IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. W1997-00097-SC-DDT-DD
	)	
TONY VON CARRUTHERS	)	**CAPITAL CASE**

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

FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DISTRICT OF TENNESSEE

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Comes now Tony Von Carruthers, through counsel, and pursuant to Tennessee Supreme Court Rule 12.4(A) and (C) and files this Response in Opposition to the Attorney General's Motion to Set an Execution Date. Pursuant to Rule 12.4(C) this Response is filed in the Nashville Division, and not Jackson. Also pursuant to Rule 12.4(C) a syllabus that summarizes the contents of this Response is filed contemporaneously.

I. INTRODUCTION

Should Tony Carruthers be executed, he will be the first person in a century to be put to death after being forced to represent himself at trial. Should Mr. Carruthers be executed, he will be the unique defendant who is executed based on an indictment and a theory of guilt that the prosecution subsequently disavowed, and based on the testimony of a witness the prosecution called a liar.

Should Tony Carruthers be executed, it will be for a crime that the State of Tennessee was willing to settle for a life sentence, and to which the State allowed his co-defendant to plead best-interest for a sentence of twenty-seven years.

Should Mr. Carruthers be executed, he will be one of a small, unlucky few, who were put to death, without the prosecution presenting any forensic evidence or firsthand eyewitness testimony of their guilt, or even their purported role in the killings. Should he be executed, it will be based on the testimony of criminals who traded cocaine by the kilogram and their testimony for sentence reductions.

Tony Carruthers' convictions and death sentence are based on proof that Tony Carruthers, forced to represent himself without aid of counsel,

misguidedly presented in his own defense. Indeed, should he be executed, the single most important event that led directly to his death will be his forced self-representation.

Indeed, the horrific crime that resulted in his pending execution in fact never occurred. Although the jury sentenced him to death for burying three humans alive, the overwhelming scientific evidence that is now acknowledged by the medical examiner proves that three already dead bodies were placed in a grave.

Critically, the person that the jury sentenced to death bears no resemblance to the person before this Court. Mr. Carruthers suffers from severe mental illness, a fact that precludes him from even understanding his own irrationality, let alone the nature of his current legal circumstances. As a result, should Tony Carruthers be executed, the State of Tennessee will put to death a profoundly mentally ill man who will have no rational understanding of why the State is killing him.

Instead, Mr. Carruthers' "understanding" of his execution - as set-forth in his voluminous public pleadings, letters to the court, and other non-privileged documents – is that a long-term "extrinsic fraud" and "fraud upon the court," in violation of Rule of Professional Conduct 3.3, and contrary to chapter 3 and verse 3 of Ezekiel, that has been perpetrated by a cabal of defense lawyers, prosecutors, judges, Masons and deviants. The conspirators have been motivated by their desire to escape indictment by the Department of Justice, and preserve their law licenses from revocation by the Board of Professional Responsibility. And, with his execution, at least one other murder, of a prominent lawyer

by a criminal court judge's law clerk, will go unsolved. Thus, his execution would be an extraordinary fraud upon the court.[1]

No execution date should be set for Tony Carruthers, this case should be remanded for further proceedings in the trial court, and this Honorable Court should issue a certificate of commutation.

A. The framework of this opposition.

Counsel for Mr. Carruthers will begin this opposition with a discussion of trial issues that warrant relief from execution. This section will be presented under the major heading "Fraud Upon the Court," as, subject to Rule of Professional Conduct 1.14 and *Holland v. Florida*, 560 U.S. 631 (2010) counsel wishes to honor Mr. Carruthers' preferred language. Moreover, while counsel might chose different language, the wording "Fraud Upon the Court" is not unfair when used to describe the legal injustices that occurred in Mr. Carruthers' case, not the least of which was the denial of his right to counsel, the presentation of an

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[1] Mr. Carruthers' profound mental illness and resulting psychosis further precludes his understanding that he will be executed. As counsel understands - Mr. Carruthers' distorted belief system, he will not be executed because the Department of Justice and Board of Professional Responsibility will intervene, he will be released from custody, and he will be awarded $3.3 million in damages from each of the dozens of various conspirators who have violated his rights. In Mr. Carruthers' mind, the current efforts to seek an execution date are nothing more than another effort to get him to enter a best interest plea to time-served, so as to provide cover for the conspirators, and concealment of their crimes.

entirely new theory of guilt that was irreconcilable with the proof presented to the Grand Jury, and the imposition of a sentence of death for three horrific murders that never happened.[2]

Following the "Fraud Upon the Court" section, again pursuant to Rule of Professional Conduct 1.14, counsel will address Mr. Carruthers' competency and mental health issues. This section is presented without his consent, and over his strenuous objections. Counsel respects Mr. Carruthers, and does not submit these arguments lightly. However, counsel has a sincere and deeply held belief that Mr. Carruthers was never competent to stand trial, was not competent to represent himself, and is not competent to be executed. Moreover, he is not competent to waive any meritorious arguments. For reason that will be developed in greater depth in this second section, counsel is certain that Mr. Carruthers has a serious mental illness, whether labelled schiziophrenia, or schizioaffective disorder bipolar type, and that the manifestations of this serious mental illness include paranoid delusions, distorted thought processes, conspiratorial misapprehension of fact, a gross inability to make prudent decisions, and a complete inability to rationally perceive or understand the world around him. He also has significant brain damage which exacerbates the debilitating effects of his serious mental illness, and, as a result of either or both the mental illness and brain

[2] Three murders happened, but the three murders that Mr. Carruthers was sentenced to death for never occurred. Three people were not "buried alive," instead, three dead bodies were hidden in a grave by someone.

injury he suffers from anosognosia, which is the delusional belief, despite all evidence to the contrary, that he is not mentally ill.

In advancing the second section, however, counsel wants to be clear. Mr. Carruthers is also a kind and charming man. Going against his sincere wishes is hard, and not at all pleasant.

Following the second section regarding mental illness, counsel will submit three arguments that are all very applicable to Mr. Carruthers that this Honorable Court may be, or may become familiar with: (1) the Severely Mentally Ill, as a class which clearly includes Tony Carruthers, should be categorically protected from imposition of the Death Penalty, (2) the death penalty is racist, and (3) Tennessee's Death Penalty is contrary to evolving standards of decency.

B. Relief requested: No execution date should be set, this case should be remanded for further proceedings in the trial court, and a Certificate of Commutation should be issued.

In regards to the various significant grounds to oppose execution that are set-forth, below, counsel asks for three different, but related, forms of relief. First, pursuant to Tenn.Code.Ann. § 40-27-106, as each ground establishes significant extenuating circumstances, this Honorable Court should issue a Certificate of Commutation. *Workman v. State*, 22 S.W. 3d 807, 808 (Tenn. 2000). Second, pursuant to Article One, §§ 8 and 16 of the Tennessee Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution, counsel asks that this Honorable Court exercise its supervisory authority to remand for further and appropriate proceedings in the trial court. *Van Tran v.*

State, 6 S.W.3d 257, 260 (Tenn. 1999). Third, each and every ground individually and collectively establishes that this Honorable Court should decline to set an execution date, at this time.

C. A note on exhibits.

Counsel has not made the majority of Mr. Carruthers' vast record an exhibit. For much of the history of his case, counsel has relied upon the narratives contained in the opinions of this Court, and the Court of Criminal Appeals. The trial record is nearly 6,000 pages in length; while the record filed in the federal district court contains over 20,000 pages. [3] However, counsel has excerpted various witnesses' trial testimony, and in so doing, counsel has included their entire testimony—even if only a few pages are directly relevant to the issue being raised. Counsel has done this to be fair to this Court and the State, and so that a witnesses words can be seen in full context.

In the appendix of Exhibits, undersigned counsel has attempted to assemble all exhibits that are relevant to Mr. Carruthers' "Fraud Upon the Court" arguments, first. Then all exhibits related to Mr. Carruthers mental health issues will follow. All exhibits that address the three

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[3] Undersigned took on the role of lead counsel in October of 2018, following the departure of the last of Mr. Carruthers' three prior federal public defenders (one retired, one is a professor, the last moved to a different state). Suffice it to say, counsel has done his best, but has not been affored the opportunity to review, let alone master, the entire 20,000 page record.

broad, but crucial, arguments regarding (1) a categorical exemption for the mentally ill, (2) racism, and (3) evolving standards of decency will be last. One exhibit relevant to the "Fraud Upon the Court," is a video from the nightly news, wherein Alfredo Shaw, a critical trial witness, claimed to have committed perjury; a "transcript" of this story was prepared by an unknown person at some unknown date, as an aid to the Court, this transcript is filed, however, counsel recognizes that the actual video is the actual evidence. Where possible, and within counsel's skills, hyperlinks have been inserted.

D. A note on citations to the various *Carruthers* opinions.

Counsel has chosen not to refer to the various appellate decisions as "*Carruthers-I*," "*Carruthers-II*" as this seemed overly confusing. Instead, all citations (other than appropriate *Id*s) will contain the cite to the appropriate reporter. In total, nine opinions can be found in Westlaw, though, for the most part, counsel will focus on the opinion of this Honorable Court on direct appeal, *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000), the Court of Criminal Appeals regarding post-conviction, *Carruthers v. State*, 2007 WL 4355481 (Tenn.Crim.App. Dec. 12, 2007), and the Sixth Circuit Court of Appeals, *Carruthers v. Mays*, 889 F.3d 273 (6th Cir. 2018). Also the unreported opinion of the District Court for the Western District of Tennessee, has been attached as an exhibit.[4]

[4] Ex. 1, DE 195, Order Denying Habeas Corpus.

II. "FRAUD UPON THE COURT"

The first major set of issues that counsel will raise relate to the fundamental (un)fairness of Tony Carruthers' trial. To best recognize how prejudicial these legal wrongs were to Mr. Carruthers it is important to start with an overview of the proof, or lack thereof. Following that, counsel will address the very troubling role of Alfredo Bernard Shaw, and discuss the other suspects that the jury never heard about, but who (unlike Mr. Carruthers) had a motive for the crime. After the setting is established, counsel will explore the specific exigent legal and constitutional wrongs that justify the issuance of a Certificate of Commutation, support a remand for further proceedings, and would justify a decision to decline to schedule an execution.

A. The facts, and lack thereof, at trial; the unmatched bloody DNA; the role of Alfredo Bernard Shaw and his contrary story of guilt; the suspects the jury never heard about.

Tony Carruthers was convicted of three murders that occurred in February of 1994, the murder of Mr. Carruthers' friend, Marcellus Anderson, Mr. Anderson's friend Frederick Tucker, and Mr. Anderson's mother, Delois Anderson; the bodies of all three victims were found buried beneath a grave. *Carruthers*, 35 S.W.3d at 524-30. No forensic evidence linked Mr. Carruthers to the crimes; no testimony was presented regarding fingerprints, or ballistics (indeed no testimony placed a pistol, such as that used to kill the victims, in his hand). *Id.* at 524-30. His DNA was not at the crime scene, but two blood stains on a piece of cloth buried with Marcellus Anderson contained DNA that did

not match the victims, Montgomery or Carruthers—**the identity of the person whose DNA and blood was left on that cloth is unknown to this day**. *Carruthers v. State*, 2007 WL 4355481, at *33 (Tenn.Crim.App. Dec. 12, 2007);[5]

Instead, the most significant proof against Mr. Carruthers came from various local criminal defendants: Alfredo Shaw to secure an indictment, and then Jimmy Maze, Terrell Adair, and Charles Ray Smith to secure convictions at trial. Shaw told a story of a murder for hire, while Maze, Adair and Smith told a very different story about a violent effort to take over the drug trade in their neighborhood—a trade that had been run by Marcellus Anderson and his partner, Andre Johnson. *Carruthers*, 35 S.W.3d at 24-30. Under the new story, while the three witnesses couldn't conclusively say Carruthers had killed anyone, they claimed that he and Montgomery had made unusual threats, and had alluded to unusual plans, all of which suggested an intent to kidnap and kill Marcellus Anderson. *Id.* This proof was combined with somewhat stronger evidence against Montgomery, including proof Montgomery was with the victims in the hours before their death, and less clear proof that Carruthers was with Montgomery and the two victims earlier in the night, and then with Montgomery the next morning, when a car that may have been used in the crime was cleaned. *Id.*

Prior to trial, indeed prior to indictment, with a dearth of concrete evidence, and a recognition that they would risk dismissal at preliminary

[5] Ex. **2**, Excerpt PCR Testimony of Todd Bille, pp. 19-23.

hearing,[6] the District Attorney convened a special grand jury and secured an indictment against Tony Carruthers based on the testimony of Alfredo Shaw, a convicted felon and career informant.[7] [8] Mr. Shaw told the grand jury a story about a murder for hire (payment to be $100,000 and a kilogram of cocaine) directed by twins named Jerry and Terry Durham.[9] [10] Shaw claimed he spoke with the Durham twins and Tony Carruthers twice during September, 1993, but ultimately declined to become involved.[11] He claimed Tony Carruthers, a man he had met five years earlier in jail, who he knew just well enough that his "name sounded familiar," began to pressure Shaw to join in this murder scheme.[12] Shaw further claimed that following the homicides he fortuitously happened to run into Tony Carruthers in the jail law library (despite being an incompatible who should have been kept separate for his own protection), and of all the people on the planet Earth, Mr. Carruthers chose to confess to Shaw—and no one else.[13] Indeed, at trial, Shaw had to admit that the last time he had seen Mr. Carruthers, face-to-face prior to the alleged confession, was in jail in 1988, when the two men had an "altercation."[14]

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[6] Ex. 3, March 1994 Memo from Wright to Brown.

[7] Ex. 4, Trans. Alfredo Shaw GJ Testimony.

[8] Ex. 5, Trans. Shaw's Statement to Media admitting paid informant and liar.

[9] Id.

[10] Ex. 6, Trans. Depo. Shaw, p. 31.

[11] Ex. X4 Trans. Alfredo Shaw GJ Testimony p. 2.

[12] *Id.* at 2-3.

[13] *Id.* at pp. 2-4.

[14] Ex. 7, Excerpt Trial Tr., Alfredo Shaw Testimony, pp. 2214-16, 2279.

The very first element of Shaw's story was factually absurd—he claimed that he had spoken with Tony Carruthers over the phone along with the Durham twins, twice, in or sometime before September of 1993—but, Tony Carruthers was still in prison in September of 1993, and was not released until November 15, 1993. *Carruthers*, 35 S.W.3d at 524. Thus, the prosecution either knew this story was false, or chose to remain deliberately ignorant of its truth, as the prosecutors and police failed to make any effort to obtain phone records of any calls between the prison and the Durham twins, or to seek prosecution of the two men who—*allegedly*—had paid $100,000 and a kilogram of cocaine for the murder of three citizens. (*Established by omission from the record*).[15] [16]

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[15] By 1994 it was common practice around the country for the police and prosecution to obtain jail phone records for use in criminal prosecutions. *E.g.* *U.S. v. Johnson*, 120 F.3d 1107, 1108-10 (10th Cir. 1997) (phone records used to verify calls from jail in July, 1994); *Consalvo v. State*; 697 So.2d 805, 810, fn. 2 (Fla. 1996) (jail phone records used to confirm defendant called witness on Oct. 3, 1991); *Carter v. O'Sullivan*, 924 F.Supp. 903, 910 (C.D. Ill. 1996) (noting that in Illinois, by 1994, the prison system "keeps track of numbers called and monitors and records phone calls); *Nadeau v. State*, 683 So.2d 504, 505 (Fla.App.4th 1995) (23 phone calls between Oct. and Dec. 1993 verified with jail records); *U.S. v. Jackson*, 1997 WL 198056 (D. Kansas, Mar. 17, 1997) (jail phone records used to verify call between defendant and witness in 1993 prosecution);

[16] Obviously, had the prosecution obtained phone records that established that Shaw had lied, these would have been produced as *Brady* materials, or at the latest, when Shaw took the stand and committed perjury in violation of *Napue v. Illinois*. Conversely, if phone records confirmed his

Not surprisingly, considering the inherent absurdity of Mr. Shaw's story, he recanted prior to trial, and made a statement to the local news admitting that he had been given police files related to the murders, and (he claimed) paid either $2,000 or $3,000 to implicate Tony Carruthers.[17] [18] [19] In response to his recantation, Assistant District Attorney Jerry Harris asserted that Mr. Shaw was a person "who lies" who he would not put before a jury.[20] [21] [22]

Instead of placing the "person who lies," Alfredo Shaw and his false story of a murder for hire before the jury, the prosecution elected to call Charles Ray Smith, "a convicted felon," Jimmy Lee Maze "another

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story, there is no doubt they would have been produced in discovery and introduced at trial.

[17] Ex. 8, "State Bribed me to lie," Tri-State Defender, March 2-6, 1996.

[18] Ex. 5, Transcript of Channel 13 Interview with Alfredo Shaw and DA Jerry Harris.

[19] While undersigned counsel submits that the evidence establishes that Alfredo Shaw lied to the Grand Jury, whether he was paid with cash for this lie, or simply was a cheap snitch who would say whatever he thought the government wanted hear to get probation is unknown. Mr. Carruthers however, is certain, that he was paid, and it was a "fraud upon the court."

[20] Ex. 9, CD/Video of Channel 13 Interview of Shaw.

[21] Ex. 5, Transcript of Channel 13 with Alfredo Shaw and DA Jerry Harris.

[22] A paralegal at the Federal Public Defenders made a transcription of the News Channel 13 Interview with Shaw. This transcription is provided to the Court as an aid, however, the actual interview is, of course, the best evidence.

convicted felon," and Terrell Adair, a third "convicted felon" who collectively testified to a diabolical plot by Carruthers and Montgomery to take over the drug trade in their neighborhood from Marcellus Anderson and his partner, Andre Johnson. *State v. Carruthers*, 1999 WL 1530153, at *19-23 (Tenn.Crim.App. Dec. 21, 1999). The State also called Andre Johnson, himself. *Id.* at *22. The new story completely omitted any mention of the evil Durham twins, or any murder for hire theory. *Id.* (established by omission). Indeed, where the Durham twins had been the criminal masterminds in the Shaw story, version two replaced them with Tony Carruthers. *Id.* Charles Ray Smith, a man who while in prison was assigned to cemetery duty, ascribed to Tony Carruthers the nefarious idea that a grave would be an excellent location to hide a body. *Id.* at *19. Maze and Adair similarly told stories about incriminating statements (or incredibly odd ones, depending on your perspective) that Mr. Carruthers had made, which they tied into a plot to kidnap and kill Marcellus Anderson. *Id.* at *19-23. While, Andre Johnson testified about threats he had received from co-defendant Montgomery, he testified about the trust and friendship between Carruthers and Marcellus Anderson. *Id.* at *22.

There were only two commonalities between Alfredo Shaw, and three of the new witnesses, Maze, Smith and Adair. All four were

criminals, and at least three of the four traded their testimony for sentencing relief by the prosecution.[23] [24] [25] [26]

There was also a very interesting commonality between Andre Johnson and Alfredo Shaw's story (but not the new version of Maze, Smith and Adair) – Johnson would come into federal court in October of 1996, and swear under oath that he would accept $100,000 to have another man killed.[27] Under oath, he testified that he would decline to be the triggerman, but he would find a cheaper hitman who he would pay $25,000, while keeping the rest as profit.[28] Whether, Mr. Johnson's admitted willingness to have someone killed for money ever reached fruition is not clear from the transcript of his testimony.[29]

At trial, Mr. Carruthers attempted to present proof from Michael Shae Holmes, a drug partner of Mr. Anderson and Mr. Johnson that Anderson and Johnson were in debt to Columbian cocaine dealers, which, may have been related to the three earlier shootings of Johnson, Terrell

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[23] Ex. 10, Jimmy Maze Declaration.

[24] Ex. 11, Deal for Charles Smith.

[25] Ex. 12, Charles Smith Judgment.

[26] Counsel is unaware of why Terrell Adair was not prosecuted federally, along with Andre Johnson. However, he admitted under oath, at Carruthers' trial, that he was involved with Anderson and Johnson in their multi-kilogram cocaine operation. (Ex. 13, Excerpt Trial Tr. Terrell Adair Testimony, pp. 1404, 1434-35, 1519-20).

[27] Ex. 14, Excerpt Trial Tr. Andre Johnson Testimony in McDonald Trial, pp. 2399-2401.

[28] *Id.*

[29] Id.

Adair, and Anderson.[30] [31] It was Mr. Holmes belief that the murders of Anderson, his mother and Tucker, were all committed by or for the Columbian drug dealers.[32] According to Holmes, after the murders, Anderson paid off the debt to the Columbians.[33] In a hearing outside the presence of the jury, Mr. Carruthers presented testimony from Holmes that Johnson had initially refused to pay the debt, and that following his failure to pay, the Columbians came around "looking for Johnson" and driving around with a man called Ronnie Ervin.[34]

Outside the presence of the jury, Michael Holmes also revealed that Andre Johnson had Michael Holmes kidnap Charles Smith (the man who was on cemetery duty while in prison, who claimed that Mr. Carruthers told him that a grave would be a good place to hide a body).[35] Holmes also testified that shortly before Anderson's murder, Johnson and Anderson were "feuding."[36] [37]

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[30] Ex. 15, Excerpt Trial Tr., Michael Shae Holmes, pp. 2394-98.

[31] Mr. Carruthers also attempted to introduce this proof through Terrell Adair, but, again, the Court found that proof that other men may have had motive to kill Anderson was irrelevant. (Ex. 13, Excerpt Adair Testimony, pp. 1436-49, 1455-86).

[32] Ex. 16, 1996 Statement of Michael Holmes, pp. 1-6.

[33] *Id.* at pp. 5-6.

[34] Ex. 15, Excerpt Trial Tr., Michael Shae Holmes at pp. 2404-06.

[35] *Id.* at 2406-10.

[36] *Id.* at 2410.

[37] Which is to say that Johnson not only may have caused Anderson to have an unpayable debt to the Columbians, he also may have been the sort of person to kill off his partner to clear the debt.

Unfortunately, the jury heard none of this exculpatory evidence. Tony Carruthers, pro se, was unable to articulate an adequate basis for the admission of any of this testimony, and the trial court held it all to be irrelevant.[38] The court stated, "I'm not going to allow you to suggest to the jury that these Columbian drug lords were coming up to collect their debt and kill these three people."[39] Similarly, the trial court refused to permit Holmes, a business partner of Anderson and Johnson, to testify that Anderson and Johnson were in debt to the Columbians.[40] This was similar to the court's earlier ruling that Terrell Adair could not be questioned about the debt Anderson and Johnson owed to the Columbians.[41]

Thus, Mr. Carruthers' was prevented from showing that Anderson owed $100,000 or $250,000 to the Columbians, or arguing that this enormous debt had already led to multiple shootings, or establishing that Johnson was feuding with his violent business partner, Anderson (a man so violent, he had his other business associate, Charles Ray Smith, kidnapped). With all of those "normal" avenues of defense shut down by the rulings of the trial court, Mr. Carruthers went to Plan B, and he called Alfredo Shaw to the witness stand, so that he could "prove" that Shaw lied.[42] As will be discussed, below, this ill-advised decision did not

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[38] *Id.* at 2414-15.
[39] *Id.* at 2415.
[40] *Id.* at 2418-19.
[41] Ex. 13, Excerpt Trial Tr. Terrell Adair Testimony, pp. 1481-83.
[42] Ex. 7, Excerpt Trial Tr. Alfredo Shaw Testimony.

work out, as Mr. Carruthers, pro se, had Shaw read some of his most damning prior statements directly into the record, while failing to establish that he was a liar.

The jury thus heard not only from multiple State witnesses that Tony Carruthers had claimed to be a criminal mastermind with a violent plan, but they then heard from his own witness that he had confessed to the murders. They were forbidden from learning about the Columbians, the drug debt, the other kidnapping ordered by Johnson, or the potential nexus of all those events with no less than three other shootings. With this testimony (and lack thereof), and despite the lack of any actual forensic or direct evidence, the jury found that Mr. Carruthers' presence with two of the victims, prior to their deaths, was sufficient to convict him, and then (for reasons that will be discussed, subsequently) to impose death.

B. For years the State of Tennessee has fought to conceal the truth: Alfredo Shaw was a paid informant before, during, and after the time he allegedly obtained Tony Carruthers' "confession;" the fight to conceal this truth rises to the level of a "Fraud Upon the Court" as formal pleadings introduced before the Honorable Walter Kurtz falsely disavowed Mr. Shaw's role as an informant.

Mr. Carruthers has maintained, for over twenty-five years, that his entire prosecution is fatally compromised, due to the prosecution's use of a paid informant, Alfredo Bernard Shaw, to secure the indictment against him. This indictment, in large part, rested on Mr. Carruthers' alleged confession to Shaw, after Carruthers had already retained counsel. Moreover, Carruthers' alleged confession was then presented to

the jury through the testimony of Shaw. This confession would have been subject to complete suppression, pursuant to *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent") and *Massiah v. U.S.*, 377 U.S. 201 (1964). Moreover, evidence that Shaw was a government agent had to be disclosed to defense counsel pursuant to *Giglio v. United States*, 405 U.S. 150 (1972). Indeed, in moving to reveal evidence that Alfredo Shaw was a government agent, Mr. Carruthers' post-conviction counsel explicitly relied on *Massiah* and *Giglio.*[43]

The extent to which the Shelby County District Attorney has attempted to conceal the facts of Mr. Shaw's status as a government agent may be indicative that it had some concern that a *Moulton/Massiah* violation may have occurred. That office has done an exemplary job for the past two plus decades in denying—contrary to fact—that Mr. Shaw was a paid informant for "anybody" at "any time."

At trial, Mr. Carruthers attempted to question Shaw as to whether he was a "confidential informant for the Sheriff's Department," but the prosecution had an objection to relevance sustained.[44].

During post-conviction proceedings, counsel for Mr. Carruthers repeatedly sought confirmation from the Shelby County District Attorney

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[43] Ex. 17, PCR Counsel Requests for Information on Alfredo Shaw.

[44] Ex. 7, Excerpt Trial Tr. Alfredo Shaw Testimony, p. 2254.

that Shaw was a paid informant[45] and by letter, and by pleading before the Honorable Judge Kurtz, the prosecutors denied that Shaw had been a paid informant.[46] Judge Kurtz, on December 3, 2002, specifically ordered the State to divulge whether Shaw "was or was not a paid government agent for either the county, state, or federal government during the time period he had conversations with the petitioner in the Shelby County Jail."[47] On January 7, 2003, in their final denial, the assigned prosecutor claimed, "I have talked to the prosecutors who tried your client and neither is aware of any situation where Alfredo Shaw acted as a paid informant for anybody. To the best of their knowledge, Alfredo Shaw was never a paid informant during the time frame stated in your letter of December 16, 2002."[48]

Finally, in December of 2017, after the conclusion of all tiers of review, but for certiorari to the United States Supreme Court, the Shelby County Sheriff's Department, provided limited and redacted records regarding Mr. Shaw's payment history from, and only from, the Shelby County Sheriff's Department.[49] What payments Mr. Shaw received from the Memphis Police, the District Attorney, the FBI, the DEA, or other agencies, have never been revealed to counsel or Mr. Carruthers, despite multiple requests for records of such.[50]

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[45] Ex. 17, PCR Counsel Requests for Information on Alfredo Shaw.
[46] Ex. 18, Three Denials by DA that Shaw an Informant.
[47] Ex. 19, Kurtz Order to Compel
[48] Ex. 18, Three Denials by DA, p. 3)(emphasis added).
[49] Ex. 20, Fessenden Letter with Attached Payment History.
[50] Ex. 21, Compilation of Requests for Records.

The records provided by the Sheriff reflect that Alfredo Shaw made purchases of crack cocaine on September 23 and 25, 1991, and a purchase of marijuana on October 29, 1992, while receiving an undefined/illegible payment of $100.00 on October 28, 1992.[51] Thus, at least three years prior to Mr. Carruthers' "confession," Shaw was already working for the government.

Thereafter, following the alleged "confession," but prior to the April 1996 trial, Shaw made another $100 purchase of marijuana for the Sheriff on November 30, 1995. Subsequent to helping secure Mr. Carruthers' conviction and death sentence, Shaw made numerous additional drug buys, and received informant payments or reimbursement for "informant expense" on December 16, 1996, and January 29, February 24, March 19, April 28, May 2 and May 7, 1997 totaling $436.00.[52] Mr. Shaw, in his subsequently recanted recantation, claimed that he received either $2,000 or $3,000 for his grand jury testimony against Mr. Carruthers.[53] [54]

The Shelby County Sheriff's Departments disclosure of December, 2017 reveals that the prosecution's response during post-conviction, and following Judge Kurtz's order was factually untrue—Alfredo Shaw had been a paid informant for, at the very least, the Shelby County Sheriff.

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[51] Ex. 20, Fessenden Letter with Attached Payment History, p. 3.
[52] *Id.*
[53] Ex. 8, TriState Defender "State bribed me to lie."
[54] Ex. 9, CD/Video of Channel 13 Interview of Shaw.

Moreover, at the time the State was denying that Alfredo Shaw was a paid informant, the State was defending the conviction of Earley Story in the Court of Criminal Appeals, which had been obtained based on Shaw's work as a "cooperating individual." *State v. Story*, 2002 WL 31257803, at *1 (Tenn.Crim.App. Sept. 13, 2002). The trial testimony reveals that Shaw, allegedly, purchased $500 of marijuana from Sheriff's Deputy (and defendant) Earley Story on January 9, 1997, $500 more on January 15, 1997, and $850 more on January 22, 1997. *Id.* at *1-2. The payment records provided by the Sheriff reflect that on January 9, 1997, the Sheriff withdrew $500 for Alfredo Shaw to purchase marijuana; albeit where the money came from for the second two buys is less than clear.[55] The three alleged purchases of marijuana from Story are bookended by payments to Shaw on December 16, 1995 and January 29, 1997. (*Id.*). Mr. Story was able to present an alibi for the first two purchases, and the jury acquitted him, but he failed to establish an alibi for the third, and was convicted. *Story*, at *2-3. To this day, Mr. Story asserts that he was framed, and never sold marijuana to anyone. *See e.g.*, Case No. W2019-01406-CCA-R3-ECN (appeal pending in Tennessee Court of Criminal Appeals).

Thus, it is clear that the State knew that Shaw was an informant, when they filed pleadings suggesting the contrary before the Honorable Judge Walter Kurtz. That the State "doth protest too much," suggests that their attorneys recognized the significance of Shaw's work as an

[55] Ex. 20, Fessenden Letter with Attached Payment History, p. 3.

informant (indeed, it may suggest that the Shelby County Sheriff is not the only agency he regularly worked for, and that a full accounting would reveal more damning evidence regarding his work inside the Shelby County Jail).

By submitting factually misleading pleadings, in the face of an explicit court order, the Shelby County District Attorney's Office perpetrated a fraud upon the court.

The Shelby County District Attorney's Office recently had a death sentence reversed due to their failure to disclose a $750 payment from the FBI to a key witness. *Thomas v. Westbrooks*, 849 F.3d 659, 661-64 (6th Cir. 2017). The *Thomas* court's observation on prosecutorial misconduct (an issue the court declined to resolve, as relief was granted under *Brady*) is very apt to our circumstances, as well:

> Were we to reach the merits of the prosecutorial misconduct claim, we might well charge the state prosecutor with actual knowledge that Jackson's testimony about her receipt of reward money was perjured. Given the importance of Jackson's testimony to the State's case and the State's repeated questioning about her purportedly high-minded reasons for testifying, it seems that any competent prosecutor would have carefully reviewed the case file for evidence that Jackson might have been testifying for some less-than-altruistic reason in order to guard against the risk of impeachment. This seems especially true in a case like this one where the witness had already testified against the same defendant in a related federal proceeding. Had the prosecutor done so, the parties agree that she would have come across a document indicating that Jackson had received a significant payment from the FBI after the

> conclusion of the federal trial. Thus, were we to presume that the State's prosecutor engaged in diligent preparation for trial, we would conclude that she knew of the payment at trial.

Id. at 667.

A similar result is appropriate here. Indeed, in light of the apparently contumacious conduct of the prosecutors in the post-conviction court, it would be highly appropriate to remand this matter for further proceedings, so that the misleading representations regarding Alfredo Shaw can be addressed (or, if possible, explained).[56] Moreover, to avoid the execution of a man who was indicted based on clearly perjured testimony, and who was convicted when he, pro se, chose to place that perjured testimony before the jury, no execution date should be set by this Honorable Court, and a Certificate of Commutation should be issued.

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[56] To be fair, as of yet, the Shelby County District Attorney has not been required to explain how they could plead that Alfredo Shaw was not a paid informant. But, perhaps, they have an explanation. Possibly, Sheriff's deputies contumaciously lied to prosecutors to conceal their relationship with Shaw, and the prosecutor's naively believed them. Albeit, for Mr. Carruthers the end result is the same, a material falsehood was submitted by the State in post-conviction proceedings, despite an explicit order from the Post-Conviction Judge.

C. Mr. Carruthers, against his will, and as punishment for his unusual behavior, was forced to represent himself; the last known case where a man was denied counsel and sentenced to death occurred in 1923; executions for men who were punished by being denied counsel are simply unheard of.

Mr. Carruthers complained about his lawyers, and due to issues that will be addressed in Section III, below, he did so intemperately, offensively, and provocatively, if not entirely unfairly. During the 22 months between when Mr. Carruthers was first appointed counsel, and when he was ordered to represent himself as punishment for his complaints, his three prior sets of attorneys and investigators had interviewed six potential witnesses out of a somewhere between 125 and 170; the majority of his prior attorneys and investigators interviewed no witnesses at all; a mitigation specialist was only sought by his final attorney, who requested such on the same day he filed a motion to withdraw (days prior to the scheduled trial); and no forensic pathologist was ever obtained by any of the lawyers (despite, as will be seen in the sub-section related to the "buried alive" myth, this being an essential

task). *Carruthers*, 2007 WL 4355481, at *16, 26-30.[57] [58] Thus, when Mr. Carruthers complained about his attorneys, his factual predicates were not unreasonable, but his theories about why his attorneys had not diligently investigated or prepared were factually absurd, and to a person of common sensibilities, offensive: Mr. Carruthers claimed that one set of lawyers were intentionally failing to represent him due to their homosexual desire to have carnal relations with him[59]; while, his final lead counsel's failure to work as expediently as Mr. Carruthers believed necessary was the product of cocaine addiction and blatant racism. *Id.* at * 18, 28.[60] [61]

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[57] Attorney Nance testified he "identified" witnesses, but he could not recollect interviewing any, Attorney Garrett who followed Nance testified he did not interview witnesses at all; and Attorney Wright, who was appointed in a dual attorney/investigator position did not interview any witnesses either. When Mr. Carruthers began representing himself and was given an investigator, John Billings, Mr. Billings discovered that in the preceding 22 months no more than 7, out of over 160 possible witnesses had been interviewed.

[58] Ex. 22, PCR Hearing Tr. Bill Massey Testimony, pp. 482-83.

[59] Two common themes to Mr. Carruthers misapprehensions of fact are (1) their internal inconsistency: why attorneys who wished to seduce Mr. Carruthers would do so by failing to help him makes no sense, and (2) their transference of mental illness and irrationality from Mr. Carruthers (who due to anosognosia cannot perceive such in himself) to defense counsel.

[60] Ex. 23, Compilation of Letters of Complaint.

[61] Mr. Carruthers' final lead counsel, the Honorable William Massey, did an excellent job of preserving letters for the record, including a batch that were written in a manic flurry during December of 1995. Undersigned

In response to Mr. Carruthers' intemperate complaints, the trial court removed two sets of lawyers, and when Mr. Carruthers complained about his final set, the court sanctioned him by denying him the right to counsel, entirely. *Carruthers*, 35 S.W.3d at 550. However, seeing that Mr. Carruthers was incapable of self-representation, the Honorable William Massey volunteered to forgive Mr. Carruthers and to represent him at trial; the trial judge refused to permit this.[62] Mr. Massey testified:

> I'm watching a man trying to defend himself in a death case and I think what I recall saying to Judge Dailey when I asked to approach him, I said, Judge, a compromised Bill Massey is better than Tony Carruthers representing himself. He wants me back aboard, I'll come. And they wouldn't – and they wouldn't let me back aboard.[63]

After the removal of Mr. Massey, Tony Carruthers repeatedly begged to have counsel appointed — whether Mr. Massey or other qualified counsel—and reiterated that he was not competent to represent himself, but his requests were denied on January 11, February 20, March 4, and April 15, 1996. *Carruthers*, 35 S.W.3d at 543-46.

In 1923, the Virginia Supreme Court upheld the death sentence of Sam Riddick. *Riddick v. Commonwealth*, 115 S.E.523 (Va. 1923). Mr. Reddick did not have counsel at trial, but the court found this

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counsel understands that these letters are representative of the letters sent to all of his various attorneys, but with one exception those other letters do not appear in the record (to the best undersigned can tell).

[62] Ex. 22, PCR Hearing Tr. Bill Massey Testimony, pp. 466-68.

[63] *Id.* at 467.

acceptable—under 1920s understandings of the law—as he had been incarcerated for "many months" pretrial, and he had friends who "might have secured counsel and ordered subpoenas for witnesses in his behalf." *Id.* at 727. Thus, Mr. Riddick's right to counsel was not "denied." *Id.* As far as counsel is aware, Mr. Riddick is the last man to be executed who did not have counsel at trial—outside of those defendants who affirmatively exercised their right to self-representation, usually with disastrous results. *E.g.* *State v. Jones*, 568 S.W.3d 101, 110 (Tenn. 2019); *Commonwealth v. Williams*, 196 A.3d 1021, 1025 (Pa. 2018); *People v. Lawley*, 38 P.3d 461, 470 (Ca. 2002).

Contrary to those foolish defendants who chose self-representation, Mr. Carruthers insisted until the end that he was not competent to handle a trial without an attorney. As will be shown, below, this was not only because he was unlearned in the law, but because he was, in fact, not competent.

To avoid the execution of a man who was denied counsel at trial, no execution date should be set, this Honorable Court should exercise its inherent authority and remand for appropriate proceedings in the trial court, and a Certificate of Commutation should be issued.

D. The State was willing to convey an offer of life in prison, which Mr. Carruthers could have already served had he accepted it; his co-defendant, James Montgomery is already free having accepted a best-interest plea for 27 years.

Mr. Carruthers informed the trial judge that William Massey had secured him a plea offer of twenty-five years,[64] which he rejected because (1) he maintained his innocence, and (2) he believed that it was "a violation of the victims' family rights" to extend such an offer without consulting with the victims' families.[65] Assistant District Attorney Harris clarified that Mr. Carruthers had not been offered twenty-five years, instead he stated on the record that his office had agreed that if Mr. Carruthers was willing to plead to life, he would seek the victims' family's approval.[66] As the murders occurred prior to July 1, 1995, Mr. Carruthers would have had release eligibility on a life sentence after service of twenty-five (25) years in prison, which is to say, earlier this year. Tenn.Code.Ann. § 40-35-501(h)(1) and (i).[67]

James Montgomery, Mr. Carruthers' co-defendant, was permitted to plead best-interest to Murder in the Second Degree, with a term of 27 years at 35% (after winning a retrial due to the prejudicial impact of

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[64] Since at least 2003, Mr. Carruthers has been convinced that he has an open offer to plead to time-served, which the State is trying to coerce him to accept.

[65] Ex. 24, Tr. Feb. 21, 1996 Hrg., pp. 9-10.

[66] *Id.* at p. 16.

[67] Thus, rather than 25 years being a misstatement by Mr. Carruthers, it was the minimum term of a life sentence.

being tried with pro se litigant Carruthers).[68] In December of 2015, James Montgomery was released from prison.[69] [70]

To avoid the execution of a man who should have been able to enter a guilty plea to a sentence of less than death, no execution date should be set, this Honorable Court should exercise its inherent authority and remand for appropriate proceedings in the trial court, and a Certificate of Commutation should be issued.

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[68] Ex. 25, State v. Montgomery Tr. of Alford Plea, p. 23.

[69] Ex. 26, "Memphis man convicted of triple murder goes from death row to freedom," NewsChannel3, Sept. 26, 2016.

[70] It is interesting to note that the debunked and repudiated theory that the three victims were buried alive was (a) not advanced during the 2000 Alford Plea, but (b) continued to be featured in the 2016 story about Montgomery's release. Clearly, this false story resonates most powerfully with the public at large, despite it being a morbid fantasy.

E. The Aggravating Factor of Hideous, Atrocious and Cruel was false; the victims were not buried alive; the prosecutions' essential argument for death was factually false; the continued repetition of this horrifying myth reveals how incredibly prejudicially misleading it was; in Mr. Carruthers' words, it was a fraud upon the court.

At sentencing, the prosecution called two witnesses. They first presented a member of the clerk's office to testify regarding the criminal records of the defendants, which included a single conviction of aggravated assault against Mr. Carruthers.[71] *State v. Carruthers*, 1999 WL 1530153, at *26 (Tenn.Crim.App. Dec. 21, 1999). Then, the State presented their star witness, Dr. O.C. Smith, who testified at length and in vivid detail about the pain suffered by the three victims who were "buried alive." *State v. Carruthers*, 35 S.W.3d at 530.

Dr. Smith's testimony became the focus of the State's final closing argument at sentencing.[72]. This powerful argument vividly and painfully told a story of prolonged suffering of three victims buried in a dark pit, Ms. Anderson listening to her son die, her son listening to her die, Frederick Tucker dying with them both, all three victims slowly suffocating, all three victims having injuries that would not have been

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[71] Co-defendant Montgomery had a much more significant record, involving two convictions for robbery with a deadly weapon and one conviction for assault with intent to commit robbery with a deadly weapon. *Carruthers*, 1999 WL 1530153, at *26.

[72] Ex. 27, Excerpt Trial Tr., State's Closing Argument at Penalty Phase.

fatal, but for the crushing weight of the dirt above them. [73] The prosecution's final closing argument relied on this emotionally wrenching horror story, while focusing almost exclusively on the single aggravating factor of heinous, atrocious and cruel.[74] The last words of the able prosecutor were as follows:

> We've come to you with awesome, horrible, unforgettable, almost unmentionable facts, haunting facts, haunting facts.
>
> The death penalty should be reserved for these two people who would put into action such a heinous, atrocious, and cruel plan, who would so callously take away human life, who would without regard for any of the social sensibilities take away what was so unnecessary, the life of Delois Anderson. So callous, so unnecessary, so horrible, so heinous and so atrocious and so cruel.
>
> Thank you.[75]

The jury in imposing death, agreed with the State, and found that all three murders had been "heinous, atrocious and cruel." *Carruthers*, 1999 WL 1530153, at *1. All but one appellate court that ruled on Mr. Carruthers' case found it important to recite: "the three victims were buried alive." *Carruthers v. Mays*, 889 F.3d 273, 277 (6th Cir. 2018); *Carruthers v. State*, 2013 WL 3968787, at *1 (Tenn.Crim.App. Aug. 1,

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[73] *Id.*

[74] Id.

[75] *Id.* at pp. 2784-85.

2013); *State v. Carruthers*, 35 S.W.3d 516, 528 (Tenn. 2000); *Carruthers*, 1999 WL 1530153, at *24.

This Honorable Court undertaking "Proportionality Review" vividly observed that "the three victims were kidnapped, bound, shot and buried alive, in a pit beneath another person's grave:" three times during this review, this court repeated the phrase "buried alive." *Carruthers*, 35 S.W.3d at 570. The Court of Criminal Appeals, in weighing aggravating factors and finding that the death sentence was legally appropriate similarly stressed that the victims were "buried alive." *Carruthers*, 1999 WL 1530153, at *60.

However, in 2007, the Court of Criminal Appeals recognized that the commonly accepted "fact" that the victims were buried alive was highly dubious; the court appointed expert pathologist, Cleland Blake, had long ago concluded that both Mr. Tucker and Mr. Anderson were dead prior to burial, and Ms. Anderson was either dead or unconscious at the time of burial. *Carruthers*, 2007 WL 4355481, at *23-24. However, Dr. Blake's conclusion, according to the Court of Criminal Appeals, could have been presented at trial, but Mr. Carruthers failed to call him. *Id.* at *44.[76] On post-conviction, Dr. Blake's conclusion was ratified by a third expert, Dr. George Nichols who testified that:

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[76] That is, the mentally ill defendant who was sanctioned with the loss of counsel, was then faulted for failing to understand that Dr. Blake's testimony could save his life. In light of the fact that Mr. Carruthers defense focused entirely on the fact that he was innocent (and that Alfredo Shaw lied to the Grand Jury), it is not surprising that he failed to understand why Dr. Blake might matter. In light of him not being

> [T]here was no evidence, in his opinion, "that any person was alive in the site in which their bodies were discovered." He further testified that there was "no proof of the best evidence of conscious activity of any victim while alive in the grave site." Specifically, **he found no evidence of inhalation of dirt, mud, dust, or earth in the upper airways, mouth, or lungs of any of the victims, which would have indicated that the victims had breathed after being placed in the grave**. On redirect examination, he reiterated that he found no evidence to show that "any of these three people were alive and breathing in that space. None."
>
> *Id.* at *24 (**emphasis** by counsel).

Finally, Dr. O.C. Smith submitted an affidavit which was filed with the Federal District Court, disavowing his conclusion that the victims were buried alive.[77] He concluded his declaration as follows:

> I will no longer sustain an opinion, as I did in my original testimony, that to a reasonable medical certainty, the victims were in fact alive at the time they were buried beneath the coffin….
>
> I have addressed this issue with Bobby Carter of the Shelby County Attorney General's Office in regard to a retrial of James Montgomery and believe this lead [*sic*] to a plea agreement.[78]

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competent to defend himself, it was inevitable he would fail to see the relevancy.

[77] Ex. 28, Affidavit of OC Smith.

[78] Ex. 28, Affidavit of OC Smith at p. 2, ¶¶ 3,4.

That is, the vivid and horrific story told by the prosecution was false. The prosecution's key reason for requesting death was untrue. Three expert witnesses have shared their opinions: two who said the story was explicitly false, one who could no longer support the story.

Sadly, due to the limits of federal habeas corpus review, the Federal District Court held that it could not consider Dr. Smith's affidavit, and examined the victims' cause of death only under a false testimony theory (and then only under the strictures of highly deferential federal habeas review).[79] Moreover, the district court found that, if it could consider Dr. Smith's recantation, it would not establish that he was lying at the time he testified, or, even then that the prosecution knew he was lying.[80] Of course, whether it was a lie, or an innocent mistake by a less than competent pathologist, had no effect on the jury – they believed the testimony, as did every court that weighed the propriety of imposing a sentence of death.

The key question, which has never been properly weighed and considered, is whether the jury would have sentenced Tony Carruthers to death for his ambiguous role in the burial of three already dead bodies? No court has ever addressed that issue. [81] In light of Montgomery's

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[79] Ex. 1, Order Denying Habeas Relief, pp. 150-51.

[80] *Id.* at 152-53.

[81] The Court of Criminal Appeals, in 2007, examined the issue from a prosecutorial misconduct perspective, and considered what the impact would have been of contrary testimony from Dr. Blake versus the testimony of Dr. Smith, and concluded that any error would have been harmless. *Carruthers*, 2007 WL 4355481, at *56. The court did not

subsequent plea to a mere 27 years, and Dr. O.C. Smith's opinion that his changed opinion on cause of death led to the Montgomery plea, it is impossible to overstate the importance of the false narrative to the State's case for death. Certainly, this Court's Confidence that the jury would have sentenced Mr. Carruthers to death, absent the false "buried alive" myth should be seriously undermined. Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001) (remanding for new capital sentencing proceeding, because evidence withheld by Shelby county prosecutor was material to sentencing).

To avoid the execution of a man who was sentenced to death based on a hideously false myth, a myth that whether intentionally fabricated or innocently propagated amounted to a fraud upon the court, no execution date should be set, this Honorable Court should exercise its inherent authority and remand for appropriate proceedings in the trial court, and a Certificate of Commutation should be issued.

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consider the impact of Dr. Smith's complete recantation of his prior testimony.

F. Tony Carruthers, in part due to his lack of legal knowledge or understanding, and in part for reasons that will be addressed, below, did more to get himself convicted and sentenced to death than did the prosecution.

Tony Carruthers was not engaging in hyperbole when he insisted that he was not competent to represent himself. The record reflects that his actions ensured his own conviction. Twice his behavior at trial was so counterproductive that the jurors felt the need to pass notes to the court: the jurors asked if the Court could have Mr. Carruthers speak up so they could hear him, instruct him not to ask repetitive questions, and much more troublingly, they requested that he stop "scratching or pulling around his groin" while standing in front of the jury.[82] In regards to the groin manipulation, the jurors noted that they found "this very offensive and distracting."[83] But these matters of style – and reflective of Mr. Carruthers' mental illness - were outweighed in significance by outrageously foolish matters of substance.[84]

Mr. Carruthers believed that to prove his innocence he needed to prove that the story the jury had not heard, about the killing being a

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[82] Ex 29, Excerpts from Trial Tr. re: Juror Notes.

[83] *Id.*

[84] Undersigned counsel wants to be clear: counsel respects Mr. Carruthers' dignity and understands the stress caused by having to represent himself at trial. The fact that, while on trial for his life, Mr. Carruthers had an unfortunate nervous tic (one that might be associated with his mental health issues) should not be used to denigrate Mr. Carruthers.

murder for hire, needed to be disproven, thus he had to put Alfredo Shaw on the stand. Shortly before trial, Alfredo Shaw had recanted, and told the local media that he had been paid $3,000 by the prosecution in return for his false testimony to the grand jury.[85] However, prior to Mr. Carruthers' calling him to the stand, through counsel, Mr. Shaw made it clear he would not only recant his recantation, and testify that Mr. Carruthers had admitted to the murder, but he would also claim that Mr. Carruthers—via deputies in the jail that he controlled—had threatened him and his family, coercing his original recantation.[86]

Given these circumstances, any reasonably effective attorney would have refrained from calling Shaw to the stand. However, Mr. Carruthers, representing himself could not refrain, and did not have the skill or talent to cross-examine Shaw. Instead, he reviewed, line-by-line, Mr. Shaw's initial damning statement to the police, wherein he claimed that he and Mr. Carruthers had been offered $100,000 and a kilogram of cocaine to murder Marcellus Anderson, and that Mr. Carruthers subsequently confessed to the three killings, in detail.[87] He then did a similar line-by-line examination of Mr. Shaw's nearly factually similar testimony the Shelby County Grand Jury.[88] He then established that Mr. Shaw had given a sworn deposition, where he told the same story as before.[89] After

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[85] Ex. 8, *TriState Defender* "State bribed me to lie."
[86] Ex. 7, Excerpt of Trial Tr., Alfredo Shaw Testimony, pp. 2129-36.
[87] Ex. 7, Excerpt of Trial Tr., Alfredo Shaw Testimony, pp. 2166-2201.
[88] *Id.* at 2208-2217.
[89] *Id.* at 2218.

producing three consistent statements regarding his own guilt, Mr. Carruthers lost control of Mr. Shaw who preceded to testify about how his life was on the line, and how Mr. Carruthers and his people had threatened the lives of Shaw and Shaw's family.[90]

It was in the midst of this inept cross-examination that the jury passed their note wondering why Mr. Carruthers kept asking the same questions, over and over.[91] The questions the jury kept hearing over and over were Mr. Carruthers' requests that Alfredo Shaw repeat his story of Carruthers' guilt. A rational jury very well may have wondered why, having had the defendant present proof of his own guilt three times, they needed to hear it a fourth time.

Possibly worse yet, Mr. Carruthers did not know to object when the prosecution asked a grotesquely inappropriate and unduly prejudicial series of questions on cross-examination, while exploring Shaw's alleged fear of Mr. Carruthers:

Q. Okay. Now, let me talk to you a little bit about the things that you – when you say things started happening, one of the things was Jonathan Montgomery was found dead in the jail; is that right?

A. Correct.

Q. How did that make you feel?

A. How would that make anyone feel, you know what I mean, that's involved in the case? I knew it was something –

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[90] *Id.* at 2219-24.

[91] *Id.* at 2241.

Q. I mean, don't tell me what you think or something about the circumstances of that, but just tell me how it made you feel?

A. How it made me feel, that, you know, he was a great asset to this case, and I knew I was a great asset to this case, and that made me feel that, you know, something would eventually happen to me on down the line.

Q. All right. Did it make you scared?

A. Right.[92]

The death of co-defendant, Jonathan Montgomery (the younger brother of James Montgomery) was found by both the Sheriff's homicide investigator and the Medical Examiner to be a suicide, a conclusion the prosecutor himself reported to the trial court.[93] However, the clear implication of the prosecutor's questions, contrary to fact, was that Jonathan Montgomery had been murdered in jail, and that Shaw risked being next. But, Mr. Carruthers, a non-lawyer, failed to raise on objection pursuant to Tennessee Rules of Evidence 401, 402, or 403. Had such an objection been made, the trial court would have been compelled to prevent the questions and strike the irrelevant and prejudicial line of answers. Moreover, a competent attorney would have also requested a mistrial, due to this flagrant misstatement of fact. Plainly, the prosecutor "intentionally misstate[d] the evidence [and] misled the jury as to the inferences it may draw." *State v. Sexton*, 368 S.W.3d 371, 419 (Tenn. 2012). This blow was not merely a hard one, but a devastating and foul

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[92] Ex. 7, Excerpt Trial Tr., Alfredo Shaw Testimony, pp. 2266-67.

[93] Ex. 30, Tr. Hrg. Aug 31, 1995, Jonathan Montgomery abated by death.

one that the prosecution was constitutionally forbidden from striking. *Berger v. United States*, 295 U.S. 78, 88 (1935). But, again, as a forced-to-be pro se litigant, Mr. Carruthers did not have the skill or learning to lodge these obvious objections.[94]

Even when Mr. Carruthers' stumbled on a point of merit, he lacked the skill, insight, or knowledge to highlight it for the jury; for example, he got Alfredo Shaw to admit that prior to either the alleged murder-for-hire phone calls of September 1993, or the jail house confession of March, 1994, the last time he had seen or spoken to Mr. Carruthers had been in 1988, when they had an "altercation" in jail.[95] However, instead of being able to exploit this absurdity, Mr. Carruthers finished his examination of Shaw with a discussion of the threats Shaw had—allegedly—received.[96] The end of Mr. Carruthers pro se cross-exam of Alfredo Shaw is one of the most singularly inept, ineffective and disastrous cross-examinations, possible, one that seemed designed to secure not only a guilty verdict, but a death sentence—especially in light of the unobjected to, prejudicial misstatement of fact elicited by the prosecutor regarding Jonathan Montgomery's death:

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[94] Reflecting most poorly on Mr. Carruthers' subsequent appellate counsel, this obvious error was not raised as "plain error" on appeal. Thus, while manifestly unfair, no court has ever addressed the prejudicial impact of the prosecution's intentionally misleading questioning.

[95] Ex. 7, Excerpt Trial Tr., Alfredo Shaw Testimony, pp. 2214-16, 2279.

[96] *Id.* at 2279-85.

Carruthers. All right. Are you aware that the jail keeps records of every time you move and every time you go to the law library?

Shaw. I understand that. But it's also -- I'm also aware that Tony Carruthers can get things arranged if he want to get things arranged, and you got that arranged, Mr. Carruthers.

Carruthers. Are you aware that Tony Carruthers is not allowed to go anywhere in the jail except escorted by an officer?

Shaw. Well, now you can't, now. But back then you wasn't. You was free to do whatever you wanted to do until you—until people start fearing you.

Carruthers. No other questions, Mr. Shaw. Thank you.[97],[98]

Sadly, no court has ever weighed in on the constitutional adequacy of Mr. Carruthers' (self-)representation. This Honorable Court (being

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[97] *Id.* at 2284-85.

[98] No proof has ever been presented in any tribunal about this magical and mysterious power that Tony Carruthers supposedly had over the Shelby County Sheriff's Deputies. The record is devoid of any indication that any deputies were ever charged for conveying Mr. Carruthers' alleged threats to Shaw. Clearly, if the District Attorney actually believed Shaw's claim was serious, they had the full-weight and power of the government behind them to investigate it. Instead, no official actions were taken.

unaware of the underlying reasons for Mr. Carruthers' intemperate objections to appointed counsel) held:

> To the extent that Carruthers is alleging that his pro se representation was ineffective, we agree with the Court of Criminal Appeals' conclusion that when a defendant forfeits or waives the right to counsel, regardless of whether the waiver is explicit or implicit, he or she also forfeits or waives the right to effective assistance of counsel."

Carruthers, 35 S.W.3d at 551. Thus, no court has ever examined Mr. Carruthers' self-representation under the standard of *Strickland v. Washington*, 466 U.S. 668, 697 (1984). But, plainly, Mr. Carruthers' decision to put Alfredo Shaw on the witness stand, and to cross-examine him in the manner he did, fell below any reasonable professional standard and was deficient. His failure to call Dr. Cleland Blake to rebut the false claim that the three victims were buried alive was equally deficient. While, his behavior that elicited notes from the jury was similarly deficient—no lawyer seeking to maintain credibility would ever engage in bodily manipulation before a jury. Moreover, it is abundantly clear that Mr. Carruthers' deficient performance caused him prejudice. But for Shaw, or but for the false buried alive myth, there I a reasonable probability that Tony Carruthers would not have gotten the death penalty.

To avoid the execution of a man who was represented by a manifestly ineffective (non)attorney, this Honorable Court should decline to set an execution date, should exercise its inherent authority and remand for appropriate proceedings in the trial court where a hearing

can be held to determine whether Mr. Carruthers' forced self-representation met a constitutional standard of deficiency and prejudice, and a Certificate of Commutation should be issued.

III. MR. CARRUTHERS IS SEVERELY MENTALLY ILL, HE WAS LEGALLY INCOMPETENT TO STAND TRIAL, TO REPRESENT HIMSELF, OR TO WAIVE MERITORIOUS ISSUES; HE IS INCOMPETENT TO BE EXECUTED

Tony Von Carruthers has fought for over 25 years to prove two essential truths: (1) his conviction was the product of a conspiratorial fraud upon the court, and (2) that he is not, and has never been, mentally ill.

As set-forth in the prior section, Mr. Carruthers' first essential truth is grounded in objective fact. Many elements of his trial were fundamentally unfair. However, as will be demonstrated in this section, Mr. Carruthers' beliefs deviate from the objective facts and are radically distorted by paranoia and delusions. As a result, while lawyers see legal errors, *Brady* violations, and valid grounds for relief, Mr. Carruthers' sees "Fraud Upon the Court!", a vast murderous conspiracy, and an entitlement to millions of dollars in damages and immediate release from confinement.

Mr. Carruthers' second deeply and sincerely held truth, that he is not mentally ill, is contrary to reality. Instead, at the time Mr. Carruthers was arrested, he was mentally ill, irrational, and incompetent to stand trial. At the time he complained about his attorneys, he was incompetent to demand their replacement. At the time

he was forced to represent himself, he was incompetent to defend himself. At the time he forced his post-conviction attorneys to abandon mental health arguments, he was incompetent to waive meritorious claims. And, today, he is incompetent to be executed.

A. The overwhelming evidence that Tony Carruthers is severely mentally ill: the conclusions of the experts who personally evaluated him.

After Charles Ray was appointed to represent Mr. Carruthers in 2002, he was surprised to discover that Mr. Carruthers had never received a "more-than-perfunctory" mental evaluation, "especially in view of the fact that his seemingly bizarre behavior" led to his forced self-representation.[99] Based on Mr. Ray's thirty-plus years of experience as a criminal defense attorney, he had "serious doubts about Mr. Carruthers' competence to stand trial, much less act as his own counsel."[100] He thus sought the expert assistance of Dr. Pamela Auble a neuropsychologist, and Dr. William Kenner, a psychiatrist.[101] They would be the first mental health professionals to conduct comprehensive in-person assessments of Mr. Carruthers that were coupled with, and informed by, his past history, and objective empirical data. Only after many hours of work and diligent analysis did they reach scientifically based conclusions. Subsequently, when Mr. Carruthers' was represented by this office, two more mental health experts comprehensively evaluated

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[99] Ex. 31, Affidavit of Charlie Ray ¶3.

[100] *Id.*

[101] *Id.,* ¶¶ 5., 6

him. Dr. Shawn Agharkar, a nationally renowned psychiatrist and professor at the Emory and Morehouse Schools of Medicine met with Mr. Carruthers in person, and conducted a first-hand evaluation. Dr. Ruben Gur, a leading neuropsychologist, and the Director of the University of Pennsylvania's Brain Behavior Laboratory and Center for Neuroimaging, examined Mr. Carruthers' brain structure through neuropsychological data and PET and MRI scans. These four experts each establish that Mr. Carruthers has a severe mental illness, that he has never had a rational understanding of the proceedings against him, and that he was not legally competent at any stage of the proceedings.

1. **Dr. Pamela Auble "preliminarily" concluded that "Mr. Carruthers was mentally ill and his mental illness distorted his appreciation of reality; she predicted that he might have brain damage; she did not reach a conclusion as to his past competency, but believed appropriate medication would have helped manage his behavior.**

Charles Ray arranged for Dr. Auble to conduct neuropsychological testing on Mr. Carruthers.[102] Based on this testing, and her review of his records, she prepared a report of her "preliminary impressions."[103] She did not reach a final diagnosis of Mr. Carruthers, but her preliminary conclusion was that he was mentally ill, and that paranoid personality

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[102] Ex. 32, Dr. Auble, Preliminary Impressions

[103] Dr. Auble's preliminary conclusions are the least significant of the four doctors, in the sense that she never reached any final, definitive result. However, (a) her work was first in time, (b) it informed the more comprehensive work done by the experts who followed, and (c) many of her preliminary predictions were later confirmed

disorder or bipolar disorder were possible diagnoses.[104] More importantly, she concluded that this mental illness, by whatever name, would have "distorted his ability to understand the impact of evidence on jurors and how his presentation would have affected them. His appreciation of reality may have been distorted and this may have affected his ability to realistically appraise possible outcomes...." She noted that his difficulties in relating to counsel should have been seen as a "symptom of mental illness."[105]

Dr. Auble did not reach any preliminary conclusions regarding Mr. Carruthers' competency, though she believed he might have managed his behavior more adaptively if he had been properly medicated.[106] She also concluded that Mr. Carruthers had not been malingering, exaggerating, or faking any symptoms.[107] Ultimately, her impressions may be most important in that her suspicions/predictions would later be confirmed by Dr. Agharkar and Dr. Gur. She noted, for instance, that Mr. Carruthers "could have…brain injury" as a result of various traumatic head injuries and a premature birth[108]—in fact, as will be discussed, below, he suffers from significant brain damage.

A few other observations from her report should be highlighted as they reflect on long-standing delusions that continue to this day, and/or that illuminate his delusional/paranoid thinking:

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[104] *Id.* at 15.
[105] *Id.* at 15.
[106] *Id.* at 15-16.
[107] *Id.* at 15.
[108] *Id.* at 15,

1. Mr. Carruthers had complaints about all former attorneys, and continued to claim that at least one had been homosexual and had made a pass at him.[109]

2. Mr. Carruthers claimed he had an offer for "time-served" but he was refusing to accept it, because he wanted "exoneration."[110]

3. He claimed that another man (who he apparently would not name) had confessed in federal court, but had not been charged.[111]

2. Dr. William Kenner unequivocally concluded that Mr. Carruthers is mentally ill, and had never been competent to stand trial, to represent himself, or to waive legal claims in post-conviction proceedings.

Dr. William Kenner[112] issued a Psychiatric Report on November 11, 2004, in which he concluded, unequivocally, that Mr. Carruthers was mentally ill, had not been competent to stand trial, had not been competent to represent himself, and was not competent to waive issues during post-conviction proceedings.[113] Dr. Kenner examined a wealth of information, including letters written by Mr. Carruthers over the preceding eight years, various pleadings related to his behavior towards attorneys, complaints filed by Mr. Carruthers to the Board of Professional Responsibility, testimony of prior counsel, various medical records, and witness interviews; and he combined this information with

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[109] *Id.* at 3.
[110] *Id.* at 9.
[111] *Id.* at 9.
[112] Dr. Kenner's curriculum vitae is attached as Exhibit 33.
[113] Ex. 34, Dr. Kenner Psychiatric Report, p. 34.

three separate in-person, videotaped clinical examinations, that lasted for six and one-half hours.[114]

Dr. Kenner provided a detailed narrative description of Mr. Carruthers' behavior both pre- and post-trial, with a full exploration of his bizarre, offensive, and highly intemperate complaints about counsel—including his complaints about a conspiracy amongst his attorneys, and regarding his attorneys' conspiracy with the prosecutors and at least one juror.[115] Dr. Kenner finished his history of Tony Carruthers with a description of his behavior during his interviews:

> I asked Mr. Carruthers if he ever felt as if his mind were racing? He said, "My mind's always racing. I can't talk as fast as I think. I can't drink coffee with caffeine because it drives me crazy. I'm already going too fast." I asked if coffee helped him focus. He said that he used ginkgo for that.
>
> Mr. Carruthers' affect has ranged from subdued wariness to yelling and threatening. His mood has ranged from extremely angry to happy and joking with the prison officers. I found no depressive affect. The inmate's rate of speech varied from carefully picking his words to spewing forth accusations about how I had violated various of his constitutional rights and how he would seek monetary damages as well as criminal penalties from me. When agitated he had pressure of speech as he spit out his words like a machine gun.

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[114] *Id.* at 1-2.
[115] *Id.* at 2-20.

> Mr. Carruthers knew who he was, where he was, and the date. He had no hallucinations or delusions other than his conspiracy theory about his case.
>
> In the weeks after our last meeting on December 1, 2003, Mr. Carruthers began to send me the same kind of letters that he had sent William Massey. His beef with me involved the tapes of our meetings. He has demanded those back "unedited," and I assume that means he wants no copies left in my possession. He has agreed to let me off cheaper than he will the State of Tennessee for "$157,000,000." [116]

Later, Dr. Kenner described how Mr. Carruthers attempted to cajole him into agreeing that he did not need mood stabilizing medications, when this failed, Carruthers decided that Kenner was "a racist charlatan who would poison him."[117]

Dr. Kenner diagnosed Mr. Carruthers with an Axis I diagnosis of Bipolar Disorder, type II, hypomanic.[118] As a result of this mental illness, at the time of trial:

> Mr. Carruthers had an inflated, grandiose sense of himself and his abilities particularly when he must understand the complex criminal justice system. With me, he could not even listen to my reasoning about the importance of a trial of mood stabilizing drug in 2003, no more than he could appreciate the subtleties of his attorneys' effort to defend him in 1996. With both them and me, he felt grandiose, and when we did not follow his lead, he fought us for control of his

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[116] *Id.* at 26-27.
[117] *Id.* at 30-31.
[118] *Id.* at 27.

> psychiatric evaluation and his defense. He turned the tables on his attorneys as he did with me. I became the bad doctor who would poison him, strip him of his rights just as Massey and the others had become the bad lawyers who conspired to have their client killed by a racist, KKK-inspired court system.[119]

Dr. Kenner concluded his report with his expert opinion that, as of 2004, "Carruthers remains incompetent to make decisions about his appeals, just as bipolar disorder had left him incompetent to stand trial in 1996 much less represent himself."

Undersigned counsel has spoken with Dr. Kenner over the last month. Dr. Kenner, should he be called to testify at a future proceeding, would stand by his conclusions that Mr. Carruthers has a severe mental illness, and that he was not competent at any stage of these legal proceedings. The subsequent 15 years of identical, paranoid and delusional behaviors by Mr. Carruthers, only provides further corroboration of Dr. Kenner's original opinion.

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[119] *Id.* at 31.

3. Dr. Ruben Gur first examined Dr. Auble's neuropsychological test results, and based on that testing predicted where brain damage might be present; he then reviewed PET and MRI scans of Mr. Carruthers' brain; there was brain damage where expected, and throughout major portions of Mr. Carruthers' brain, including significant damage to the right parietal lobe.

Dr. Ruben Gur[120] prepared a Neurobehavioral Assessment of Tony Carruthers in September of 2011.[121] He began his report by analyzing the neuropsychological evaluations performed by Dr. Auble under a Behavioral Imaging algorithm.[122] This analysis suggested that brain impairment was likely to be seen in the left interior fronto-temporal region, and in the right parietal region.[123] This analysis produced the following graphical illustration that displays the two areas of predicted impairment in blue.[124]

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[120] Dr. Gur's curriculum vitae is attached as Exhibit 35.
[121] Ex. 36, Dr. Gur Assessment, Sept. 27, 2011.
[122] *Id.* at 1.
[123] *Id.* at 1.
[124] *Id.* at 1.

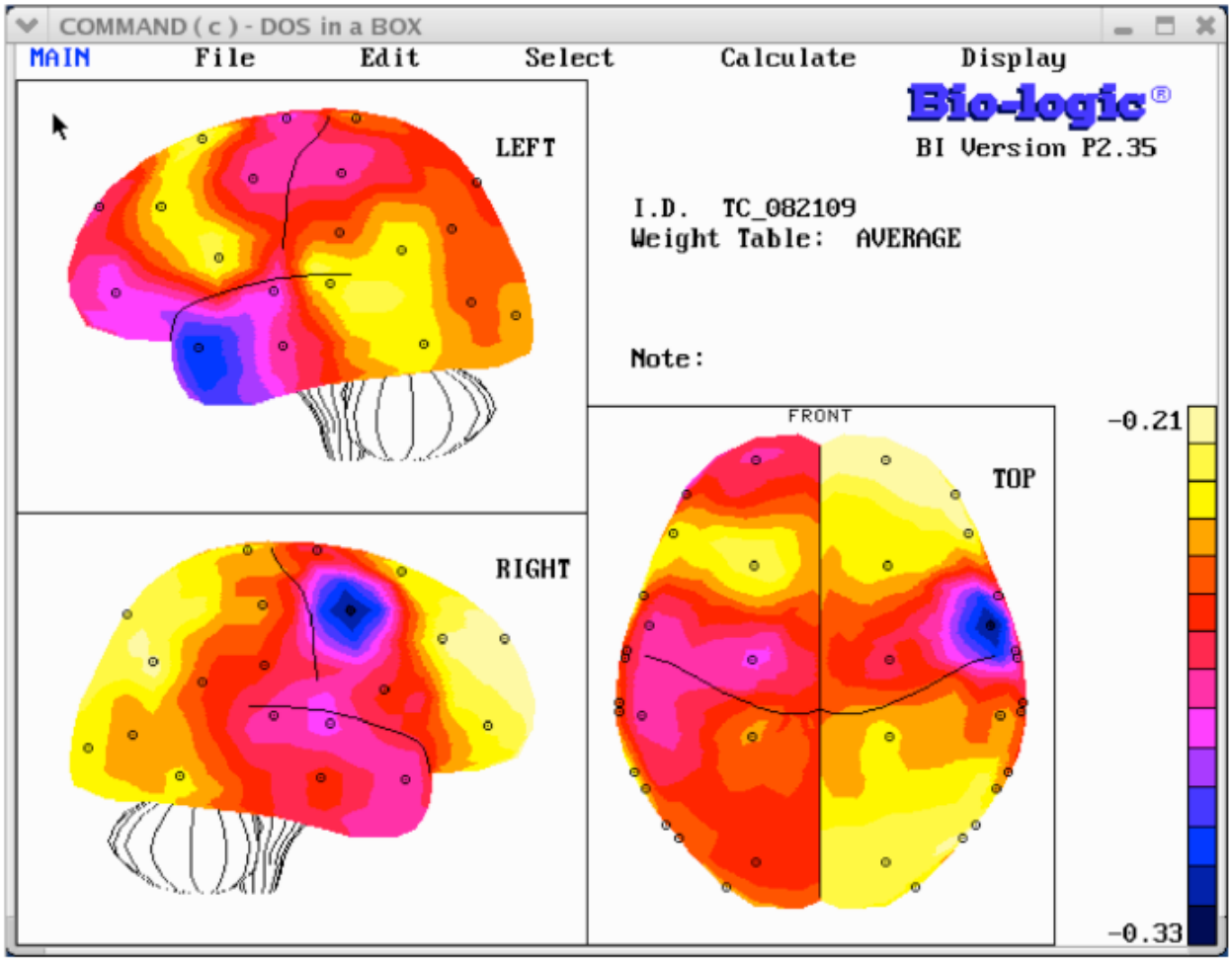

Figure 1. Behavioral image of Mr. Carruthers's brain

The pattern of impairment seen in Mr. Carruthers' brain is "consistent with traumatic brain injury."[125] Of course, Dr. Auble and Dr. Kenner in their reports both detailed multiple traumatic head injuries that Mr. Carruthers had suffered as a child, and Dr. Auble predicted that brain scans could reveal such injury.

A Magnetic Resonance Imaging (MRI) analysis of Mr. Carruthers' brain confirmed that his right parietal lobe was significantly abnormal,

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[125] *Id.* at 1-2.

while additional areas of abnormally low volume were observed.[126] Positron Emission Tomography (PET) revealed yet more abnormalities.[127]

Dr. Gur explained the behavioral effects resulting from these observed brain impairments (which were consistent with Mr. Carruthers' real world behavior), which include the following:

- "The structural abnormalities…in the frontal regions of Mr. Carruthers' brain would cause diminished execution functions, such as…emotion regulation…and impulse control.
- Damage to his right parietal lobe "could lead to a lack of insight into one's own motives and behaviors."
- Damage to his amygdala, hippocampus, and cortical regions would collectively lead to "compensatory hypervigilance…, sudden hyperexcitability" and "severe emotional dysregulation."
- His damaged amygdala "will misinterpret threat signals and when excited it will issue false alarms." This damage "can also lead to paranoia."
- "[A]bnormalities in basal ganglia could further impair rational performance under stress."[128]

The cause of Mr. Carruthers' brain abnormalities could not be immediately determined, but they were "most consistent with traumatic brain injury, toxic exposure, a neurodevelopment disease process, or a

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[126] *Id.* at 2-3.
[127] *Id.* at 3-4.
[128] *Id.* at 4-5.

combination of these factors."[129] Again, the histories developed by Drs. Auble and Kenner both confirmed traumatic head injuries. Dr. Gur was unable to offer a final diagnosis "without a personal examination of Mr. Carruthers and incorporation with history."[130] However, Dr. Gur offered that clinicians could use his data and findings to reach their own conclusions, and this offer was taken up by Dr. Shawn Agharkar.

4. Dr. Shawn Agharkar found that Mr. Carruthers, due to his delusional, psychotic thought processes, coupled with organic brain impairments lacked the capacity to rationally understand the proceedings against him, to assist in his own defense, to defend himself, or to waive post-conviction mental health claims; he found that Mr. Carruthers was seriously mentally ill.

Dr. Shawn Agharkar[131] built upon all of the prior work done by Drs. Auble, Kenner, and Gur, while personally meeting with Mr. Carruthers for 3.5 hours.[132] He concluded that the best diagnostic label for Mr. Carruthers' mental illness was schizioaffective disorder, bipolar type; which is a psychotic disorder that resembles a combination of Schizophrenia and Bipolar Disorder.[133] Schizioaffective disorder, bipolar type "is a severe and persistent debilitating mental illness with an extremely poor prognosis if untreated."[134]

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[129] *Id.* at 5.
[130] *Id.* at 5.
[131] Dr. Agharkar's curriculum vitae is attached as Exhibit 37.
[132] Ex. 38, Dr. Agharkar's Report, Sept. 23, 2011.
[133] *Id.* at 5.
[134] *Id.* at 5.

People, like Mr. Carruthers, who have this mental illness are psychotic, may experience hallucinations, have delusions such as paranoid and persecutory beliefs, and may exhibit disorganized thoughts or behaviors.[135] Other ill effects include cognitive impairment and problems with "memory, insight, judgement, thought organization, and problem solving."[136]

Dr. Agharkar observed that Mr. Carruthers' mental illness, coupled with the brain damage visible in Dr. Gur's MRI and PET scans would cause further difficulties:

> Persons like Mr. Carruthers who suffer from two major mental disorders are far sicker than persons with one. The co-morbidity of Schizoaffective disorder and brain damage is a marked, severe, disabling condition. His psychotic and other Schizoaffective symptoms are likely to be exacerbated by the effects of his brain impairments, and likewise, his psychiatric symptoms will intensify the negative effects of the damage to his brain.[137]

Dr. Agharkar's observations of Mr. Carruthers, particularly his paranoia and irrationality, are remarkably consistent with others' observations of Mr. Carruthers over the past twenty-five years:

- Mr. Carruthers "appeared quite paranoid," and was "guarded and suspicious" during their interview. He believed that Dr. Agharkar may have been an FBI agent who was masquerading as a psychiatrist;

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[135] *Id.* at 5.
[136] *Id.* at 5.
[137] *Id.* at 6.

he also believed their visit was being secretly monitored by microphones placed in the ceiling.[138]

- Mr. Carruthers' claimed to have a "silver bullet" that proved his innocence, but all of his prior lawyers in "collusion with the state" refused to raise this issue. His entire prosecution was part of a "vast government conspiracy."[139]

- Mr. Carruthers' reiterated his complaint about some of his attorneys making homosexual advances towards him.[140]

- Mr. Carruthers claimed that even though he did not want to represent himself, he was "winning" at trial, but "the Judge and prosecutor 'shut me down' because he was doing so well."[141]

- Mr. Carruthers became very upset when discussing the prior evaluation by Dr. Kenner. He claimed that Dr. Kenner and his prior attorneys had violated ethical Rule 3.3 and that he was owed $33.3 million dollars.[142]

- Mr. Carruthers claimed the media was colluding with the State in covering up the bias and errors at trial. When Dr. Agharkar could not follow his reasoning and asked for clarification, Mr. Carruthers responded that the doctor "did not know all the facts and it was 'self-evident.'" He followed this explanation with his claim that had been

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[138] *Id.* at 2.
[139] *Id.* at 2.
[140] *Id.* at 2-3.
[141] *Id.* at 3.
[142] *Id.* at 3.

poisoned while in prison, given "Pylori" in his food, been secretly monitored, and had his social security number stolen.[143]

- Mr. Carruthers adamantly denied all mental illness, refused to discuss any symptoms of mental illness, and repeatedly stated, "I am not crazy." "Mr. Carruthers denies feelings of paranoia…though he clearly was paranoid…during our interview."[144]

- Mr. Carruthers was "hyperverbal," his thinking was "tangential and difficult to follow" and there was "evidence of significant delusional thought processes involving persecutory and paranoid delusions."[145]

a. Mr. Carruthers was not competent to stand trial; his lack of insight and delusions are not purposeful, but are sincerely believed.

Regarding Mr. Carruthers' competency to stand trial, Dr. Agharkar concluded that his mental illness "impaired his capacity to rationally understand the proceedings against him and to assist in his defense." Dr. Agharkar found that

> [to] rationally assist counsel, Mr. Carruthers would need to accurately perceive the world around him. There is ample evidence that due to his mental illness and brain damage he is unable to do this. Paranoid delusions color his worldview and affect his decision-making capacity. He may act out of fear or see "shadows" or threats that do not exist. As

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[143] *Id.* at 3.
[144] *Id.* at 3
[145] *Id.* at 5.

> a result, he makes decisions that are not in his best interest.[146]

Dr. Agharkar observed that Mr. Carruthers "accused his attorneys of a vast conspiracy within the legal system involving homosexual themes and demands for millions of dollars which he persists in believing the government owes him:" he "continues to express fixed false beliefs involving persecutory and conspiratorial themes, resulting in his mistrust of anyone involved in his legal case."[147]

Dr. Agharkar found that Mr. Carruther's "lack of insight is typical of persons with psychotic illness. It is not volitional or purposeful, but rather, he exists in a delusional world that appears 'normal' to him and is thus akin to asking a fish what water is. He does not believe he is mentally ill, though he clearly is. His brain damage only makes this worse."[148]

He concluded, "to a reasonable degree of medical certainty, that due to mental disease and defect, namely his delusional, psychotic thought processes, and organic brain impairments, Mr. Carruthers lacked the capacity to rationally understand the proceedings against him and assist in his defense at the time of his trial in April, 1996."[149]

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[146] *Id.* at 7.
[147] *Id.* at 7.
[148] *Id.* at 7.
[149] *Id.* at 8.

b. Mr. Carruthers was not competent to represent himself at trial; his decisions at trial would have been based on fear and paranoia rather than rational thinking; he would fixate on small details, while missing the big picture.

Dr. Aghharkar concluded that Mr. Carruthers was "the worst possible candidate for the role of advocate in his own capital [trial]. In my opinion, to a reasonable degree of medical certainty, Mr. Carruthers was not competent to represent himself."[150] In reaching this conclusion, Dr. Agharkar noted that, based on his mental illness and brain damage, and due to his delusional and persecutory beliefs, Mr. Carruthers' ability to make rational decisions would have been grossly impaired.[151] Dr. Agharkar predicted that Mr. Carruthers would (1) fixate on collateral details, while missing the big picture, (2) fail to appreciate the consequences of his own behavior, and (3) he would fail to follow good advice out of paranoia.[152] Counsel would ask this Honorable Court to refer back to section II.F, above, for direct evidence that Mr. Carruthers behaved exactly as Dr. Agharkar predicted.

c. Mr. Carruthers was not competent to waive post-conviction mental health claims.

Dr. Agharkar concluded that Mr. Carruthers' lack of insight into his own paranoid delusional beliefs, and his inability to appreciate the

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[150] *Id.* at 9.
[151] *Id.* at 8.
[152] *Id.* at 8.

legal significance of his psychiatric condition, left him unable to competently waive any mental health claims.[153]

d. Mr. Carruthers lacks the capacity to rationally understand his criminal case, and to rationally understand the reasons for his potential execution.

A key conclusion of Dr. Agharkar's report is that Mr. Carruthers lacks the capacity to rationally appreciate or understand his legal case.[154] His delusions and paranoia so significantly distort his world view that his perceptions of reality are radically different from the perceptions possessed by the world around him.[155]

Since the filing of the instant motion, undersigned counsel has preliminarily consulted with Dr. Agharkar, who states that that there is no reason, whatsoever, to suspect that Mr. Carruthers' delusions, paranoia or lack of capacity for rational thought have changed in the past eight years. Absent evidence to the contrary, it is a near certainty that Mr. Carruthers is as mentally ill, today, as he was in 1996 when he was incompetent to stand trial, or in 2011, when he met with Dr. Agharkar. Dr. Agharkar is willing to conduct another clinical interview with Mr. Carruthers and review additional information and provide a more complete assessment of Mr. Carruthers' current mental functioning.

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[153] *Id.*
[154] *Id.* at 5-8.
[155] *Id.* at 7.

5. Dr. Sarah Vinson, a Board Certified Forensic Psychiatrist who directed the Fulton County Jail Competency Restoration Program, has attempted to assess Mr. Carruthers, as of yet, she has simply been served a claim for $3.3 million dollars, but she will continue her efforts.

Dr. Sarah Vinson, a Board Certified Forensic Psychiatrist, who for two years directed the Fulton County Jail Competency Restoration Program, and who has been qualified as an expert witness in State and Federal Courts,[156] attempted to meet with Mr. Carruthers on December 13, 2019, to perform a preliminary assessment of his competency to be executed. Mr. Carruthers declined to see Ms. Vinson, and has demanded her insurance paperwork so that he can be paid $3.3 million for her malpractice in attempting to see him. With her name appearing in this pleading, she may receive an additional claim for $3.3 million dollars.

Dr. Vinson has reviewed the reports prepared by the prior experts, as well as court records, letters and documents that Mr. Carruthers publicly filed pro se, and various non-privileged records provided by counsel. Her initial conclusions are that Mr. Carruthers is severely mentally ill and that he lacks the capacity to rationally understand the State of Tennessee's rationale for his execution. Obviously, she remains available and willing to attempt further in-person assessment of Mr. Carruthers and to consider additional documentation provided by any party.

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[156] Dr. Vinson's curriculum vitae is attached as Ex. 39.

B. The overwhelming evidence that Tony Carruthers is severely mentally ill: twenty-five plus years of delusional and paranoid behavior.

Mr. Carruthers' irrational, delusional, and paranoid behavior has been witnessed by all of his prior attorneys, and has been demonstrated in myriad pro se filings that he has submitted over the past 25 years.[157] Undersigned counsel possesses eight bankers' boxes of letters from Mr. Carruthers to this office, alone. A few explicit highlights—that have previously been filed in the public record, or are based entirely on documents in the public record—of Mr. Carruthers' irrationality will be provided to assist this Court in corroborating the findings of Drs. Agharkar, Gur and Kenner.

Attorney Lee Filderman submitted a declaration to the U.S. District Court, detailing his observations of Mr. Carruthers' mental illness during the time he represented him on direct appeal.[158] While he initially thought Mr. Carruthers was lucid and rational, his opinion changed the longer he knew him, and the more he witnessed his paranoid belief in plots against him.[159] Mr. Carruthers had a "skewed" view of legal issues; he would not focus on relevant issues, but instead he concentrated only on the issues that he believed important.[160] Mr.

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[157] Ex. 55, Examples of Pro Se Pleadings in Post-Conviction Court (these are simply all pro se pleadings taken from one volume of the District Court record, they are not comprehensive, merely illustrative).
[158] Ex. 40, Filderman Declaration, Sept. 21, 2011.
[159] *Id.* at ¶ 4.
[160] *Id.* at ¶ 7.

Carruthers disagreed with counsel that the best result he could hope for was a new trial, instead, he irrationally believed that all Mr. Filderman had to do "was file what he [Mr. Carruthers] wanted, on the arguments he deemed important, and the case could end and he could then be a free man."[161] Mr. Carruthers subsequently accused Mr. Filderman of being ineffective, and he demanded $66.6 million to settle his claims.[162] He wrote incessant letters, often inscribed with signs and symbols, and irrational and nonsensical words.[163] Mr. Filderman and his co-counsel both believed that Mr. Carruthers had "major mental health issues," however they did not believe those issues were relevant at their stage of the representation.[164]

Attorney Jefferson Dorsey from the Capital Case Resource Center, worked with Mr. Carruthers in 1996 and 1997.[165] He noted that Mr. Carruthers could appear coherent for a time, but eventually he would decompensate and "lose focus on this legal issues and begin discussing religious matters, claiming to have Messianic powers, telling me that he was a prophet or that he had other spiritual endowments."[166] Mr. Dorsey described his behavior as "psychotic," and he provided another example: "he would persistently assert that he would be released immediately."[167] Prior to becoming an attorney, Mr. Dorsey had worked as a residential

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[161] *Id.* at ¶ 8.
[162] *Id.* at ¶¶ 9, 10.
[163] *Id.* at ¶ 11.
[164] *Id.* at ¶ 12.
[165] Ex. 41, Declaration of Jefferson Dorsey, July 29, 2011.
[166] *Id.* at ¶ 8.
[167] *Id.* at ¶ 8.

specialist, medication coordinator, and case manager at residential treatment program for "chronically mentally ill young adults,"[168] and thus, he had some greater professional insight into Mr. Carruthers' condition. Mr. Dorsey concluded that Mr. Carruthers had an apparent serious mental illness.[169]

Jim Thomas represented Mr. Carruthers in post-conviction proceedings from 2004 through 2008. His memoranda regarding this representation were previously filed in federal district court.[170] Based on those documents, and other materials that are part of the public record, Mr. Thomas prepared a new affidavit detailing his observations of Mr. Carruthers.[171] Mr. Thomas, like Mr. Filderman and Mr. Dorsey before him, discovered that Mr. Carruthers had fixed beliefs, including (1) unshakeable beliefs in what legal arguments were meritorious (meritless ones) and which ones weren't (the ones Mr. Thomas would wish to advance), and (2) the belief that he would be immediately set free, with no new trial ordered.[172] Mr. Carruthers' belief in his imminent release was so strong, he had Mr. Thomas price a new Jaguar automobile, and made plans for his victory party in Memphis.[173] However, Mr. Carruthers also believed that Mr. Thomas and his partner, Bill Ramsey, were engaged in "Extrinsic Fraud" or "Fraud Upon the Court," and he

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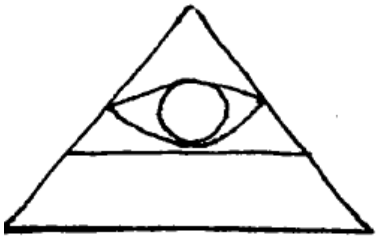
[168] *Id.* at ¶ 3.
[169] *Id.* at ¶ 8.
[170] Ex. 42, Thomas Memoranda.
[171] Ex. 43, Thomas Affidavit, Dec. 30, 2019.
[172] *Id.* at ¶ 9.
[173] *Id.* at ¶ 9.

wrote them many letters on this theme, containing numerous references to the number 3.3, whether from RPC 3.3, or Ezekiel 3.3, or "Oil #333."[174] He also put his magical pyramid on top of many of his letters.[175]

Undersigned counsel has included some exemplars from the first pages of letters, which are not submitted for their content, but only their symbology.[176] The pyramid that Mr. Thomas describes appears like this[177]:

Earlier in pleadings submitted to the trial court, and in letters to counsel, the pyramid had not "evolved" and appeared more simply as this[178]:



[174] *Id.* at ¶¶ 7, 9.
[175] *Id.* at ¶ 7.
[176] Ex. 44-49.
[177] This is a portion of Ex. 47, Example Motion to Not Have GAL 10-22-2004.
[178] This is cut from the first page of Ex. 23, Compilation of Letters to Trial Counsel, and was found on a letter to Craig Morton, dated June 5, 1995.

Previously filed in the U.S. District Court was a memo from 2010 that was prepared by an investigator in this office, Kate Tate, detailing Mr. Carruthers' behavior on a single day in April of 2010.[179] Years after Mr. Carruthers had not won immediate release with Mr. Filderman, and not won immediate release with Mr. Thomas, he continued to have fixed false beliefs that he would be released immediately and that he would be awarded millions of dollars for various transgressions.[180] Mr. Carruthers wanted Ms. Tate to look into hotel rooms in London for late July, 2010, when, presumably, he would be free, and to get him a "pre-users guide" for a particular Jaguar automobile.[181]

Concurrent with his belief that release was imminent, however, Mr. Carruthers also held the belief that his lawyers were filing frivolous motions to stall his case, and were lying and working against him.[182] Other topics of the April 2010 conversation included prayer oils, the smell of pork on other inmates, his refusal to allow Ms. Tate to talk to his family or explore mitigation, the prison's habit of reading his mail, and his discovery of a suspicious hair in a letter that Ms. Tate had sent him, which he thought should be DNA tested.[183]

To give this court a better flavor of what the lawyers described, counsel has provided exemplars of letters that contain his symbols, or display his thoughts about the various frauds. The first such letter is one

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[179] Ex. 50, Kate Tate Memo, April 21, 2010.
[180] *Id.* at 1.
[181] *Id.* at 1-2.
[182] *Id.* at 1-2.
[183] *Id.* at 2.

that our office was copied, that was sent to the Board of Professional Responsibility in regards to former counsel Michael Passino.[184] This 10-page letter opens with an apparent demand for $3.3 million dollars for four separate claims, all related to "FRAUD UPON THE COURTS," it then covers many topics and contains many complaints, including: (1) the defense lawyers are part of a civil conspiracy, (2) they have a conflict of interest that requires withdrawal, (3) the conflict is between their office and their malpractice insurance carrier, (4) there are four pending "malpractice for malfeasance and intentional negligence" claims pending, (5) they owe $*3.3* million dollars for each violation, (6) the lawyers are playing homosexual games, (7) they owe $**3.3** million as "Their interest is adverse to my claim of extrinsic fraud and fraud upon the courts!!"[185]

Also provided as exemplars are (1) the first page from a letter that contains Mr. Carruthers' "Lion of Judah" symbology, which appears infrequently, but often enough to have made an impression,[186] (2) the first page of a letter that contains his Moneyhouse with three $100

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[184] Ex. 44, Example Fraud Upon the Court letter. Mr. Passino personally prepared a release of information earlier this month, so that present counsel could obtain his entire file from the BOPR as it relates to complaints filed by Tony Carruthers. This release is attached as Ex. 51. Counsel understands the file is massive and does not expect to receive it prior to the filing of this Response. The complaint also references a second attorney, whose name is redacted from the complaint.

[185] *Id.* at 1-7.

[186] Ex. 45, Example Lion of Judah letter.

bills,[187] and (3) the first page of a letter ordering cigars for a future victory party.[188]

These documents, coupled with the observations of his attorneys demonstrate that Mr. Carruthers has been displaying delusional, paranoid, and psychotic thinking for decades, and he has been doing so in a manner that has been consistent from attorney to attorney to attorney.

C. Undersigned counsel's best description of Mr. Carruthers' present mental state.

Counsel had hoped to have Mr. Passino's Board of Professional Conduct file of complaints made against him by Tony Carruthers, prior to filing this Response.[189] Counsel believes that file contains the most current and clearly not privileged communications from Mr. Carruthers. At the time of the filing of this Response, however, counsel does not possess those records. Thus, in an effort to best describe Mr. Carruthers' present mental state (which is, ultimately, no different than it has been for the past 25 years), this section details counsel's personal observations.[190]

At this time, counsel has refrained from sharing any letters directly written to undersigned, or voice recordings left on undersigned's phone.

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[187] Ex. 46, Example Moneyhouse letter.
[188] Ex. 49, Example of Victory Cigar letter.
[189] *See* Ex. 51, Michael Passino's BOPR Release.
[190] Any and all observations of counsel that are described in this Response, are the observations of Richard Lewis Tennent, Tn.Sup.Ct.No. 16931.

Disentangling the portions of those messages that might, arguably, be attorney-client communications from matters that can be disclosed under Rule of Professional Conduct 1.14 is somewhat difficult. It has been counsel's hope that the most delusional, paranoid, conspiratorial and irrational aspects of those communications would be shared directly with examining experts by Mr. Carruthers, himself, and/or would be evident in his complaints to the Board regarding Mr. Passino.

However, in light of Mr. Carruthers' refusal to speak with Dr. Vinson, counsel feels ethically compelled to provide an overview of Mr. Carruthers' belief system. This overview is provided subject to Rule of Professional Conduct 3.3 and in light of counsel's obligation to speak truthfully, and to not make any "false statement[s] of fact."

Mr. Carruthers' deeply held beliefs, which he has consistently and repeatedly expressed throughout counsel's representation (which meaningfully commenced in October of 2018), include the following:

1. Mr. Carruthers is subject to constant surveillance by the Justice Department. All of his phone calls are intercepted, and NASA or the NSA uses voice recognition software to create contemporaneous transcripts of all that is said. These transcripts are provided to the Office of the Shelby County District Attorney, so that they can gain a tactical advantage in these legal proceedings. All phone conversations begin with Mr. Carruthers reminding the Justice Department (and/or District Attorney Amy Weirich) that they owe him $3.3 million per intercepted call. When static occurs, or Global TellLink cuts the call short, Mr. Carruthers notes that this is evidence of the intercept. He has contacted this office's IT department to request that they undertake security

measures to remove the wiretaps, and he has contacted the Public Defender Henry Martin, so that he may speak directly with the Justice Department about ending the illegal wiretap. As counsel understands it, this wiretapping issue has been raised by Mr. Carruthers since this office first began representing him, nearly a decade ago.

2. The Justice Department is also responsible for investigating "Fraud Upon the Court" and the crime of misprision of a felony, thus it is very important when speaking over the phone that he (or I) read into the Department of Justice's wiretap transcript various documents that establish the fraud. We must inform the listening Justice Department personnel that Mr. Carruthers' lawyers have failed report ethical and criminal violations committed by the Shelby County District Attorney's Office, contrary to those lawyers obligations under Rule of Professional Conduct 8.4 and in violation of 18 U.S.C.A. § 4. Mr. Carruthers believes that the Justice Department ethically MUST investigate the fraud, and even though they are illegally wiretapping his calls to assist the Shelby County District Attorney, they will also indict that same District Attorney for her office's crimes.

3. Not only is Mr. Carruthers innocent,[191] but his entire case is the product of a vast criminal fraud that involves the trial judge, the

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[191] In no way does counsel wish to suggest his claim of innocence is a delusion. As far as counsel knows, Mr. Carruthers is innocent. The evidence against him at trial was weaker than the evidence in many cases counsel successfully tried when he made his living as a trial attorney. Certainly, other than the extraordinarily dubious statement of Alfredo Shaw, no one else has heard Mr. Carruthers maintain anything other than absolute innocence.

judge's former law clerks, the prosecutors, defense attorneys, and the media. Jurors were intentionally planted, and Alfredo Shaw was paid to lie. The "Checks prove it!" Mr. Carruthers can escape this conspiracy when the Justice Department indicts the conspirators, and/or when the Board of Professional Responsibility revokes their law licenses.

4. Getting the Department of Justice to indict, or the Board to seize licenses is easy, any lawyer could have done it, and should have done it, years ago. All any lawyer needs to do is file a report regarding the fraud with the Department of Justice and/or the Board, and they will act (Mr. Carruthers' has never been able to explain why his own reports, and the transcriptions of his phone calls have not been sufficient to trigger intervention). However, all of Mr. Caruthers' lawyers, sadly including undersigned, keep failing to report the Fraud Upon the Court, and the Extrinsic Fraud to those agencies. Instead, all of his lawyers have routinely violated Rule of Professional Conduct 8.4, and have knowingly failed to report the conspiracy and the misconduct, so as to protect the Shelby County District Attorneys. Lawyers are either in direct conspiracy with the prosecutors, or (possibly in counsel's case) are just too chicken to take on that scary office.

5. To conceal the conspiracy the conspirators have murdered at least one lawyer, who was killed by one of the Trial Judge's former law clerks.

6. Just about everyone who has been involved in this case, or is aware of the frauds perpetrated as part of this case, owes Mr. Carruthers $3.3 million dollars, for each and every violation they have committed, and/or violation they have failed to report. (I am also aware that a

number of people and business entities, outside of the criminal conspiracy owe Mr. Carruthers large sums of money for various other bad acts, but I do not know the details of what they did wrong, or why they owe him so many millions).

7. To conceal the conspiracy, preserve their law licenses, dodge prison, and avoid millions in damages, the conspirators need Mr. Carruthers to accept a best interest plea. The motion to set execution dates was timed concurrent with certain other events, which were all designed to trick Mr. Carruthers into entering a plea (possibly to time-served). Mr. Carruthers will not accept a best-interest plea to time-served; he wants exoneration, as he is owed hundreds of millions of dollars in damages that he would forfeit if he pled.

8. Mr. Carruthers will win, the Justice Department and Board will intervene, the conspirators will go to prison and lose their law licenses, while Mr. Carruthers will be released as a multi-millionaire. He has the location for a home, and a model of car already selected.

9. Mr. Carruthers believes that Federal Bureau of Investigation agents desire to interview him for the purpose of creating false statements of him admitting to crimes. For this reason, all counsel and defense personnel must submit business cards to the prison staff to provide to Mr. Carruthers prior to all legal visits. This procedure must be followed for Mr. Carruthers to appear for a visit, even when he is informed by letter or telephone call of the pending visit and he has met with the legal visitor on countless prior occasions.

10. Mr. Carruthers is not mentally ill, has never been mentally ill, and any attempt by undersigned to claim he is mentally ill is fraud

upon the court, extrinsic fraud, and actionable malpractice—subject to $3.3 million in damages per violation.

This is not a complete list of Mr. Carruthers' unusual beliefs. However, these are some of those that seem most directly related to his (mis)understanding of his legal situation. These beliefs appear to be "fixed," and not subject to change despite argument, or twenty-five years of contrary evidence.

D. The four relevant (and distinct) legal standards for competency: competency to stand trial, to self-represent at trial, to waive post-conviction claims, and to be executed.

1. The *Dusky* and *Blackstock* standards for competency to stand trial; Mr. Carruthers did not have a rational understanding of the proceedings and was not competent to stand trial.

Tennessee follows the standard for competency to stand trial set-forth by the United States Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). *State v. Blackstock*, 19 S.W.3d 200, 205 (Tenn. 2000). Under these precedents, the relevant standard for competency to stand trial is whether the accused "has the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in in preparing his defense." *Blackstock*, 19 S.W.3d at 205 (quoting *State v. Black*, 815 S.W.2d 166, 174 (Tenn. 1991)). Additionally, pursuant to *Dusky* and, as required by the 14th Amendment to the United States Constitution, a defendant must (1) have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) have "a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. Conversely, the

United States Supreme Court holds that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

As has been set-forth in sections III.A-C, above, Mr. Carruthers simply did not and does not possess a rational understanding of the legal process, his legal situation, or the options available to him. Moreover, due to his mental illness, absent mood-stabilizing medications,[192] he lacked the capacity to consult with his counsel with any degree of rational understanding, or to assist in the preparation of his own defense. Plainly, Mr. Carruthers' conduct was the opposite of assisting counsel.

In his unmedicated state, Mr. Carruthers lacked the capacity for rational thought, could not assist his counsel, and could not achieve a rational understanding of the proceedings against him. Indeed, as discussed in Section II.F, above, Mr. Carruthers' behavior at trial demonstrated that he had no rational understanding of the process, or of the impact of his (irrational, illogical and self-defeating) choices on the jury.

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[192] Mr. Carruthers has successfully fought against all mental health treatment for years, so we do not have real world evidence of how he would respond to medication. However, Dr. Kenner, with decades of treating similarly mentally ill individuals, was confident that "if he had taken mood stabilizers before his trial, Carruthers more likely than not would have achieved 'chemical competency' and would have been able to assist his attorneys in his own defense." (Ex. 34 at 34).

2. The *Edwards* and *Hester* non-standards for permitting a defendant to represent themselves at trial; a seriously mentally ill individual might be competent to stand trial, but might not be competent to defend themselves; as Mr. Carruthers was plainly not competent to stand trial, he clearly was not competent to defend himself.

The United States Supreme Court, in 2008, recognized that there were a group of mentally ill defendants who satisfied the *Dusky* competency standard, but who "lack[] the mental capacity to conduct [their] trial defense unless represented." *Indiana v. Edwards*, 554 U.S. 164, 174 (2008). This Court following *Edwards* has recognized that in some cases "a defendant's communication skills may be so limited or impaired that they cannot be appropriately accommodated using means less restrictive than declining to allow a defendant to exercise his or her right of self-representation." *State v. Hester*, 324 S.W.3d 1, 32–33 (Tenn. 2010). However, both *Edwards* and *Hester* addressed the issue of when a trial court could deny a defendant the right to engage in self-representation, neither addressed what legal standard of competency would require a court to prohibit self-representation (or would prevent a court from punishing a defendant by denying them the right to counsel). This court in *Hester* explicitly stated, "The issue of whether the Tennessee Constitution would permit an exception from the right to self-representation for those 'competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves' is not before the Court in the present case." *Hester*, 324 S.W.3d at 32. Thus, this court

has not articulated the constitutional standard for determining whether a defendant is competent to represent themselves at trial (whether voluntarily or as a punishment).

Nonetheless, whether this court were to determine that a higher standard should apply, or whether the *Blackstock* and *Dusky* standards are sufficient, Mr. Carruthers is still incompetent; he simply had no capacity for rational understanding.

3. The Three-Part *Reid* Analysis for Waiver of Post-Conviction Claims; Mr. Carruthers has a serious mental disease that prevented him from understanding his legal position, and which prevented him from making a rational decision; he was not competent to waive competency during post-conviction.

The competency standard for waiving rights during post-conviction proceedings was set-forth in *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013). Broadly, does the prisoner possess "'the present capacity to appreciate [his or her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity.' The question is not whether the prisoner is able to care for himself or herself, but whether the prisoner is able to make rational decisions concerning the management of his or her post-conviction appeals. The prisoner (or the "next friend") bears the burden of proving incompetency by clear and convincing evidence." *Reid*, 396 S.W.3d at 513

(quoting *Reid v. State*, 197 S.W.3d 694, 703-05 (Tenn. 2006). In *Reid* this Honorable Court provided a three-part analysis:

> (1) Is the person suffering from a mental disease or defect?
>
> (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
>
> (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?
>
> If the answer to the first question is no[;] the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.

Id. (citing *Rumbaugh v. Procunier*, 753 F.2d 395, 398-99 (5th Cir. 1985)).

As has been developed in Sections III.A-C, Mr. Carruthers clearly has a severe mental illness, thus the first question is answered, affirmatively. Mr. Carruthers' mental illness prevents him from understanding that he is mentally ill, thus the second question is also answered affirmatively, and Mr. Carruthers was not competent to waive his competency claims during post-conviction. Moreover, his mental

illness prevents him from rationally understanding anything about his case, most especially about his own mental illness, thus he could not rationally choose between his options, thus the third question is also answered affirmatively, and Mr. Carruthers, for a second reason, was not competent to waive post-conviction competency claims.

4. Those who are unable to rationally understand the State's rationale for their execution are categorically immune from execution; Mr. Carruthers lacks this rational understanding, and is incompetent to be executed; a *Van Tran* remand is legally required.

The Eighth Amendment to the United States Constitution precludes the execution of a prisoner "who has 'lost his sanity' after sentencing." *Madison v. Alabama*, 139 S.Ct. 718, 722 (2019). (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)).

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court rejected a competency test that asked whether the prisoner was aware that he was to be executed and why he was to be executed. *Id.* at 956. The Supreme Court recognized that a defendant may be able to parrot the words that would indicate that he is aware that he will be executed for a crime, but this parroting or simple awareness does not equate to competency. *Id.*

Instead, "[t]he critical question is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.* at 958-60. "The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question,

however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.* at 958-59.

The Court in *Panetti* recognized that "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id.* at 960. In determining whether any particular defendant met the newly defined competency standard, the Court emphasized the key role of experts:

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

Id. at 962.

In 1999 this Honorable Court recognized that it possessed "an affirmative constitutional duty to ensure that no incompetent prisoner is executed." Van Tran v. State, 6 S.W.3d 257, 265 (Tenn. 1999), In light of this obligation, and seeing that there was no statutory process, this Court exercised its "inherent supervisory authority [to] set forth the procedure that a prisoner sentenced to death must follow in order to assert his or her common law and constitutional rights to challenge competency to be executed." *Id.* at 260-61. This procedure was incorporated into Tenn. S. Ct. R. 12.4(A), and modified by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). Under *Van Tran*, a defendant who is incompetent to be executed

must raise the issue with this Court in response to a motion to set execution date. This Court, in turn, will remand the case to the criminal court for the prisoner to submit proof necessary to make a required threshold showing; once that showing is met, the criminal court will appoint appropriate experts, and conduct a hearing. *Id.* at 273-74.

Counsel for Mr. Carruthers, for all the reasons that are set-forth in this section, including in sub-sections III.A-C, above, now gives formal notice that Mr. Carruthers is incompetent to be executed and should be categorically excluded from the death penalty under the United States and Tennessee constitutions. He respectfully requests that this case be remanded to the criminal court for a full and fair determination of whether Mr. Carruthers is competent to be executed.

Counsel for Mr. Carruthers further, respectfully, asks that all due process procedural protections be afforded to him during such a proceeding, including provisions that he and all relevant witnesses be given adequate time and opportunity to prepare, and to be heard. *Panetti*, 551 U.S. at 950-51. A recent examination of the truncated time frames envisioned by the *Van Tran* court suggests that the trial court must be given more leeway to comport with due process. *Van Tran*, 6 S.W.3d at 267-72. That is, as counsel reads it, the entire process from the moment of remand to the deadline for the trial court's final order is to take no more than thirty-five (35) days, and the experts will be given a total of ten (10) days from the date of their appointment to see and assess Mr. Carruthers, and to draft and file their final report. *Id.* at 269. Respectfully, those tight time frames are unrealistic, and risk preventing experts from being able to complete helpful, intelligent, complete and

scientifically valid reports. This rushed schedule also compromises the ability of the lawyers and the trial judge to engage in reasoned analysis and discourse. Counsel is not suggesting any particular time-frame, other than that the trial court be given authority to deviate from the *Van Tran* schedule.

E. No court has ever determined whether Mr. Carruthers was competent to stand trial, defend himself, or waive meritorious legal issues; until today, his competency to be executed was not ripe for adjudication.

In the trial court, prior to their removal, no lawyer for Mr. Carruthers ever sought ex parte funding for an independent psychiatric or neuropsychological exam, and no lawyer ever pled that Mr. Carruthers was incompetent to stand trial. During post-conviction proceedings, appointed counsel investigated these issues, and filed Dr. Kenner's report with the court. However, Mr. Carruthers repeatedly filed pro se pleadings objecting to his lawyers' assertion of mental health issues, and challenging their efforts to secure a Guardian ad Litem to assist them.[193] Ultimately, Judge Kurtz appointed an independent expert (suggested by post-conviction counsel), Dr. Stephen Montgomery—who never met with Mr. Carruthers, but who reviewed other reports and documents.[194] Dr. Montgomery disagreed with Dr. Kenner and Dr. Auble (despite their in-person clinical evaluations of Mr. Carruthers) and concluded that

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[193] *E.g.* Ex. 47, Oct. 22, 2004, Motion to Dismiss GAL "Frivolous!", etc.; Ex. 48, Nov. 4, 2004 Pro Se Motion to Dismiss GAL and Pro Se Claim Against the State.

[194] Ex. 52, Dr. Montgomery Report.

Carruthers merely had a personality disorder, which did not impair his ability to make rational choices, and thus he was, and had been, competent.[195] Mr. Carruthers' post-conviction counsel then submitted a Response to Dr. Montgomery's report, wherein they stated:

> Regardless of whether undersigned counsel necessarily "agree" with Dr. Montgomery's factual assumptions and the conclusions he draws from them or would otherwise seek to challenge them under different circumstances, the reality is that under the circumstances of this particular (even unique) case, Dr. Montgomery's report effectively requires Petitioner's counsel to honor Petitioner's longstanding and consistently-expressed wishes not to challenge his competency to stand trial.[196]

Subsequently, PCR counsel honored Mr. Carruthers' demands, and refrained from presenting any proof regarding Mr. Carruthers' mental illness; Judge Kurtz held that all grounds for relief based on incompetency to stand trial were waived: "The petitioner and his counsel in this proceeding have chosen purposely not to raise any issues regarding the petitioner's mental state, possible insanity defense, or competency to stand trial or waive counsel."[197]

In federal habeas corpus proceedings, counsel for Mr. Carruthers in the office of the federal public defender took the position that they were ethically required to overrule Mr. Carruthers and raise competency and

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[195] *Id.* at 15-17.

[196] Ex. 53, Response to Dr. Montgomery, filed April 5, 2005.

[197] Ex. 54, Order, Feb. 2, 2006, p. 9.

mental health issues. They sought the expert services of Dr. Agharkar and Dr. Gur (referenced, above), who collectively concluded that Mr. Carruthers had never been competent. However, the District Court ruled that Judge Kurtz's finding of waiver precluded consideration of these arguments, or of the reports of Dr. Agharkar and Dr. Gur, under the doctrine of procedural default.[198] The Sixth Circuit Court of Appeals upheld this decision, again for purely procedural reasons. *Carruthers*, 889 F.3d at 292.

Thus, no court has addressed the significance of Dr. Agharkar's, Dr. Gur's, and Dr. Kenner's conclusions. No court has held a hearing where their opinions can be tested by the State, and where any contrary opinions (such as that of Dr. Montgomery) can be subjected to cross-examination. As of today, however, Mr. Carruthers' meritorious claim of incompetency to be executed has become ripe (until the State requested an execution date, it was not ripe). *Van Tran*, 6 S.W.3d at 267.

Thus, it would be just and appropriate if this Honorable Court exercised its supervisory authority and not only remanded Mr. Carruthers' incompetency to be executed claim, but also instructed the criminal court to determine whether Mr. Carruthers had been competent to stand trial, or to represent himself.

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[198] Ex. 1, Order, Mar. 31, 2014, pp. 43-48.

F. A certificate of commutation should be issued, because Mr. Carruthers' unaddressed severe mental illness and clear legal incompetency are exactly the type of extenuating circumstances envisioned by Tenn.Code.Ann. § 40-27-106.

The proof of Mr. Carruther's severe mental illness that is set-forth in this section is overwhelming. The evidence that he lacked all rational understanding, and was manifestly incompetent to stand trial, or to represent himself, is clear. His waiver of these claims during post-conviction proceedings was entirely irrational, and utterly incompetent, and of no significance.

However, no court has ever addressed this proof on its merits. Had proof of Mr. Carruthers' incompetency to stand trial and represent himself been presented on direct appeal, Mr. Carruthers would have been entitled to a new trial—like the one won by his co-defendant, James Montgomery, who is now free and at liberty, today.

Indeed, the reasons that justified Montgomery's relief apply equally to Mr. Carruthers, once we recognize that his enforced self-representation was not punishment for contumacious behavior, but an inappropriate sanction for his unchosen mental illness:

> [Carruthers'] pro se representation [prejudiced] Montgomery's right to a fair trial. Indeed, despite the trial court's efforts, the record demonstrates that Montgomery was severely prejudiced by Carruthers' self-representation, specifically, his offensive mannerisms before the jury, his questioning of witnesses that elicited incriminating evidence, and most importantly, his calling Alfredo Shaw to testify as a witness. The prejudice to Montgomery was compounded when

> the State used and emphasized the incriminating evidence elicited by Carruthers during its closing argument.
>
> *Carruthers*, 35 S.W.3d at 553–54.

Under Tenn.Code.Ann. § 40-27-106 the irrefutable evidence of Mr. Carruthers' incompetency and mental illness amounts to an extenuating circumstance warranting commutation of his sentence. *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000). This court's previous finding that Mr. Carruthers; mentally ill, delusional, paranoid, self-defeating self-representation denied James Montgomery a fair trial, should now be extended to justify relief for Mr. Carruthers as well.

Respectfully, it would be good and just if the Certificate of Commutation were entered here.

IV. TONY CARRUTHERS SHOULD BE CATEGORICALLY EXEMPT FROM EXECUTION DUE TO SERIOUS MENTAL ILLNESS

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

opinions expressed by relevant professional organizations, and the opinion of the international community. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing *Harmelin v. Michigan,* 501 U.S. 957, 1000 (1910); *Rummel v. Estelle,* 445 U.S. 263, 274–275 (1980)).

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

The Diagnostic and Statistical Manual defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[199] "People with [severe mental illness] experience both a mental illness *and* a functional disability . . . and often have a long history of hospitalizations or intensive outpatient treatment due to severe psychological dysfunction."[200]

According to the American Psychological Association:

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

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[199] Ex. 56, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.
[200] Ex. 57, J. Sanchez et. al, *Predicting Quality of Life in Adults With Severe Mental Illness: Extending the International Classification of Functioning, Disability, and Health* (2016) 61 Rehab. Psych. 19, 20 (citations omitted).

> Manual] diagnoses most associated with SMI include schizophrenia, **schizo-affective disorder**, **bipolar disorder**[201] and severe depression with or without psychotic features.[202]

Similarly, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines "serious mental illness" as "someone over 18 having (within the past year) a diagnosable mental, behavior, or emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities."[203] The National Institute of Mental Health (NIMH)[204] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[205]

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

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[201] **Emphasis** by counsel, in light of diagnoses of Drs. Agharkar and Kenner.

[202] Ex. 58, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

[203] Ex. 59, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/find-help/disorders (last visited Dec. 22, 2019); *Mental Health and Substance Use Disorders.*

[204] Ex. 60, *Serious Mental Illness (SMI) Among U.S. Adults*, available at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited Dec. 22, 2019).

[205] Ex. 61, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited Dec. 22, 2019).

perception of the environment, accurate interpretation of the environment, and memory.[206]

B. Mr. Carruthers' psychotic disorder is a serious mental illness, which renders his conviction and death sentence unconstitutionally unreliable.

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

For this reason, in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons,* 543 U.S. 551 (2005), and *Graham v. Florida,* 560 U.S. 48 (2010), the Supreme Court identified two categories of defendants who it held could not reliably be sentenced to death: the intellectually disabled and juveniles. Because the Court's rationale resulting in those

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[206] *See* Ex. 62, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 63, § II.05 (Anxiety Disorders); Ex. 64, § II.08 (Dissociative Disorders).

categorical exclusions applies with *at least* equal force to the seriously mentally ill, execution of individuals who are seriously mentally ill is likewise unconstitutional.

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

While insisting that individualized sentencing is the lynchpin of reliability in capital cases, the Supreme Court has recognized that some qualities are inherently difficult for jurors to appropriately weigh and

consider. These facts are, by their very nature, "double edged." They should mitigate a defendant's moral culpability, but societal misconceptions about those factors create too significant a risk that they will be misused for a defendant with those qualities to be reliably sentenced to death. The *Atkins* Court determined that where a reliable assessment of constitutionally protected mitigation lies beyond the jury's ability, jurors cannot be asked to consider a death sentence.[207]

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

The Supreme Court has identified six factors that so undermine the reliability of a jury assessment of individualized characteristics that

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[207] *See*, Ex. 65, Scott E. Sunby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WILLIAM & MARY BILL OF RIGHTS JOURNAL, 21 (2014).

categorical exemption from the death penalty is required. In exempting the intellectually disabled and juveniles from capital punishment in *Atkins* and *Roper*, and juveniles from mandatory life sentences in *Simmons*, the Court established a framework for the evaluation of when a categorical ban is necessary:

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

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

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

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

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

1. **Mental illness impairs a defendant's ability to work with his counsel; and it unambiguously destroyed Mr. Carruthers' ability to even have an attorney at trial.**

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

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

Tony Carruthers, as has been shown in Section III.A-C, has always had incredible difficulty working with counsel, and has always opposed any claim that he is mentally ill. His belief that all of his attorneys have ultimately chosen to work against him, and actively wished to do him harm has significantly impaired his ability to work with counsel. In his case, his intemperate complaints about counsel led the trial court to deny him the right to counsel, entirely; while his inability to recognize his own mental illness prevented him from presenting proof of his disease at sentencing.

2. Mental illness makes a defendant a poor witness.

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

> impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe "significantly fewer bits of information about the context of the story and the events that initiated it." … [They] are less

> able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to "tell their story in the forensic context."[208]

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

If a defendant's mental illness manifests in outburst, inability to control movements, or my making inappropriate gestures or noises, the jurors may interpret such behavior as proof of a lack of remorse or as proof of dangerousness.[209] As Justice Kennedy observed in *Riggins v. Nevada*, 504 U.S. 127 (1992) (Kennedy, J., concurring), medicating a mentally ill defendant may actually make the situation worse: "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.* at 143-44.

Tony Carruthers had to do more than testify; he had to make opening and closing statements, cross-examine witnesses, and perform

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[208] Ex. 66, Michele LaVigne & Gregory Van Rybroek, "*He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships*, UNIV. OF WISC. LAW SCHOOL, SERIES PAPER No. 1228 at 4.

[209] Ex. 67, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1563 & n.22 (1998) (reporting Capital Jury Project findings describing jurors' reactions to defendants who engaged in outbursts during trial).

in front of the jury—not for a brief time as a witness, but for the duration of his trial. The jury's notes about his odd behavior (not least being his groin manipulation problem), and the irrational, counter-productive, self-defeating nature of his defense case, reveal that this second factor is very applicable to his situation.

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

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

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

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

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

Mr. Carruthers chose to put Alfredo Shaw on the witness stand, and then have him read into the record three consistent statements wherein he claimed that Mr. Carruthers had confessed to a triple murder. That was a terrible, illogical, irrational and counter-productive decision. Indeed, it was Mr. Carruthers' profoundly impaired decisions that secured co-defendant Montgomery a new trial. *Carruthers*, 35 S.W.3d at 553-54. Clearly, mental illness distorted Mr. Carruthers' decision making.

4. Mental illness is a double-edged mitigator.

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

The Capital Jury project has determined that, beyond all other aggravating factors, a jury's determination that a defendant might be dangerous in the future trumps all other considerations.[210] As the

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[210] Ex. 67, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998) (37.9% of jurors stated it would make them "much more likely" and 20%

Supreme Court noted in *Skipper v. South Carolina*, 476 U.S. 1 (1986), a jury's belief that that a defendant will adapt to prison life is key to a successful penalty phase defense. *Id.* at 4-5.

Here Mr. Carruthers' mental illness, and his unfortunate case of anogsognosia, caused the jury not to learn of his mental illness at all. They simply saw odd behavior with absolutely no context. Thus, in his case, mental illness was single-edged, as it only cut against Mr. Carruthers.

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

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

"slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 68, Marla Sandys, *Capital jurors, mental illness, and the unreliability principle: Can capital jurors comprehend and account for evidence of mental illness?* BEHAVIORAL SCIENCES & THE LAW (2018), available at https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2355 (last visited Dec. 23, 2019).

> If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having anti-social personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty.
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> *Roper*, 543 U.S. at 573.

Evidence shows that juries are incapable of reliably sifting through competing psychiatric testimony. Juries frequently view defense experts as hired guns who offer up excuses, while not discounting the opinions of prosecution experts.[211] Further, where juries have already rejected a defendant's mental health evidence in the form of an insanity or diminished capacity defense, there exists a distinct risk that the jury will be confused as to how to weigh mental illness (which it just rejected) as mitigation.

Obviously, the jury heard nothing about Mr. Carruthers' mental illness, due to Mr. Carruthers' mental illness.

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

Mental illness frequently contributes the brutality of the crime, resulting in acts that appear particularly unnecessary, aberrant, sadistic, and frightening to the jury.[212] The *Roper* Court's determination that an

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[211] Ex. 69, Scott E. Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV., 1109, 1126-30 (1997).

[212] Ex. 70, Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013) (summarizing multiple

unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

This factor does not apply to Mr. Carruthers (if counsel is correct in his belief that Mr. Carruthers did not kill anyone, and is innocent). However, to the extent he is a murderer, and simply no longer remembers or accepts that truth, then, this truly senseless, absurd, and awful crime would have to be the product of mental illness—as, unlike the Columbian drug dealers who were owed $100,000+, he had no rational motive to kill one of his friends.

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

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cases where severely mentally ill defendants have been sentenced to death).

seriously mentally ill does not violate the federal constitution, it should find that it violates the state constitution.

C. Execution of a seriously mentally ill person violates contemporary standards of decency.

The Eighth Amendment to the United States Constitution states in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Accord Robinson v. California*, 370 U.S. 662 (1962) (applying the Eighth Amendment to the individual States of the union).

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

When conducting a proportionality review, the Supreme Court evaluates a number of factors: (1) whether state legislative enactments indicate that a national consensus has emerged against the imposition of a particular punishment, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316; (2) whether trends in prosecution and sentencing indicate the practice is uncommon, *Atkins*, 536 U.S. at 316; (3) whether polling data shows the death penalty is disfavored, *Atkins*, 536 U.S. at 316 n.21; (4) whether there is a consensus among relevant professional and social organizations, *Atkins*, 536 U.S. at 316 n.21; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); and (5) how the international community views the practice, *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830.

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

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

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

The Supreme Court's analysis of the objective indicia of a national consensus with regard to exclusion of certain categories of offenders has included the states that prohibit the death penalty outright. *Roper*, 543 U.S. at 564. ("When *Atkins* was decided, 30 States prohibited the death penalty for the [intellectually disabled]. This number comprised 12 that had abandoned the death penalty altogether and 18 that maintained it but excluded the [intellectually disabled] from its reach.").

Twenty-one states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and ten additional states have an actual or de facto (ten years since an execution) moratorium on executions.[213] A national consensus is emerging, as more than half of United States jurisdictions prohibit the death penalty in practice and 60% of Americans told Gallup they preferred life imprisonment over the death penalty as the better approach to punishing murder. *Id.*

Additionally, the Supreme Court looks to the consistency of the direction of change. *Atkins*, 536 U.S. at 314. Since 2010, nine states have taken affirmative stances against the death penalty; four states have passed legislation ending the death penalty (Connecticut, Illinois,

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[213] *See* Ex. 71, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

Maryland, and New Hampshire), and six governors have imposed moratoriums on executions. (California, Colorado, Ohio, Oregon, Pennsylvania, and Washington).[214]

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

Since 2016, some of the most active death-penalty states have introduced legislation to exempt persons with serious mental illness from being eligible for the death penalty. These states include Arizona, Arkansas, Idaho, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia. In 2019 alone, nine state legislatures considered measures to ban the execution of individuals with SMI.[215]

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

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[214] Ex. 72, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

[215] *See* Ex. 71, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[216]

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

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

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[216] Ex. 73, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 74, *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 22, 2019).

(mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1)(c)(A) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (mental or emotional disturbance and capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102(j) (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity). Prior to its legislative abolishment of the death penalty in 2012, Connecticut specifically prohibited the execution of persons with serious mentally illness. Conn. Gen. Stat. § 53a-46a(h)(2).

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

Even though these states have statutory mitigating factors that allow the jury to take into count a defendant's serious mental illness, a

jury's unreliability in doing so mitigates in favor of an outright exclusion of the death penalty for persons with SMI.[217]

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

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed. *See e.g.*, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316. As discussed below, an analysis of the evolving standards of decency demonstrates that the frequency of new death sentences has decreased considerably over time for *all* defendants, not just the seriously mentally ill. Many jurisdictions that have the death penalty as an option do not impose it.[218] Numerous other jurisdictions have eliminated it altogether. In 2018, the Washington Supreme Court held that that the death penalty

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[217] *See* Ex. 65, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 2014 Wm. & Mary Bill Rts. J., Vol. 23:487, 492, 497 ("*Roper* thus strongly reinforced *Atkins*'s recognition that if circumstances prevent a juror from being able to give proper consideration to constitutionally protected mitigation, the death penalty *categorically* cannot be imposed." (emphasis in original)).

[218]Ex. 75, Pew Research Center, California is one of 11 states that have the death penalty but haven't used it in more than a decade (Mar. 14, 1999) https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ (last visited Dec. 23, 2019).

violates the state constitution, as it is contrary to the evolving standards of decency: "We recognize local, national, and international trends that disfavor capital punishment more broadly." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018). But, even in states where the death penalty continues to be a sentencing option, jurors are increasingly less likely to impose it, particularly against defendants who are seriously mentally ill.[219] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[220]

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

In addition to legislation and trends in prosecution, the Supreme Court has cited other factors in identifying a national consensus, such as the opinions of relevant professional and social organizations, polling

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[219] Ex. 67, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 76, Michelle E. Barnett, *When mitigation evidence makes a difference: effects of psychological mitigating evidence on sentencing decisions in capital trials*, 22 Behavioral Sciences and the Law 751 (2004) ("Mitigating evidence such as the defendant was suffering severe delusions and hallucinations . . . yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.").

[220] *Id.*

data, and views among the international community. *See e.g.*, *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830.

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for defendants with serious mental illness:[221]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[222]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[223]
- National Alliance on Mental Illness, *Death Penalty*.[224]
- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[225]

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[221] Ex. 77, American Psychological Association, *Associations concur on mental disability and death penalty policy*, Vol 38, No. 1, p. 14 (2007), https://www.apa.org/monitor/jan07/associations (noting the APA, the ABA, the American Psychiatric Association, and the National Alliance on Mental Illness' agreement that SMI offenders should not be subject to the death penalty) (last visited Dec. 22, 2019).

[222] Ex. 78.

[223] Ex. 79, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[224] Ex. 80, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

[225] Ex. 81, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Dec. 22, 2019).

The American Bar Association also publically opposes executing or sentencing to death the defendants with serious mental illness.[226] In 2016, the ABA published a white paper that concluded:

> The death penalty is the ultimate punishment that should be reserved for the most blameworthy individuals who commit the worst crimes - and it does not serve any effective or appropriate purpose when it is applied to individuals with severe mental illness. The Supreme Court has already recognized that there are two other categories of individuals who have similar functional impairments to people with severe mental illness that are inherently 'less culpable' to the point that it is unconstitutional to apply the death penalty in their cases. In light of this constitutional landscape, the growing consensus against this practice, and the fact that none of the current legal mechanisms afford adequate protection against the death penalty to those diagnosed with serious mental disorders or disabilities, it is time for the laws in U.S. capital jurisdictions to change.[227]

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness

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[226] Ex. 82, American Bar Association, *ABA Recommendation 122A*, Serious Mental Illness Initiative (adopted Aug. 2006), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/ (last visited 12/19/2019).

[227] Ex.83, https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Dec. 22, 2019).

exemption from the death penalty by a 2 to 1 majority."[228] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SMI.[229] In 2019, the ABA filed an amicus brief in the Nevada Supreme Court arguing that imposition of the death penalty on people with severe mental illness serves no legitimate penological purpose and asking the court to "categorically prohibit the execution of individuals who were suffering from severe mental illness at the time of their crimes."[230]

Turning to Tennessee, in 2018, the ABA published an analysis of the savings an exclusion for the mentally ill would likely generate for the state of Tennessee.[231] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like

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[228] Ex. 84, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness;
see also Ex. 85, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[229] Ex. 86, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

[230] Ex. 87, ABA Amicus Brief in Nevada Supreme Court.

[231] Ex. 88, ABA, Potential Cost Savings of Severely Mentally Ill Exclusion from the Death Penalty: An Analysis of Tennessee Data, https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf

schizophrenia, can still be subject to the death penalty in Tennessee."[232] Mr. Cody noted that defendants with SMI differ from other defendants: "In 2007, an ABA study committee, of which I was a member, conducted a comprehensive assessment of Tennessee's death penalty laws and found that 'mental illness can affect every stage of a capital trial' and that 'when the judge, prosecutor and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.'"[233]

Other community organizations oppose the execution of persons with SMI. For example, in 2009, Murder Victims' Families for Human Rights published "Double Tragedies, Victims Speak Out Against the Death Penalty for People with Severe Mental Illness."[234] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[235]

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

- Frank R. Baumgartner and Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*' THE WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the

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[232] Ex. 89, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[233] *Id.*

[234] Ex. 90, https://www.amnestyusa.org/double-tragedies/.

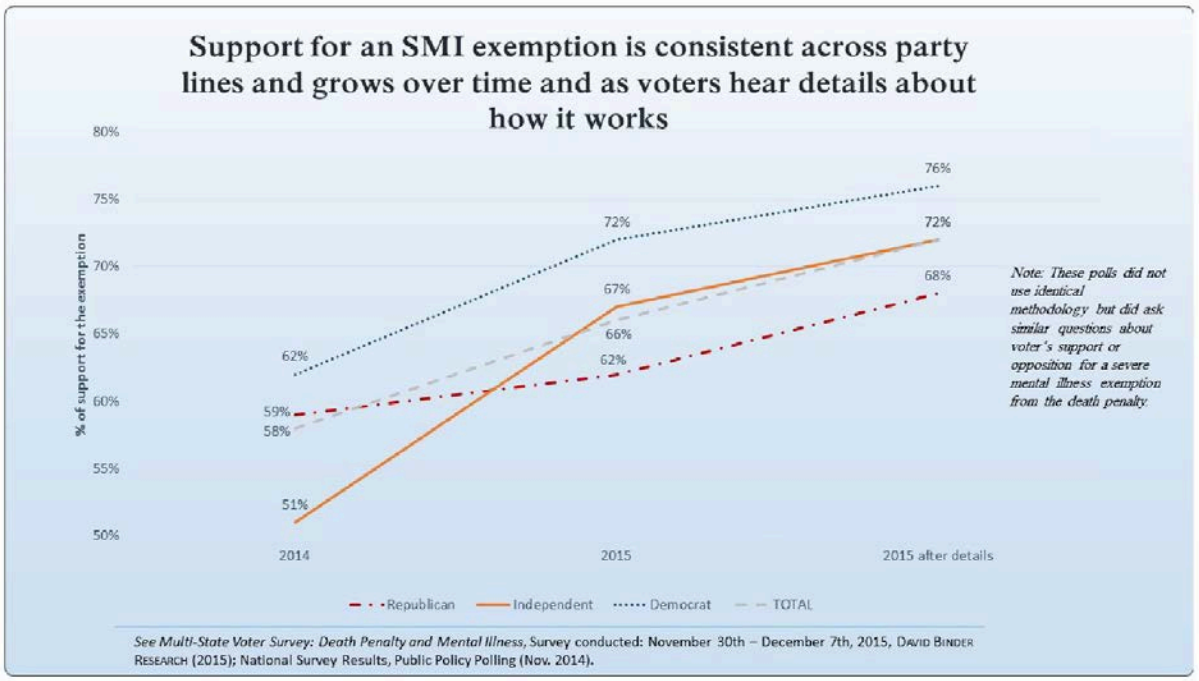
[235] Ex. 91.

death penalty actually targets those who have mental illnesses."), Ex. 92.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 93.
- Bob Taft and Joseph E. Kernan, *End the Death Penalty for Mentally Ill Criminals*, THE WASHINGTON POST, March 24, 2017 (written by two former governors (Ohio and Indiana)), Ex. 94.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 95.

Public opinion polls also support this consensus:

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



- The ABA's 2016 polling found that 66% of respondents oppose the death penalty for people with "mental illness." The rate of opposition rose to 72% when respondents learned about the details of how a "severe mental illness" exemption would work. *Id.*
- In 2014, Public Policy Polling found that 58% of respondents opposed the death penalty for "persons with mental illness"; with 28% in favor and 14% unsure.[236]

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[236] Ex. 96, Public Policy Polling, National Survey Results, https://drive.google.com/file/d/0B1LFfr8Iqz_7R3dCM2VJbTJiTjVYVDVodjVVSTNJbHgxZWlB/view.

- A 2009 poll of Californians found 64% opposed the death penalty for the "severely mentally ill."[237]
- A 2007 North Carolina poll found that 52% of respondents were against imposing the death penalty on defendants who had a "severe mental illness or disability" at the time of the crime, with only 30% being in favor of the practice.[238]

Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[239] Opposition was similar to the rate of opposition of the death penalty for the "mentally retarded (82%)." *Id.* Notably, a higher percentage of respondents opposed the death penalty for the mentally ill (75%) than for juveniles (69%). *Id.*

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with

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[237] Ex. 97, Jennifer McNulty, *New poll by UCSC professor reveals declining support for the death penalty*, University of California Santa Cruz Newscenter, Sept. 1, 2009, http://news.ucsc.edu/2009/09/3168.html (last visited Dec. 22, 2019).

[238] Ex. 98, Rob Schofield, *NC Policy Watch Unveils Inaugural "Carolina Issues Poll:" Results Show that Voters are Supportive of Public, Humane Solutions in Mental Health and Affordable Housing* (Apr. 9, 2007), http://www.ncpolicywatch.com/2007/04/09/nc-policy-watch-unveils-inaugural-"carolina-issues-poll"/ (last visited Dec. 22, 2019).

[239] *See* Ex. 99, Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* https://news.gallup.com/poll/1606/death-penalty.aspx, p.12 (last visited Dec. 22, 2019).

capital punishment to abolish it for people who suffer to "from any form of mental disorder."[240] A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[241]

The European Union has also declared that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[242] Generally, the EU opposes the death penalty for all crimes.[243]

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[240] Ex. 100, *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999), *see Press Release*, https://www.un.org/press/en/1999/19990428.HRCN938.html ("The Commission urged all States that still maintained the death penalty . . . not to impose it on a person suffering from any form of mental disorder.").

[241] Ex. 101, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[242] Ex. 102, European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000).

[243] Ex. 103, October 10, 2019, World and European Day Against the Death Penalty, https://www.coe.int/en/web/human-rights-rule-of-law/day-against-death-penalty (last visited Dec. 22, 2019).

f. Evidence of National Consensus: Mental Health Courts

Jurisdictions nationwide are adopting mental health courts that take a holistic approach to rehabilitated persons with mental illness who are in the criminal justice system. Nationwide, there are over 300 mental health courts in all fifty states.[244] At least one hundred of these courts serve felony offenders.[245] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing … [in which participants] voluntarily participate in a judicially supervised treatment plan."[246] These special courts clearly reflect a consistency in the direction of change in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded.

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[244] Ex. 104, *Adult Mental Health Treatment Court Locator*, Substance Abuse & Mental Health Services Administration, https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults (last visited Dec. 22, 2019).

[245] *Id.*

[246] Ex. 105, *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), https://csgjusticecenter.org/wp-content/uploads/2012/12/mhc-primer.pdf (last visited Dec. 22, 2019).

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

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

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

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

536 U.S. at 318.

Much like intellectual disability, serious mental illness is a persistent and frequently debilitating medical condition that impairs an

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

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

D. Conclusion:

This Court should hold that execution of severely mentally ill individuals violates the Eighth Amendment and Article I, §16 of the Tennessee Constitution, set out a procedure by which Mr. Carruthers may vindicate his claim, and remand his case to the trial court for further proceedings where he may establish the nature and severity of his mental illness and, thus, his exemption from execution. It would be highly appropriate and just to join this issue with the necessary *Van Tran* remand for determination of competency to be executed. Certainly the proof of serious mental illness that is relevant to this issue, is also highly relevant to the competency to be executed question.

V. THE DEATH PENALTY IS UNCONSTITUTIONAL DUE TO INHERENT AND SYSTEMIC RACISM.

Rooted in a racist past and currently racist in application, Tennessee's use of the death penalty violates the Eighth Amendment to the United States Constitution and Article I, §16 of the Tennessee Constitution. Nothing could be more arbitrary under the Eighth Amendment than a reliance upon race in determining who should live and die, but despite decades of judicial oversight, the application of the Tennessee death penalty statutes remain racially disparate. Racism infects the process through implicit bias in prosecutorial discretion, through the bias (both sometimes overt and sometimes unknowing) in jury selection, through the ineffective assistance of defense counsel, and through bias in the jurors' perceptions and determinations. Because

there is no way to root out this impermissible consideration of race, the death penalty is unconstitutional.

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

Since its inception in 1796, the law in Tennessee has allowed for capital punishment.[247] "Until 1913, all individuals convicted of a capital offense were hanged. There are no official records of the number or names of those executed."[248] In 1916, Tennessee progressed to electrocution as a means to end human life. Electrocution remained the sole method of execution from 1916 until 1960. During this time, Tennessee executed 125 people. Of the 125, 85 were African-American including the 31 African-American men executed for rape.[249] After decades of legal battles on the constitutionality of the death penalty and method of execution,

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[247] Ex. 106, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS,https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

[248] Ex. 107, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[249] In 1977, too late to save the 36 men Tennessee had already executed for the crime of rape, the United States Supreme Court found it unconstitutional to impose a sentence of death for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977). 455 people were executed for rape between 1930 and 1972. 89.1% of those men were black. Ex. 108, *Race, Rape, and the Death Penalty,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty

Tennessee made lethal injection the method of execution starting January 1, 1999.[250]

Parallel to the official, state-sanctioned death penalty, there has been a darker history of capital punishment in Tennessee. There have been 237 reported extra-judicial lynchings in Tennessee—the birthplace of the Ku Klux Klan.[251] Of the 95 counties in Tennessee, 59 counties have reported lynchings. *Id.* The numbers of lynching per county range from one to twenty, with Shelby County holding the record for most lynchings. *Id.* In keeping with that history, Shelby County is also responsible for nearly 50% of the current number of people on death row. The individuals lynched in Memphis include Calvin McDowell, William Stewart, and Thomas Moss.[252] After opening the People's Grocery store in Memphis, TN, a thriving business, Misters McDowell, Stewart, and Moss were confronted and jailed by law enforcement officers along with over 100 other black men. *Id.* On March 9, 1892, masked men entered the jail and removed Mr. Moss, Mr. McDowell, and Mr. Stewart and hung them in an

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[250] Ex. 106, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.
From 1960 to 2000 there was not a single execution in the state of Tennessee. Ex. 107, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[251] Ex. 109, *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/tennessee.

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

open field. *Id.* When the executioners asked Mr. Moss for his last words he stated, "Tell my people to go west. There is no justice for them here." *Id.*

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

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

> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

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

In his separate concurring opinion, Justice Stewart indicted the capital punishment system saying, "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310. The Court later found that the death penalty does not comport with the Eighth Amendment if "imposed

under sentencing procedures that create a substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Racial disparity in the application of the death penalty is unconscionable. The Supreme Court has repeatedly held that consideration of race is completely inconsistent with the dictates of justice. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *Rose v. Mitchell,* 443 U.S. 545, 555 (1979); *Castaneda v. Partida,* 430 U.S. 482 (1977); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (declaring the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states"). Contrary to the mandates of the Supreme Court, the overt racism that led to the lynching of black citizens became ingrained in the justice system. This happened, in part, because for many years the courts viewed their duty as limited to minimizing racist enforcement of the law. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman*, 408 U.S. at 257 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As Justice Black observed in *Callins v. Collins*, 510 U.S. 1141 (1994),

> [E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the

> field . . . providing no indication that the problem of race in the administration of death will ever be addressed.

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

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

> It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.
>
> ***
>
> [R]acial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

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

While blacks make up approximately 12% of the population, they account for 42% of the national death row.[253] *Id.* These disparities are well known and well documented. The death penalty is intended for the worst of the worst, (*see Harmelin v. Michigan*, 501 U.S. 957, 966 (1991)), yet research continues to show that race, not crime, is the more likely indicator for who receives the death penalty.

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

C. Implicit biases influence prosecutorial discretion in seeking death.

A defendant's journey through the legal system has but one conductor: the prosecutor. From the pretrial decisions to the final closing statement, prosecutors bring their own perspectives, strategies, and biases into each decision. The most critical of these decisions, however, is whether to seek the death penalty. Prosecutors make such decisions against the backdrop of their own worldview – including their implicit,

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[253] Ex. 110, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

unconscious biases. Studies have shown that racialized implicit biases cause associations between black citizens and violence, criminality, and aggression.[254] Whites are associated with purity and seen as victims.[255] Research shows that merely seeing a black face can trigger negative associations.[256] By the time a prosecutor has made a charging decision, she has been primed with both the race of the defendant and the victim. Similar to an implicit bias test, a prosecutor must then make choices about the charge, the strategy, plea negotiations, and, ultimately whether to seek death. If prosecutors' implicit biases align with the rest of the country's – and there is no reason to believe that they are uniquely immune – these racial associations impact every decision prosecutors make.[257] Racial priming affects charging decisions, how prosecutors perceive jurors, how they assess witnesses, what evidence they perceive

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[254] Ex. 111, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, SEATTLE UNIV. L. REV., V. 35:795.

[255] *Id.*

[256] *Id.* at 799; Ex. 112, Lisa Trei, *'Black' features can sway in favor of death penalty, according to study*, Standford Report (2006); Ex. 113, Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes.* CORNELL LAW FACULTY PUBLICATION (2006).

[257] *Id.,* Ex. 114, Katherine Barnes, et al. *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 Arizona Law Review, 305 (2009). Ex. 115, Mike Dorning, *Plea Bargains Favor Whites in Death Penalty Cases, Study Says*, WASHINGTON POST, July 26, 2000.

as exculpatory, etc. Even when not acting intentionally, a prosecutor's implicit bias becomes the lens through which she dispenses justice.

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

The history of the exclusion of blacks from jury service is long – and telling. In 1880, the Supreme Court held that statutes limiting jury service to whites are unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303 (1879). In the wake of *Strauder*, states removed the racial discrimination from their statutes, while initiating a series of facially constitutional practices aimed at achieving the same goal—preventing blacks from serving on juries. While some states began using seemingly neutral requirements such as intelligence, experience, or good moral character to keep black citizens out of the jury box, other states printed the names of black jurors on separate color paper so those names could be avoided during a putatively "random" drawing or, alternatively, utilized the jury commissioner as a proxy for the state's racism.[258]

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

> If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory

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[258] Ex. 116, Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004).

> requirement. The general attitude of the jury commissioner is shown by the following extract from his testimony: 'I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.'
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> *Norris v. State of Alabama*, 294 U.S. 587, 598–99 (1935).

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

In 1986, the Supreme Court declared any exclusion prospective jurors based on race unconstitutional. *Batson v. Kentucky,* 476 U.S.79 (1986).[259] However the Court's ruling proved difficult to enforce. In 2015, the New Yorker reported that in the approximately 30 years since *Batson*, courts have accepted the flimsiest excuses for striking black jurors and prosecutors have trained subordinates to strike black jurors without a judicial rebuke.[260] A 2010 report by the Equal Justice Initiative

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[259] Much of this section is drawn from Ex. 117, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[260] Ex. 118, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?* THE NEW YORKER, June 5, 2015.

documented cases in which courts upheld prosecutors' dismissal of jurors because of allegedly race-neutral factors such as affiliation with a historically black college, a son in an interracial marriage, living in a black-majority neighborhood or that a juror "shucked and jived."[261]

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

- A study of criminal cases from 1983 and 1993 found that prosecutors in Philadelphia removed 52% of potential black jurors as compared to only 23% of nonblack jurors.[262]
- Between 2003 and 2012, prosecutors in Caddo Parish, Louisiana — one of the most aggressive death penalty counties in the country — struck 46% of prospective black jurors with preemptory challenges, as compared to 15% of non-blacks.[263]
- Between 1994 and 2002, prosecutors in Jefferson Parish, Louisiana struck 55% of blacks, but just 16% of whites.[264]

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[261] Ex. 119, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*.

[262] Ex. 120, ACLU, *Race and the Death Penalty.*

[263] Ex. 121, Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, Reprieve, August 2015.

[264] Ex. 118, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015.

- Although blacks make up 23% of the population in Louisiana, *80%* of criminal trials had no more than two black jurors, and it notably takes only 10 of 12 juror votes to convict in that state.[265]
- A 2011 study found that between 1990 and 2010, North Carolina state prosecutors struck about 53% of black people eligible for juries in criminal cases as compared to about 26% of white people.[266] The study's authors concluded that the chance of this occurring in a race-neutral process was less than 1 in 10 trillion.[267] Even after adjusting for excuses given by prosecutors that tend to correlate with race, the 2-to-1 discrepancy remained.[268] The North Carolina legislature had previously passed a law stating that death penalty defendants who could demonstrate racial bias in jury selection could have their sentences changed to life without parole.[269] The legislature later repealed that law.[270]
- Recently, American Public Media's "In the Dark" podcast did painstaking research on the 26-year career of Mississippi District Attorney Doug Evans and found that during his career, Evans'

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[265]Ex. 119, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*.

[266]Ex. 122, Barbara O'Brian & Catherine M. Grosso, *Report on Jury Selection Study*, MICH. ST. UNIV. COLLEGE OF LAW FACULTY PUBLICATIONS, Dec. 15, 2011.

[267] *Id.*

[268] *Id.*

[269] Ex. 123, North Carolina Senate Bill 461, The Racial Justice Act.

[270] Ex. 124, Matt Smith, *"Racial Justice Act" repealed in North Carolina*, CNN, June 21, 2013.

office struck 50% of prospective black jurors, compared with just 11% of whites.[271]

- In the 32 years since *Batson*, the U.S Court of Appeals for the 5th Circuit — which includes Mississippi, Texas and Louisiana — has upheld a *Batson* challenge only twice, out of hundreds of challenges.[272]
- A survey of seven death penalty cases in Columbus, Georgia, going back to the 1970s found that prosecutors struck 41 of 44 prospective black jurors.[273] Six of the seven death penalty trials featured all-white juries.[274]
- In a 2010 study, "mock jurors" were given the same evidence from a fictional robbery case but then shown alternate security camera footage depicting either a light-skinned or dark-skinned suspect.[275] Jurors were more likely to evaluate ambiguous, race-neutral

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[271] Ex. 125, Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APMReports, June 12, 2018.

[272] Ex. 126, Ian Millhiser, *Something has gone wrong with Jury Selection in Mississippi, and the Fifth Circuit is to Blame.*, THINK PROGRESS, Apr. 5, 2018.

[273] Ex. 127, Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death penalty cases*, ATLANTA JOURNAL CONSTITUTION, Mar. 19, 2018.

[274] *Id.*

[275] Ex. 128, Justin D. Levinson, Danielle Young, *Different Shards of Bias: Skin Ton, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV., 307 (2010).

evidence against the dark-skinned suspect as incriminating and more likely to find the dark-skinned suspect guilty.[276]

- Between 2005 and 2009, prosecutors in Houston County, Alabama, struck 80% of black people from juries in death penalty cases.[277] The result was that half the juries were all white and the remainder had only a single black juror, even though the county is 27% black.[278]

Although these statistics make painfully clear that racism in jury selection is still rampant, it is very difficult for defendants to prove that a prosecutor's purportedly race-neutral reasons are pretext for racism in all but the most egregious cases. In recent years, the Supreme Court has encountered a few of these egregious cases. In 2016, the Supreme Court held 7-1 that Georgia prosecutors violated *Batson* when they used peremptory strikes to remove all four African American potential jurors from Timothy Foster's capital jury. *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016). The trial court accepted the prosecutors' purportedly race-neutral reasons for the strikes and denied Foster's *Batson* challenge. *Id.* at 1742-43. Mr. Foster, a black man, was then convicted and sentenced to death for the sexual assault and murder of a white woman, and his postconviction litigation of the *Batson* claim was unsuccessful. *Id.* at 1742. Almost 20 years later, Foster obtained a copy of the prosecutors'

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[276] *Id.*

[277] Ex. 129, Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NPR Nov. 2, 2015.

[278] *Id.*

jury selection file, and the evidence of racial discrimination contained in it was so stark that it led to almost unanimous consensus among the justices that the prosecutors' strikes "were motivated in substantial part by race."[279] *Id.* at 1743, 1755. It is noteworthy that it took 20 years for Foster to obtain evidence of the blatant racism of his prosecutors and that he had lost his *Batson* claims in many courts along the way.

In 2019, the Court encountered another egregious case, and seven justices held that a Mississippi prosecutor violated *Batson* when he struck 41 out of 42 potential black jurors throughout six different trials of Curtis Flowers. *Flowers v. Mississippi*, 139 S. Ct. 2229, 2251 (2019).[280] The Mississippi Supreme Court reversed three times (all for prosecutorial misconduct, and one specifically for a *Batson* violation), and twice the jury could not reach a unanimous verdict. *Id.* at 2236-37. The Court described the prosecutor's pattern of racist use of peremptory strikes across his trials as follows:

> Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury

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

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

> with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.
>
> The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

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

Though the courts continue to attempt to root out racism in the selection of juries, the history outlined above makes clear that racist considerations often infect the jury selection process. Such prejudice is difficult for the courts to police – often masquerading as a socially acceptable trope or commonly held belief. Because the courts cannot effectively police the considerations applied to the selection of jurors, the courts cannot eliminate racism from the process. Where a defendant's life is on the line, the risk that racism will infect the process renders the use of the death penalty unconstitutional.

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

Although prosecutors are often blamed for racial disparities in the legal system, defense attorneys are not immune to the effects of racism and implicit bias. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court

considered an ineffective assistance of counsel challenge to defense counsel's introduction of a medical expert's report counsel knew presented the view that the defendant's "race disproportionately predisposed him to violent conduct" during the penalty phase, in which "the principal point of dispute" was whether the defendant "was likely to act violently in the future." *Id.* at 775. The Court characterized the report of stating "in effect, that the color of Buck's skin made him more deserving of execution." *Id.* As to the deficient-performance prong of *Strickland*, the Court concluded that the introduction of this report "fell outside the bounds of competent representation." *Id.* As to *Strickland's* prejudice prong, the Court rejected the district court's conclusion that "'the introduction of any mention of race' during the penalty phase was '*de minimis*.'" *Id.* at 777 (quoting the district court opinion). Instead, the Court held that the expert's testimony was "potent evidence" on the penalty phase question of future dangerousness, as it

> appealed to a powerful racial stereotype—that of black men as "violence prone." In combination with the substance of the jury's inquiry, this created something of a perfect storm. Dr. Quijano's opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.

Id. at 776. Thus, the Court held, "Buck has demonstrated prejudice." *Id.* at 777. The Court held, no matter how egregious the crime, "[o]ur law punishes people for what they do, not who they are." *Id.* at 778. Using this guiding principle the Court found that use of race as a factor

to determine the future dangerousness of a defendant, regardless of which party presents that evidence, is intolerable in our justice system. *Id.* at 780. As the Court explicitly found that defense counsel introduced the expert report (and live testimony) while aware of the expert's blatantly racist conclusions, counsel was clearly infected himself with overt racism or implicit bias.

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

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

The Constitution requires that capital sentencing be individualized to each defendant's "record, personal characteristics, and the circumstances of his crime." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In *Woodson*, the Court held that in capital cases, the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process." *Id.*; *accord Kansas v.*

Marsh, 548 U.S. 163, 173-74 (2006); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983). Under the Eighth Amendment, "[w]hat is important at the [punishment] selection stage is an *individualized* determination of the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 897 (emphasis in the original).

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

> The unmistakable principle . . . is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey v. Kemp,* 481 U.S. 279, 310 (1987). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *cf. Aldridge v. United States,* 283 U.S. 308, 315 (1931); *Buck v. Davis, 137 S. Ct. 759,* 779 (2017).

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

Despite this constitutional requirement, death-qualified juries routinely consider race in making sentencing determinations.[281] Nearly

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[281] Ex. 130, David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, HANDBOOK OF PSYCH AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research indicating that a black defendant who kills a white victim has a significantly greater likelihood of receiving a sentence of death).

80% of executions are for the murder of white victims, despite blacks being as likely to be victims of murder.[282] Killers of black people rarely get death sentences.[283] White killers of black people get death sentences even less frequently.[284] And far and away, the person *most* likely to receive a death sentence is a black man who kills a white woman.[285] While white people make up less than half of the country's murder victims, a 2003 study by Amnesty International found that about 80 percent of the people on death row in the United States killed a white person.[286]

The correlation between the race of the victim and the severity of punishment exists in jurisdictions across the country:[287]

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[282] Ex. 110, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

[283] Ex. 131, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 CRIM. L. & CRIMINOLOGY 733 (2017).

[284] *Id.*

[285] *Id.*

[286] Ex. 132, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases*, Amnesty International, Apr. 23, 2003.

[287] Much of this section is drawn from Ex. 117, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

- A 2012 study of Harris County, Texas, cases found that people who killed white victims were 2.5 times more likely to be sentenced to the death penalty than other killers.[288]
- In Delaware, according to a 2012 study, "black defendants who kill white victims are seven times as likely to receive the death penalty as are black defendants who kill black victims . . . Moreover, black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims."[289]
- A study of death penalty rates of black perpetrators/white victims versus white perpetrators/black victims through 1999 showed similar discrepancies. Notably, prosecutors are far less likely to seek the death penalty when the victim is black.[290]
- A study of North Carolina murder cases from 1980 through 2007 found that murderers who kill white people are three times more

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[288] Ex. 133, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUSTON L. REV. (2008).

[289] Ex. 134, Sheri Lynn Johnson, John H. Blume, et al., *The Delaware Death Penalty: An Empirical Study (2012*), CORNELL LAW FACULTY PUBLICATIONS, Paper 431.

[290] Ex. 135, John H. Blume, Theodore Eisenberg, et. al., *Explaining Death Row's Population and Racial Composition*, (2004), CORNELL LAW FACULTY PUBLICATIONS, Paper 231.

likely to get the death penalty than murderers who kill black people.[291]

- A 2000 study commissioned by then-Florida Governor Jeb Bush found that the state had, as of that time, never executed a white person for killing a black person.[292]
- A 2004 study of Illinois, Georgia, Maryland and Florida estimated that "one quarter to one third of death sentenced defendants with white victims would have avoided the death penalty if their victims had been black."[293]
- According to a 2002 study commissioned by then-Governor Frank O'Bannon (D), Indiana had executed only one person for killing a nonwhite victim, and although 47% of homicides in the state involved nonwhite victims, just 16% of the state's death sentences did.[294]

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[291] Ex. 136, Michael L. Radelet & Glenn L. Pierce*, Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).
[292] Ex. 137, Christopher Slobogin, *The Death Penalty in Florida,* 1 ELON L. REV. 17 (2009).
[293] Ex. 138, David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Face and Perception*, 53 DE PAUL L. REV. 1411 (2004).
[294]Ex. 139, Indiana Public Defender Council, *Death Penalty Facts* http://www.in.gov/ipdc/public/pdfs/Death%20Penalty%20Factsheet.pdf (last updated 6/3/2019; last checked 12/26/2019).

- Studies in Maryland,[295] New Jersey,[296] Virginia,[297] Utah,[298] Ohio,[299] Florida[300] and the federal criminal justice system produced similar results.[301]
- A 2014 study looking at 33 years of data found that after adjusting for variables such as the number of victims and brutality of the crimes, jurors in Washington state were 4.5 times more likely to impose the death penalty on black defendants accused of aggravated murder than on white ones.[302]

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[295]Ex. 140, Raymond Paternoster, Robert Rame, et. al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2004).

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

[297]Ex. 141, *Broken Justice: The Death Penalty in Virginia*, ACLU (2003).

[298]Ex. 142, Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, NTY, Feb. 24, 1995 at. B1.

[299] Ex 143, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (2016).

[300] Ex 144, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (2016).

[301]Ex. 145, Excerpt from *U.S. DOJ Survey of the Federal Death Penalty System*, 1988-2000, available at https://www.justice.gov/archives/dag/survey-federal-death-penalty-system.

[302]Ex. 146, Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014*.

How a defendant's race affects the jury's assessment of his moral responsibility is more difficult to parse. Psychologist Samuel Sommers found that "[r]esearch examining the influence of a defendant's race on individual juror judgments has produced inconsistent results that are difficult to reconcile."[303] Studies have found everything from no effect, to bias for defendants of the same race, to even bias against or harsher judgment of defendants of the same race.[304] However, African American capital defendants suffer an extreme attribution error that whites commit when whites interpret and judge the behavior of minority group members.[305] This is based, in part, on years of media portrayal of criminal defendants (particularly defendants of color) as "others" via predatory language like "roving packs," "thugs," and "terrorists, " and the use of mug shots when reporting on suspects of color.[306]

Racist considerations infect jury rooms – often insidiously, but sometime overtly. Despite evidentiary rules that generally prevent discovery of juror considerations, the Supreme Court held that the need to ferret out juror racism trumps even long-standing evidentiary rules.

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[303]Ex. 147, Erik Ausion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 2018.

[304] *Id.*

[305] Ex 148, Rebecca Hetey and Jennifer Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, Assoc. for Psych. Science (2018).

[306] *Id.*; *see also* Ex. 149, Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 105).

Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017). For centuries, jury deliberations were a sacred space protected by the "no-impeachment rule." *Id.* at 861. Intended to promote "honest, candid, and robust" conversations, jurors were given the assurance that once their verdict was rendered, that verdict could not and would not be questioned based on the comments and conclusions they expressed while deliberating. *Id.* However, when faced with reports that a juror made racist statements during jury deliberations, the Court found that "racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule." *Id.* at 871. The *Peña* Court found that racism, is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868.

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

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

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

As Justice Blackmun once wrote,

> The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the *Furman* promise. To the contrary, where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought." Justice Brennan explained:
>
> > Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the

> death penalty, for no decision of a society is more deserving of "sober second thought."

Callins v. Collins, 510 U.S. 1141, 1154–55 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 341(1987) (Brennan, J., dissenting) (internal citations omitted)).

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

VI. TENNESSEE IS OUT OF STEP WITH THE EVOLVING STANDARDS OF DECENCY THAT HAVE LED MOST OF THE COUNTRY TO STOP EXECUTING ITS CITIZENS AND WHICH RENDER TENNESSEE'S DEATH PENALTY UNCONSTITUTIONAL.

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

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

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

Determination of the current standards of decency is not static, but instead courts must continually reassess the current standards of decency as new challenges to punishments are brought under Article I, §16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. The Supreme Court modeled the ongoing nature of this analysis in *Roper*, describing the change in the standards of decency in the 16 years between its holding that executing juveniles over 15 but under 18 was not unconstitutional in *Stanford v. Kentucky*, 492 U.S. 361 (1989), and its holding to the

contrary in *Roper* and the similar changes in the 13 years between its holding that executing the intellectually disabled was not unconstitutional in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its holding to the contrary in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Roper*, 543 U.S. at 561. As the Court summed up its task in *Roper*: "Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Id.* at 564.

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

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment . . . .

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

Here, these factors provide sufficient evidence that there is now a national consensus against the death penalty. Executions are now rare or non-existent in most of the nation. The majority of states—32 out of 50—have either abolished the death penalty or have not carried out an

execution in at least ten years.[307] An additional six states have not had an execution in at least five years, for a total of 38 states with no executions in that time.[308] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor life in prison over a death sentence.[309] Perhaps most revealing about this poll is the sea change in attitudes occurring in just the last five years. Where, in 2014, only 45% of the country favored a life sentence over death, that number has increased by 15% in only five years. Importantly, the poll also demonstrates that the shift toward favoring a life sentence is apparent in every single major subgroup:

> Since 2014, when Gallup last asked Americans to choose between life imprisonment with no parole and the death penalty, *all key subgroups show increased preferences for life imprisonment*. This includes increases of 19 points among

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[307] Ex. 150, *Indiana Marks 10 Years Without an Execution*, Death Penalty Information Center (DPIC), December 11, 2019, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[308] Ex. 151, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[309] Ex. 152, *Americans Now Support Life in Prison Over Death Penalty*, Gallup, November 25, 2019, https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx (last visited Dec. 24, 2019).

> Democrats, 16 pointes among independents, and 10 points among Republicans."[310]

Particularly significant to Tennessee, conservative Christians have also coalesced in an effort to abolish the death penalty. *Conservatives Concerned About the Death Penalty* was formed on a national level in 2013 to "question the alignment of capital punishment with conservative principles and values."[311] Tennessee has since formed its own chapter.[312] Both the national and Tennessee chapters are opposed to capital punishment for increasingly familiar reasons. *Tennessee Conservatives Concerned About the Death Penalty* cites the following concerns:

- Innocence – Since 1973, more than 150 people have been freed from death row across the country after evidence of innocence revealed they had been wrongfully convicted.[313]
- Arbitrariness – "Just one percent of murders in the United States have resulted in a death sentence over the last decade. But are

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

[311] Ex. 153, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[312] Ex. 154, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

[313] Ex. 155, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019. Ex. 170, Samuel Gross, et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017).

those individuals truly the 'worst of the worst' – or simply those with inadequate legal representation?"[314]

- Lack of deterrence –The death penalty does not prevent violent crime.[315]

Indeed, these same concerns are recognized in the recent year-end report by the Death Penalty Information Center, which noted that, "innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[316] Even more poignant, "Two prisoners were executed this year despite substantial doubts as to their guilt and [two more] came close to execution despite compelling evidence of innocence."[317] As to the unconstitutional arbitrariness of capital punishment, the report concluded:

> The 22 executions this year belied the myth that the death penalty is reserved for the "worst of the worst." At least 19 of the 22 prisoners who were executed this year had one or more of the following impairments: significant evidence of mental illness (9); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range

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[314] *Id.*

[315] *Id.*

[316] Ex. 156, *DPIC 2019 Year End Report: Death Penalty Erodes Further As New Hampshire Abolishes and California Imposes Moratorium*, Death Penalty Information Center, December 17, 2019, https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

[317] *Id.*

(8); or chronic serious childhood trauma, neglect, and/or abuse (13). Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[318]

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

> Much has changed since *Penry's* conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S. at 334. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides

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318 *Id.*

> powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon.

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

While the standards of decency of the nation as a whole have evolved towards rejection of the death penalty, Tennessee has fallen out of step with the rest of the country – particularly in the last eighteen months, during which the State has executed six of its citizens at a rate not seen since before 1960.[319] Post-*Furman* and *Gregg*, Tennessee was one of the last states[320] to resume executions when it executed Robert Coe

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[319]Ex. 157, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[320] Of states that have performed executions post-*Furman*, only three states waited longer than Tennessee to resume: New Mexico (2001); Connecticut (2005); and South Dakota (2007). Ex. 158 – *Executions by State and Year*, Death Penalty Information Center https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Dec. 24, 2019). Of those three states, two have since abolished the death penalty all-together, New Mexico doing so in 2009 and Connecticut in 2012. Ex. 159, *States with no Recent Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

on April 19, 2000 – the state's first execution in forty years.[321] The State executed another five men between 2006 and 2009.[322] And, it should be stressed that one of those men, Sedley Alley, may well have been innocent of the murder for which he was put to death – an unconscionable reality.[323] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[324] – is but one of the features of capital punishment that have led a clear majority of the country to decide that it doesn't represent our standards of decency and should be eliminated. Another, is the completely arbitrary way the death penalty is imposed. Indeed, whether based on race, poverty, or where the crime happens to take place, the imposition of the

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[321] Ex. 157, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

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

[323] Ex. 160, *Did Tennessee Execute and Innocent Man?* Nashville Scene, May 2, 2019, https://www.nashvillescene.com/news/pith-in-the-wind/article/21067050/did-tennessee-execute-an-innocent-man (last visited Dec. 24, 2019).

[324] Ex. 161, *Tennessee*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

death penalty in the United States is not reserved for the worst of the worst but is, rather, completely and unconstitutionally arbitrary.

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

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

> It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.
> *Furman v. Georgia*, 408 U.S. 238, 242 (1972).

Just a few years after *Furman*, the Supreme Court approved supposed legislative corrections designed to eliminate arbitrariness in the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Yet, time and again, these purported fixes, adopted in some form

or fashion by numerous states, have failed to actually result in the death penalty being any less arbitrary. In fact, its imposition in many cases is more arbitrary than ever. As a result, more and more states have ceased executions or abolished the practice all-together.[325]

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

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

Racial disparity in the imposition of the death penalty has actually gotten significantly worse in the last ten years, both nationally and here in Tennessee. Whereas nationally, in the ten years post-*Gregg*, 46% of those sentenced to death were people of color, in the last ten years, that number reached a remarkable 60%.[326] In Tennessee, while African-

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[325] Ten states never had the death penalty post-*Gregg*. An additional eleven states have eliminated their death penalty since that time: Massachusetts (1984); Rhode Island (1984); New Jersey (2007); New York (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016) (state supreme court found unconstitutional); Washington (2018) (state supreme court found unconstitutional); and New Hampshire (2019). Ex. 162, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[326] Ex. 163, *Death and Texas: Race Looms Ever Larger as Death Sentences Decline*, THE INTERCEPT, December 3, 2019,

Americans comprise only 17% of the state's population, 50% of the individuals on Tennessee's death row are African-American.[327] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

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

The most important factor for determining who is sentenced to death and who is not has nothing to do with the nature of the offense but, rather, where it is committed. Initially, and most obvious of course, is the fact that 21 states do not even have a death penalty. Moreover, as outlined above, an additional 11 have not executed anyone in the last ten years. And in the last five years there have been no executions in almost 80% (38 of 50 states) of the country. But it is even more revealing to take note of the death penalty by county.

Eighty-four percent (84%) of the counties in the United States have not had an execution (of an individual sentenced to death in that county)

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https://theintercept.com/2019/12/03/death-penalty-race-texas/ (last visited Dec. 24, 2019).

[327] Ex. 164, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

in the past 50 years.[328] As the graph below shows, among the counties that have had an individual sentenced to death in that county executed, Harris County, Texas—Houston—outpaces the rest by an astonishing margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [329]

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[328] Ex. 150, *Indiana Marks 10 Years Without An Execution*, Death Penalty Information Center, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[329]Ex. 165, *Executions by County*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).

When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[330]

In Tennessee, the geographic disparity is no less stark. Since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed sustained death sentences.[331] While Shelby County represents less than fourteen percent (14%) of Tennessee's population, almost half of the men on death row come from Shelby County.[332] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[333]

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

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[330] Ex. 166, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

[331] Ex. 167, *Tennessee's Death Penalty Lottery*, TENNESSEE JOURNAL OF LAW AND POLICY, Vol. 13, Summer, 2018, at 139-140, https://tennesseelawandpolicy.files.wordpress.com/2018/07/maclean-and-miller-tennessees-death-penalty-lottery1.pdf (last visited Dec. 24, 2019).

[332] Ex. 164, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[333] *Id.*

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

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

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

It wasn't until 2005 that the Supreme Court determined that our standards of decency had evolved to the point of concluding that it was unconstitutionally cruel and unusual to execute individuals who were juveniles at the time of their crime. *Roper v. Simmons*, 543 U.S. 551 (2005). And it was only three years before that the Court, also looking to our standards of decency, put a stop to executing the intellectually

disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). These realities are now so accepted by society that it is almost impossible to fathom a time when they were not. The discussion in *Roper* is instructive, as it demonstrates a clear parallel between the evolution of the standards of decency that led to the abolition of executing children and those that put a stop to executing the intellectually disabled. An identical parallel can now be seen between those evolutions and the one now evident supporting the abolition of the death penalty entirely. Indeed, reviewing how standards of decency previously evolved is particularly instructive to the argument presented here – that Tennessee is simply behind the rest of the country in recognizing that current evolving standards of decency are not commensurate with the execution of individuals who were sentenced to death in such an arbitrary way.

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

Court held that standards of decency had evolved to the point that executing the intellectually disabled was unconstitutional).

The *Roper* Court noted that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Roper*, 543 U.S. at 564. The Court then tracked the evolution of the national consensus against executing the intellectually disabled that led to its decision in *Atkins*, and conducted a similar review of the increasing number of states that had prohibited the death penalty for juveniles. *Roper*, 543 U.S. at 564-65. What, perhaps, stands out most in this portion of the *Roper* discussion is the emphasis the Court placed on the fact that, even prior to the Court declaring the death penalty for juveniles unconstitutionally cruel and unusual, the state of Kentucky made this determination on its own and commuted the sentence of the very juvenile it had previously fought for and won the right to execute.

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

Regarding *national consensus*, last month's Gallup poll revealed that 60% of the nation now prefer a life sentence over a death sentence.[334]

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[334] Ex. 168, *2019 Year-End Report*, Death Penalty Information Center (hereinafter "2019 DPIC report"), at 2 (report available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-

As to *practice within the states*, there are now 21 states without the death penalty and, as noted at the outset of this section, a total of 38 states (very nearly 80% of the country) have not had an execution in the last five years.[335] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing numbers of states sought to further limit the use of the death penalty.[336] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[337] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[338] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[339]

Perhaps most important is the *consistency in the trend towards abolition* – the type of evidence the *Atkins* Court referred to as "telling." 536 U.S. at 315. According to the Gallup poll conducted in October 2019, in only five years, the percent of individuals who favor of a life sentence

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end-reports/the-death-penalty-in-2019-year-end-report (last visited Dec. 24, 2019)).

[335] Ex. 159, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[336] Ex. 168, 2019 DPIC Report, at 2.

[337] *Id.* at 3.

[338] *Id.* at 4.

[339] *Id.*

over capital punishment rose 15%, from 45% in 2014 to 60% in 2019.[340] Moreover, this Gallup poll showed a wide demographic preference for life imprisonment over the death penalty, with majorities of men and women, whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[341] Equally consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[342]

Tennessee was one of only seven states to perform an execution in 2019,[343] and joins only Texas in having any executions scheduled for 2020.[344] Although Ohio previously had executions scheduled, the Governor suspended them in the wake of a court decision comparing its execution process to waterboarding, suffocation and being chemically burned alive.[345] Otherwise, across the United States, 2019 saw the use of

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

[341] Ex. 152, Gallup Poll at 1-2.

[342] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 162, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[343] Ex. 168, 2019 DPIC Report, at 6.

[344]Ex. 169, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[345] Ex. 168, DPIC Report, at 2.

the death penalty remain near historic lows, as there were but 22 executions and less than 40 new death sentences imposed – the fifth straight year in a row with fewer than 30 executions and fewer than 50 new capital sentences.[346]

There are now entire regions of the country without the death penalty. With New Hampshire's abolition of the death penalty in May of this year, there is no death penalty in any New England state.[347] Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[348] Indeed, the geographic disparity for determining who is executed and who is not is more striking than ever as 91% of the executions in 2019 happened in the South and 41% in Texas alone.[349] Tennessee accounted for 14% of all executions in 2019 (3 out of 22),[350] and if the nine requested execution dates are issued, that percentage will be yet higher in 2020 and 2021.

Four decades after *Furman* and *Gregg*, the cruel and unusual nature of the arbitrary imposition of the death penalty is plainly evident. Moreover, such arbitrary imposition does not satisfy our standards of decency. This much is clear from the ever-dwindling number of states—and counties—performing executions and the ever-increasing number of states abolishing the practice all-together. There is clearly a consistent,

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[346] Ex. 168, 2019 DPIC Report, at 2.
[347] *Id.*
[348] *Id.* at 3.
[349] *Id.* at 6.
[350] *Id.* at 6.

national trend towards abolition of the death penalty. As the reality of capital punishment is exposed – whether its racist and otherwise arbitrary imposition or the terrifying fact that scores of innocent people have been sentenced to death and some likely executed – a national consensus has formed declaring that capital punishment does satisfy our standards of decency.

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

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

1902) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673, 685 (1882) (same).

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

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

Id. at 635-36 (citations omitted).

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

Carruthers, therefore, respectfully requests that this Court deny the State's request for an execution date, and, instead, issue a certificate of commutation.

VII. CONCLUSION

Undersigned counsel cares deeply about Tony Von Carruthers. He does not deserve to die. He did not choose to have a serious mental illness. He never wanted, as a consequence of his mental illness, to be forced to defend himself at a trial for his life.

But, against his will, and contrary to justice, he was forced to defend himself. And, he failed. He failed, primarily, because he was not competent to defend himself. Due to mental illness he acted in a manner, and made choices in a way, that assured conviction and the death penalty.

He also failed because the jury was lied to. Alfredo Shaw lied, thrice, about a confession that never happened. The jury was lied to by a medical examiner who told them a horrific myth about three victims being buried alive—and that myth became the prosecutions' essential argument for death. And based on that since repudiated myth and that central, but false, argument, the jury imposed death.

This Honorable Court can stop this train of injustice.

Respectfully, it would be appropriate under our constitutions and our laws for this Honorable Court to (1) refuse to set a date for Mr. Carruthers' execution, (2) issue a Certificate of Commutation based on the unique and powerful extenuating circumstances that have been set-

forth in this Response, and (3) remand this case to the trial court for full and fair hearings where Mr. Carruthers' competency to be executed, competency to stand trial, competency to defend himself, and claim of exemption from execution due to Serious Mental Illness may be heard.

Respectfully submitted this 30th day of December, 2019,

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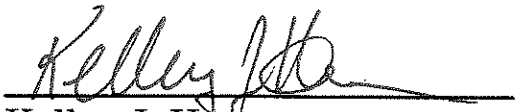
CERTIFICATE OF SERVICE

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

BY: 
Kelley J. Henry