (X) Transient ( )

27. Other significant data about the offense:_____

_____

_____

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured: August 31, 1984

2. How was counsel secured? A. Retained by defendant ( )
B. Appointed by court ( )
C. Public defender (X)

3. If counsel was appointed by court, was it because:

A. Defendant unable to afford counsel? (X)
B. Defendant refused to secure counsel? ( )
C. Other (explain)_____ ( )
_____
_____

4. How many years has counsel practiced law? A. 0 to 5 ( )
B. 5 to 10 (X)
C. over 10 ( )

5. What is the nature of counsel's practice? A. Mostly civil ( )
B. General ( )
C. Mostly criminal (X)

6. Did the same counsel serve throughout the trial? Yes (X) No ( )

7. If not, explain in detail._____

_____

_____

8. Other significant data about defense representation._____

_____

_____

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No (X)

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

2. Did race otherwise appear as an issue in the trial? Yes (X) No ( )
Procedure employed to select the foreperson of the grand jury, resulting in the systematic exclusion of blacks.

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....( )
b. 10 to 25%.....( )
c. 25 to 50%.....( )
d. 50 to 75%.....( )
e. 75 to 90%.....(X)
f. Over 90%.....( )

4. Were members of defendant's race represented on the jury? Yes (X) No ( )

How many of defendant's race were jurors? 1, 2, 3, 4, 5, 6, 7, (8), 9, 10, 11, 12

5. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No (X)

6. Was there extensive publicity in the community concerning this case? Yes (X) No ( )

7. Was the jury instructed to disregard such publicity? Yes (X) No ( )

8. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes (X) No ( )

9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No (X)

10. If answer is yes, what was that evidence?_____

11. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case:_____

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense 5-30-84	0
2.	Date of arrest 6-6-84	6
3.	Date trial began 9-9-85	458
4.	Date sentence imposed 10-9-85	488
5.	Date post-trial motions ruled on 12-13-85	552

6. Date trial judge's report completed 12-16-85 — 555

7. *Date received by Supreme Court _____ _____

8. *Date sentence review completed _____ _____

9. *Total elapsed days _____

10. Other _____

_____

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.*

	D.A.	Defense Counsel
1. His comments are attached	( )	( )
2. He stated he had no comments	( )	( )
3. He has not responded	( )	( )

*Counsel for both sides responded orally and their comments are incorporated herein.

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

Dec 16, 1985
Date

Judge, Fifth Circuit Court

of Davidson County