ORIGINAL

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



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| STATE OF TENNESSEE, | ) | |
| | ) | |
| Movant, | ) | |
| | ) | |
| v. | ) | No. M2002-01798-SC-DDT-DD |
| | ) | |
| WILLIAM GLENN ROGERS | ) | **CAPITAL CASE** |
| | ) | |
| Respondent. | ) | |

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**RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE, AND REQUEST FOR CERTIFICATE OF COMMUTATION**

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FEDERAL PUBLIC DEFENDER FOR
THE MIDDLE DISTRICT OF
TENNESSEE

KELLEY J. HENRY, BPR #21113
Chief, Capital Habeas Unit

AMY D. HARWELL, BPR #18691
First Assist., Federal Public Defender
Assistant Chief, Capital Habeas Unit

KATHERINE M. DIX, BPR #22778
DREW S. BRAZER, BPR #42363
Asst. Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047

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Through counsel, Glenn Rogers files this Response in Opposition to the Attorney General's Motion to Set an Execution Date pursuant to Tennessee Supreme Court Rule 12.4(A) and (C).

## I. SYLLABUS

Mr. Rogers respectfully requests that this Court deny the State's Motion to Set an Execution Date.

First, Mr. Rogers requests that this Court not set an execution date because he is not guilty of kidnapping, raping, or killing nine-year-old Jackie Beard. For the purposes of this request, however, Mr. Rogers focuses particularly on the rape allegation, which was critical to the jury's decision to sentence him to death. In closing argument, the prosecutor twice told the jury that child rape *in and of itself* was enough to sentence him to death. There is a reasonable probability it would not have sentenced him to death but for the State's allegation that he raped her. But there was insufficient evidence that *anyone* raped Beard. The trial court violated Mr. Rogers's due process right to present a complete defense by admitting evidence and allowing cross-examination to prove he wasn't the source of the few (maybe as little as one) sperm heads on the victim's shorts. And Mr. Rogers's court-appointed trial counsel were constitutionally ineffective in failing to adequately investigate the guilt-innocence issues and mount an effective defense at trial, particularly to challenge the false testimony by the State's witness that there was "semen" in the victim's shorts.

Second, Mr. Rogers invokes his right to a hearing during which he will demonstrate that he is not competent to be executed. He is a severely

traumatized, seriously mentally ill, and brain damaged person. He requests that the hearing provide the full measure of due process—as is required by a case of this magnitude—including sufficient time to prepare and present proof of his current incompetence.

Third, because of Mr. Rogers's serious mental illness and brain damage, it would violate Article I, §§ 16 and 32 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution to execute him. In *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court identified two categories of defendants who it held could not reliably be sentenced to death: the intellectually disabled and juveniles. Because the Court's rationale resulting in those categorical exclusions applies with *at least* equal force to the seriously mentally ill, execution of individuals who are seriously mentally ill is likewise unconstitutional.

Notably, a panel of the United States Court of Appeals for the Sixth Circuit found numerous problems with Mr. Rogers's trial *and* sentencing proceedings. Even given the strictures of federal court review of constitutional claims under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Sixth Circuit concluded that he was entitled to a new sentencing hearing. *See Rogers v. Mays*, 43 F.4th 530 (6th Cir.), *reh'g en banc granted, opinion vacated*, 54 F.4th 443 (6th Cir. 2022), *and on reh'g en banc*, 69 F.4th 381 (6th Cir. 2023). Mr. Rogers urges this Court to consider carefully the panel's conclusions about the legal errors that infected his trial and sentencing hearing. The Sixth

Circuit, sitting en banc, reversed the panel's decision as a result of the highly constrained review AEDPA, as interpreted by the U.S. Supreme Court, requires when a federal court reviews a state court conviction and sentence. *See Rogers*, 56 F.4th at 389, 391–99 (describing and applying federal court deference to state court adjudications under AEDPA).

This Court, of course, is not constrained by AEDPA. As the Court with supervisory authority over Tennessee courts, this Court has the authority not to schedule an execution date where breakdowns in the judicial process resulted in a conviction and death sentence so infected with constitutional error as to give cause for a panel of the Sixth Circuit to conclude that he was entitled to a new sentencing hearing. This Court summarized its authority over the judicial branch as follows:

> As "a direct creature of the Constitution," the Tennessee Supreme Court "constitutes the supreme judicial tribunal of the [S]tate." *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976); *see also In re Bell*, 344 S.W.3d 304, 313 (Tenn. 2011). This Court has broad authority over the Tennessee Judicial Department. *In re Bell*, 344 S.W.3d at 313; *Belmont v. Bd. of Law Exam'rs*, 511 S.W.2d 461, 463 (Tenn. 1974). The General Assembly has acknowledged this Court's "broad conference of full, plenary and discretionary power," Tenn. Code Ann. § 16-3-504 (2009), and its "general supervisory control over all the inferior courts of the [S]tate," id. § 16-3-501.

*Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017).

## II. LEGAL STANDARD

### A. Tennessee Supreme Court Rule 12.4 and Tennessee Code Annotated § 40-23-119 require the Court to evaluate whether an execution can lawfully go forward.

This Court's Rule 12.4 requires the State of Tennessee to request a date of execution from the Tennessee Supreme Court before carrying out a sentence of death. Any request to a court for an execution date is subject to Tennessee Code Annotated § 40-23-119, which directs the Court to "inquire into the circumstances of" the State's desire to proceed and to ascertain whether "legal reason exists against the execution of the sentence." Tenn. Code Ann. § 40-23-119.

The General Assembly, in enacting § 40-23-119, elected not to impose a procedural or substantive structure for how that inquiry should proceed. Rather, it was commended to the discretion of the courts to exercise reasonable discretion in determining how best to make the final determination of whether a proposed execution would, in fact, be lawful. The result is that, as a matter of fundamental state policy, it is the Tennessee Supreme Court that must make a final determination regarding whether an execution may lawfully proceed.

The State of Tennessee agrees that § 40-23-119 plays this important, substantive role. In the State's recent briefing in *State v. Payne*, Case No. W2022-00210-SC-R11-CD, it repeatedly cited § 40-23-119 to argue that it would be unproblematic to leave Mr. Payne's death sentence in place, despite the fact that Mr. Payne could not lawfully be executed, because this Court would deny any request to proceed with an

execution pursuant to § 40-23-119. *See* Ex. 1, Payne Main Brief at 28, 40; Ex. 2, Reply Brief at 19. Although the State's argument in *Payne* was a bridge too far, its sentiment was correct; it is, by statute, the responsibility of the courts to be the final bar to an unlawful execution, and the relevant court, under Rule 12, is this one.

Rule 12 requires a prisoner opposing an application for a date of execution to include "any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur." Tenn. Sup. Ct. Rule 12.4(A). Under the plain text of § 40-23-119, the Tennessee Supreme Court has the authority to refuse to set an execution date for any one of those reasons, if found to be meritorious.

Nevertheless, both as a practical matter and in reflection of the Court's historical practice of avoiding the re-litigation of issues that have already been considered, *see Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000), some issues are uniquely suited to resolution under § 40-23-119. Issues that could not have been meaningfully addressed in other litigation are especially appropriate for relief pursuant to § 40-23-119, because, without action by the Court, any interests dependent on those issues will go wholly unvindicated.

### B. The standard governing the Court's consideration of the motion depends on the relief requested and the grounds raised.

Requests for a competency hearing and for a certificate of commutation have separate standards. All other issues fall within the equitable discretion of this Court.

#### 1. Issues of competence to be executed require fact-finding and must be considered by the trial court through the *Van Tran* process.

If the respondent has presented an issue regarding his competence to be executed, Rule 12.4(A) requires that those issues be considered pursuant to the structure set out in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Under *Van Tran*, "[t]his Court will not make a determination of the issue, and asserting the issue will not constitute grounds for denying the State Attorney General's motion," but, when the Court issues "the order setting the execution date, this Court will remand the issue of competency to be executed to the trial court where the prisoner was originally tried and sentenced for a determination of the issue." *Van Tran*, 6 S.W.3d at 285.

#### 2. Requests for certificates of commutation are governed by the *Workman* standard.

Rule 12.4(A) requires that a request for a certification of commutation pursuant to Tenn. Code Ann. § 40-27-106 be considered pursuant to the standards set out in *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000). Under *Workman*, the Court may issue a certificate of commutation if it finds, based on either the preexisting record or "a

combination of record facts and new evidence that is uncontroverted," that such action is warranted by the "extenuating circumstances" of the case. *Workman*, 22 S.W.3d at 808 (quoting Tenn. Code Ann. § 40-27-106).

### 3. All other issues are within the equitable discretion of the Court.

Other than with regard to the aforementioned discrete issues, neither Rule 12 nor § 40-23-119 prescribes a specific quantum of proof or persuasion for either a request for an execution date or an opposition thereto—leaving that determination to the discretion of the Court itself. *See State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (applying the "likelihood of success on the merits" standard only after holding that the request was based on collateral state court litigation).

However, longstanding principles of judicial practice suggest that the showing necessary for a delay without prejudice need not be as high as the showing necessary for a holding that no execution should ever occur. That is particularly true if the Court imposes such a delay by holding the State's motion in abeyance, rather than outright granting it. Although this Court has an obligation to resolve the State's motion at some point, the question of when it does so is fundamentally one of case management, rather than purely substance. The "broad discretion" of courts in such decisions is well-established. *See Just. v. Sovran Bank*, 918 S.W.2d 428, 430 (Tenn. Ct. App. 1995) (citing *Kelley v. Brading*, 337 S.W.2d 471, 474 (1960)). Accordingly, if the Court finds that the interests of justice warrant a delay, there is no basis for denying that delay for

failure to clear some additional threshold necessary for the award of relief.

## III. THIS COURT SHOULD NOT SET AN EXECUTION DATE.

### A. Mr. Rogers is innocent.

Mr. Rogers's court-appointed counsel failed to thoroughly investigate, develop, and present evidence that he was not responsible for the victim's disappearance and murder. Defense counsel also failed to adequately challenge the State's forensic evidence to show that he was not responsible for the crimes.

#### 1. The evidence presented at trial was constitutionally insufficient to establish that the victim was raped.

Before setting an execution date, this Court should take a close look at the sufficiency of the evidence presented at trial that Mr. Rogers raped Jackie Beard. Specifically, the trial evidence was constitutionally insufficient to establish penetration of the victim, which is an essential element for rape and for felony murder in perpetration of a rape, and which the State also used to prove the charge of premeditated murder.

On direct appeal, this Court rejected Mr. Rogers's sufficiency-of-the-evidence claim because there were sperm heads inside the crotch of her shorts; her mother testified that she had changed into clean shorts right before she disappeared; her shirt was found inside out; and there was an inference that Mr. Rogers was the last person to see her alive. *State v. Rogers*, 188 S.W.3d 593, 617 (Tenn. 2006).

> The Sixth Circuit panel, in reviewing this claim, concluded:
> This is a close case regarding sufficiency. The fact that Beard's shirt was inside out was of limited relevance because (1) it does not provide evidence of penetration; and (2) Beard's remains and clothing were scattered, which one of the state's experts explained was due to scavenging by animals. R. 25-8 (Tr. at 88) (Page ID #4493). Thus, the only evidence of penetration was the sperm on Beard's shorts, and the only evidence that Rogers was responsible for the sperm was the testimony that Beard had changed into clean shorts before she left the house, coupled with the evidence that Rogers abducted and killed her. Jurors may "draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. If, however, the evidence leads to only "reasonable speculation" about those ultimate facts, the evidence is insufficient to support a conviction. *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008). We agree with the trial court's statement that the sufficiency of the evidence of penetration was "somewhat of a 'close call.' " R. 24-5 (Order at 6) (Page ID #1173). On direct review, we might have found such evidence to be insufficient.

*Rogers*, 43 F.4th at 542–43. As a result of AEDPA deference required in federal habeas review, the Sixth Circuit rejected the sufficiency of the evidence claim, but Mr. Rogers urges this Court to decline to set an execution date as a result of the insufficient evidence of rape.

In federal court, Mr. Rogers presented significant evidence that cast doubt on what "clean shorts" likely meant in the Beard household. Had defense counsel conducted an adequate investigation, they would have discovered numerous witnesses willing to testify about the severe neglect the victim and her siblings suffered at the hands of her mother and her mother's boyfriend and about her mother's suspected involvement in prostitution. Mr. Rogers submitted in federal district court declarations from numerous teachers of the Beard children describing them as "malnourished and starved," "in desperate need of a bath," having "asphyxiating body odor," coming "to school in dirty clothes," "filthy" and being "heartbreaking." Ex. 3, Declarations. Jackie Beard's former classmate said that Jackie and Jeremy came to school in "dirty . . . ragged clothes," that they smelled bad, and that she avoided their house." *Id.* She suspected Jeannie used drugs. *Id.* Jeremy Beard told a guidance counselor that he slept with his dog, who urinated on him at night. Ex. 3 at pg. 2, Evans Decl. The guidance counselor also stated that DHS reports noted that the family moved frequently, likely due to evictions. Ex. 3 at pg.2, Evans Decl. Jeremy's former teacher said she brought a washcloth from home to wash his feet, that "no adult took care of him," and that she asked the principal to notify DHS about "parental neglect." Ex. 3 at pg. 3, Medlock Decl. Ms. Thompson, a neighbor of Jeannie Beard (Jackie's mother) described their trailer park as "rough." Ex. 4, Thompson Decl. Ms. Thompson said Jackie was always dirty and hungry and had no one taking care of her. *Id.* This neighbor said "there were always different men that came to get Jackie . . . . All those different men handling Jackie

made me nervous." *Id.* She suspected Jackie had been abused because she always flinched when touched on the shoulder and also suspected Jeannie was running a prostitution ring from her trailer. *Id.* Jackie's close childhood friend Jacqueline Rowe Edgin said her mother did not allow her to go into Jackie's house because Jackie's "parents were hoarders and that it was filthy. . . . I remember the house just being disgusting; covered with old filth. The place smelled bad, like animal feces. . . . There were cockroaches and bugs all throughout the house." Ex. 5, Edgin Decl. Ms. Edgin said Jackie would come to her house dirty and her own mother would feed her, dress her, and take care of her: "My mom always said of Jackie, 'I just want to keep her.' I really think we could have. I don't think that her parents would have fought us." *Id.*

Further, as an expert forensic biologist who testified at both trial and the post-conviction hearing testified, the presence of sperm heads on an article of clothing does not mean that semen was ever present on it, because just washing family members' clothes together can transfer a sperm head from one article of clothing to another. Ex. 6 at 248–54, Meghan Clement PC Tr.

After viewing the evidence in the light most favorable to the prosecution, no rational juror could have found beyond a reasonable doubt the essential elements of penetration, an essential element for rape and for felony murder in perpetration of a rape. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

Mr. Rogers's federal court filings include briefing on the *Jackson* claim of insufficiency of the evidence of rape and are attached here for

the Court's review. Ex. 7 at 339–44, 500–03, Rogers Resp. to Summ. J.; Ex. 8 at 105–55, Rogers Sixth Cir. Opening Br.; Ex. 9 at 1–6, Reply Br.

**2. The trial court violated his due process right to a meaningful opportunity to present critical evidence to his defense by excluding cross-examination and admission of evidence regarding prior sexual acts between the victim and her brother.**

Mr. Rogers presented new evidence in federal court that the victim's brother, Jeremy Beard, was the source of the semen found on the victim's shorts. Ex. 7 at 340, Rogers's Resp. to Summ. J. Jeremy and Jackie Beard's father "taught him how to have sex with his sister," and "watched" them. Ex. 10 at 2, Jeremy Beard Psychological Evaluation. Trial counsel never interviewed Jeremy, his family members, his foster parents, his teachers, or his juvenile counselors. Ex. 7 at 340, Rogers Resp. to Summ. J. Jeremy's foster mother signed a declaration admitted in federal court corroborating evidence about his frequent use of clothing to wipe himself off after masturbating, including frequent use of her husband's underwear. Ex. 11 at 3, M. Westerbeck-Deckle Decl. [Satyra, R. 125-6] She also corroborated that Jeremy told her he frequently had sex with the victim. *Id.* at 2. Indeed, Jeremy admitted to the federal habeas team under oath that he was the source of the semen on his sister's shorts. *Id.* Yet the trial court refused to allow Mr. Rogers' counsel to present evidence that Jeremy Beard was the source of the semen on the victim's clothing, in violation of *Chambers v. Mississippi*, 41 U.S. 284 (1973).

Mr. Rogers attaches here his Sixth Circuit Opening Brief and Reply Brief for his legal argument on his *Chambers* claim. Ex. 8 at 56–60, 123–42, Opening Br.; Ex. 9 at 6–9, Reply Br.

### 3. Trial counsel were ineffective during both the guilt-innocence stage and the sentencing hearing in failing to adequately challenge the semen evidence.

Trial counsel rendered ineffective assistance by failing to investigate the serological evidence and conduct an adequate cross-examination regarding this evidence. As the Sixth Circuit panel noted, "Every court to consider this claim has found that Rogers's counsel performed deficiently. This issue is also undisputed before this court." *Rogers*, 43 F.4th at 545 (citing Rogers's state court decisions). As the panel noted, the state post-conviction trial court concluded that trial counsel's performance was deficient:

> The testimony of Ms. Clement and Mr. Squibb at the [post-conviction] hearing reveals certain deficiencies in Mr. Warner's cross-examination of those witnesses at trial. Mr. Squibb's testing produced evidence favorable to the petitioner, but counsel did not present some of this evidence to the jury. For instance, the jury did not hear there were very few (or "rare," the term used by the TBI lab to denote fewer than ten) sperm heads found on the microscopic slides developed from the victim's shorts. Mr. Squibb was also not asked about his testing for semen in great detail; the jury heard no information about the mechanics of the acid phosphatase test

> (color changes, timing, etc.) or that Mr. Squibb's acid phosphatase test yielded a "weak" positive result. The jury heard nothing about the P30 antigen as it related to seminal fluid or that Mr. Squibb's testing yielded negative results for P30. The jury also did not hear that very little DNA was derived from the stains taken from the victim's shorts. Perhaps most relevant, counsel for the petitioner did not present evidence attacking Mr. Squibb's conclusion that the presence of sperm cells necessarily indicated the presence of semen. Given Ms. Clement's testimony and the publication of the washing machine study in the Canadian forensic journal—an article published some four years before the trial in the instant case—such evidence was available to counsel.

*Id.* (quoting the post-conviction trial court order). Clement testified at the post-conviction hearing that a 1996 article published in the Canadian Journal of Forensic Sciences suggested spermatozoa could transfer in the washing machine from soiled to unsoiled underwear—the "washing machine study." *Id.* at 545 n.5 (citing post-conviction transcript).

The Sixth Circuit panel described the deficiency of trial counsel's performance as follows:

> Although, as discussed above, the sperm evidence was the only evidence of penetration, Rogers's counsel "wasn't as concerned about" the semen evidence, R. 26-9 (Tr. at 83–84) (Page ID #8154–55), and did not ask Squibb "about his testing for semen in great detail." Rogers III, 2012 WL 3776675, at

> *46 (agreeing with post-conviction court). Counsel also failed to "present some of this [favorable] evidence to the jury," including evidence that called into doubt whether the presence of sperm indicated the presence of semen. Id.; R. 26-9 (Tr. at 83) (Page ID #8154). Further, although a P30 test is used to indicate the presence of semen and although Squibb's P30 test was negative, meaning that it did not indicate the presence of semen, Rogers's counsel, at trial, established "nothing about the P30 antigen as it related to seminal fluid or that Mr. Squibb's testing yielded negative results for P30." R. 26-8 (Order at 59) (Page ID #7921). In fact, Rogers's counsel later admitted that he did not even know what P30 is. R. 26-9 (Tr. at 89) (Page ID #8160). Because of these inadequacies, counsel's performance was deficient.

*Id.* at 546.

The Sixth Circuit panel concluded that the Tennessee Court of Criminal Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984): "Rogers did not need to 'eliminate or completely discredit' this evidence to undermine confidence in the jury verdict. This is not a case in which there was substantial other evidence pointing to rape." *Id.* at 547 (citations omitted). The panel found:

> Because penetration—a necessary element of the rape conviction—was "only weakly supported by the record," it was "more likely to have been affected by errors than [a conclusion] with overwhelming record support." Strickland,

> 466 U.S. at 696. In short, where (1) the trial court acknowledged that whether there was sufficient evidence to support a rape conviction was a "close call," R. 24-5 (Order at 6) (Page #1173); (2) counsel's performance was undisputedly deficient by failing to undermine the only evidence of penetration; and (3) penetration is a necessary element of the rape conviction, it follows that (4) the state court unreasonably applied *Strickland* when it determined that counsel's deficient performance did not render the rape conviction unreliable.

*Id.* at 547–48. Nonetheless, the panel concluded that there was no prejudice at the guilt-innocence stage: "Because all three murder convictions were merged, this error could not undermine Rogers's conviction for murder." *Id.* at 548.

However, the panel concluded that counsel's deficient performance *was* prejudicial at the penalty phase, *id.* at 548–51:

> As explained above, even under AEDPA's deferential standard, we cannot be confident that, in the absence of counsel's errors, Rogers would have been convicted of rape. We thus consider de novo the impact of removing this rape conviction. Eliminating the statutory aggravator for rape would have removed the most powerful aggravating factor and would have likely caused the jury to weigh the aggravating and mitigating factors differently. Murdering a child is an unspeakably tragic crime. But raping and then

> murdering a child is altogether more heinous. Thus, on de novo review, we conclude that there is a reasonable probability that, to at least one juror, this difference mattered.

*Id.* at 551.

Again, the Sixth Circuit sitting en banc reversed the panel's grant of the writ with respect to this claim on the basis that the panel had not complied with AEDPA's deferential requirements. But this Court is not so constrained and can right this constitutional violation by not setting an execution date.

**4. Because child rape is a uniquely heinous allegation, and because child rape was the centerpiece of the prosecution's case at the penalty phase, Mr. Rogers was prejudiced by his counsel's constitutionally deficient performance.**

As the Sixth Circuit panel concluded, with child rape removed as a potential aggravating circumstance, there is a reasonable probability at least one juror would have reached a different decision at the penalty phase. Rape of a child stands apart from most any other crime as an aggravating circumstance for imposition of the death penalty. In holding imposition of the death penalty was unconstitutional for the sole crime of child rape, the Supreme Court cautioned that child rape was a crime that "will overwhelm a decent person's judgment" when that person is asked to weigh aggravating and mitigating factors. *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008). Indeed, child rape was the last non-homicide crime against a person for which the Supreme Court found the death penalty to be unconstitutional. *See id.* The Supreme Court came to that decision

more than three decades after it held that the death penalty could not be imposed for the rape of an adult. *See Rogers*, 43 F.4th at 549 n.7 (citing *Coker v. Georgia*, 433 U.S. 584 (1977)).

The Supreme Court's judgment and observations are backed up by empirical data. Capital sentencing juries regularly refuse to impose the death penalty against defendants convicted of brutally murdering children where there is no allegation of rape. A recent law review article summarizes more than seventy cases from 1979 to 2017 in which juries rejected the death penalty for defendants who were convicted of killing children. *See* Russell Stetler, *The Past Present & Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, 1229–38 (Appendix 2) (2018). Despite convicting defendants of the following brutal violence against children, these juries nonetheless rejected the death penalty:

- Murder by strangulation of two infant sons; sent photo of youngest son's hanged body to estranged wife
- Murder of defendant's three children by slitting throats with a butcher knife
- Murder of defendant's five children by smothering
- Kidnap and murder of 15-year-old girl
- Triple murder for hire, including quadriplegic eight-year-old child
- Execution-style murder of a two-year-old girl and 14-year-old girl in their home in front of their mother
- Murder of five-year-old child by beating her to death

- Murder of five children by drowning them in the bathtub

*Id.* This data demonstrates that if the rape of a child is removed from a jury's sentencing decision, a jury that considers particularly heinous circumstances in connection with the murder of a child often chooses not to impose the death penalty.

That child rape is a uniquely heinous allegation is proven not only by legal principles, instinctive reactions, and sentencing data, but also by the prosecution's closing argument in Mr. Rogers's trial. Rape was the centerpiece of the prosecution's argument for imposition of the death penalty. The prosecution argued at the penalty phase that rape was unique among the statutory aggravating circumstances, twice telling the jury that child rape "in and of itself" merited a death sentence.

> *Because he raped the child*, he had to remove her from this county, and take her some place where he would hope that she would never, ever be found. . . . And the reason for that, ladies and gentlemen, because of this aggravator, *which is so powerful in and of itself that will convince you—convict this man and sentence him to death*, because he did not want to see her come through that door back here, walk up that aisle right here, wearing her Minnie Mouse shirt and those teal shorts and those little sandals that she had on, walk up here, take the oath and get in that chair and point the finger of guilt to this man. That's why, that's why he killed her. And ladies and gentlemen, *that is enough in and of itself to sentence him to death.*

Ex. 12 at 7–8, State's Closing Argument (emphasis added). In this case, the uniquely prejudicial impact of the allegation of child rape need not depend on any particular judge's view of how heavy that aggravating factor weighs in a reasonable juror's mind. The prosecutor cemented the uniquely prejudicial value of that allegation in his closing argument to the very jury that sentenced Mr. Rogers to death.

Combine the absence of rape as an aggravating factor with the extensive mitigating evidence presented at trial, and the prejudice to Mr. Rogers at the penalty phase is unassailable. Even the State's Sixth Circuit brief acknowledged the power of Mr. Rogers's mitigating circumstances. Petitioner's sister "vividly recounted" in "often emotional testimony" about how Mr. Rogers's stepfather abused him "in horrific fashion." Ex. 13 at 57, State's Brief. Mr. Rogers's stepfather "physically assault[ed] him to the point of near unconsciousness" and "frequently chained [him] to his mattress as a form of punishment . . . without food and forced to relieve himself on the mattress." *Id.* at 57–58. Mr. Rogers's sister Sam would sneak food to him through a hole in her closet. *Id.* at 61. His stepfather shoved his face into a urine-soaked mattress, rubbed human feces in his face, and attempted to drown him in a bathroom. *Id.* at 58. As a result of this horrific and incessant abuse, from a very young age and continuing into adulthood, Mr. Rogers acted as if he were a wolf, including in elementary school where his principal testified he would "howl, bite, and hit other children." *Id.* at 61.

Because Tennessee is a "weighing" state, where the jury must find beyond a reasonable doubt that aggravating factors outweigh mitigating

circumstances in order to impose the death penalty, the prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance." *Lundgren v. Mitchell*, 450 F.3d 754, 770 (6th Cir. 2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523–28 (2003)). If the prosecution had not been able to highlight child rape as an aggravating factor—one that "in and of itself" ought to lead to a death sentence—at least one juror would have struck a different balance of aggravating factors and mitigating circumstances at the penalty phase.

### B. Mr. Rogers is incompetent to be executed.

#### 1. Competency Standard

The Eighth Amendment to the United States Constitution precludes the execution of a prisoner "who has 'lost his sanity' after sentencing." *Madison v. Alabama*, 586 U.S. 265, 268 (2019) (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)). Put another way, *Ford* holds that the insane are categorically excluded from the death penalty under the Eighth Amendment to the United States Constitution. *Madison*, 586 U.S. 268. Because the insane are constitutionally excluded from the death penalty, the State of Tennessee is prohibited from executing an insane person. *See id.*; *see also Van Tran v. State*, 6 S.W.3d 265, 257 (Tenn. 1999) ("[T]his Court has an affirmative constitutional duty to ensure that no incompetent prisoner is executed."); *Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 618 (6th Cir. 2006) (Cole, J., concurring) ("It is undisputed that the state cannot execute [the defendant] if he is incompetent.").

The rationale for the decision in *Ford* and its progeny is rooted in the common law and the Eighth Amendment. "Surveying the common law and state statutes, the Court found a uniform practice against taking the life of [an insane] prisoner." *Madison*, 586 U.S. at 268. The *Madison* Court observed that the bar against the execution of the insane is "time-honored" because to do so "simply offends humanity." *Id.* at 267-68 (quoting *Ford*, 477 U.S. at 407, 409). Further, the Supreme Court recognizes the "natural abhorrence" of "civilized societies" to the execution of this category of defendants. *Id.* at 268. Moreover, there is no retributive purpose to executing the insane. *Id.*

Additional considerations support excluding the insane from execution. There are religious underpinnings to the prohibition against executing the insane. Commentators observed that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it[.]" *Ford*, 477 U.S. at 407 (quoting Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685)) (internal quotation marks omitted). Further, the goal of deterrence is not served by the execution of the insane. *Id.* at 407. "It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus solo furore punitur*." *Id.* at 407–08.

In the years since *Ford*, the states have struggled with defining the scope of the category of those individuals who are "insane" and therefore ineligible for execution. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court rejected the Fifth Circuit Court of Appeals' test, which asked whether the prisoner was aware that he was to be executed

and why he was to be executed. *Id.* at 956. In *Panetti*, the Fifth Circuit Court of Appeals concluded that a prisoner could not present evidence that his mental illness "obstruct[ed] a rational understanding of the State's reason for his execution." *Id.* The Supreme Court held that this standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 956-57.

In essence, the Supreme Court acknowledged in *Panetti* that a defendant may be able to parrot the words that would indicate that he is aware that he will be executed for a crime, but that does not end the inquiry.[1] The Eighth Amendment requires more. Specifically, it requires that a defendant rationally understand what is about to happen to him *and why*. If a defendant's delusions prevent a rational understanding of his execution and the reason for it, then the Constitution places a substantive prohibition on his execution. "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." *Panetti*, 551 U.S. at 960. Although the Court did not adopt a rule governing all competency

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

determinations, it did conclude "[i]t is . . . error to derive from *Ford* . . . a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." *Id.*

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

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

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

In *Madison*, the Court re-affirmed the competency to be executed exclusion and clarified the scope of the category. The defendant in *Madison* suffered from dementia and, as a result, had no memory of the offense for which he was to be executed. According to the Court, "[t]he first question presented is whether *Panetti* prohibits executing Madison merely because he cannot remember committing his crime. The second question raised is whether *Panetti* permits executing Madison merely because he suffers from dementia, rather than psychotic delusions." *Madison*, 586 U.S. at 274.

The Court observed that the test for competency was clarified and adopted by the majority in *Panetti*, and that test "is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's rationale for [his] execution.'" *Madison*, 586 U.S. at 269 (quoting *Panetti*, 551 U.S. at 958–59). The Court concluded that memory loss due to dementia, by itself, does not meet this test. However, "a person suffering from dementia may be unable to rationally understand the reason for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 586 U.S. at 274-75. The Court emphasized that the critical question is whether the defendant has a "rational understanding." *Id.* at 275.

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

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

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

*Madison*, 586 U.S. at 277 (emphasis added) (internal citations omitted). The etiology of the defendant's lack of rational understanding is irrelevant to the analysis: "*Panetti* framed its test . . . in a way utterly indifferent to a prisoner's specific mental illness. The *Panetti* standard concerns . . . not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Madison*, 586 U.S. at 278. The Court held:

> [A] judge must therefore look beyond any given diagnosis to a downstream consequence. As *Ford* and *Panetti* recognized, a delusional disorder can be of such severity—can "so impair the prisoner's concept of reality"—that someone in its thrall will be unable "to come to grips with" the punishment's meaning. *Panetti*, 551 U.S. at 958; *Ford*, 477 U.S. at 409. But delusions come in many shapes and sizes, and not all will interfere with the understanding that the Eighth Amendment requires. *See Panetti*, 551 U.S. at 962 (remanding the case to consider expert evidence on whether the prisoner's delusions did so). And much the same is true of dementia. That mental condition can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him. . . . But dementia also has milder forms, which allow a person to preserve that understanding. Hence the need—for dementia

> as for delusions as for any other mental disorder—to attend to the particular circumstances of a case and make the precise judgment *Panetti* requires.

*Madison*, 586 U.S. at 279.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court created the procedure under which state and federal claims of competency to be executed are raised and litigated. This procedure was affirmed in *Coe v. State*, 17 S.W. 3d 191 (Tenn. 2000), adopted in Tenn. S. Ct. R. 12, and modified by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). Under *Van Tran*, a defendant who is incompetent to be executed must raise the issue with this Court in response to a motion to set execution date. This Court, in turn, will remand the case to the criminal court for the prisoner to submit proof necessary to meet the required threshold showing. Once that showing is met, the criminal court will conduct a hearing.

Mr. Rogers gives notice that he is incompetent to be executed and categorically excluded from the death penalty under the United States and Tennessee Constitutions. This case must therefore be remanded for a full and fair evidentiary hearing under Tenn. S. Ct. R. 12 (4)(a); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Coe v. State*, 17 S.W. 3d 191 (Tenn. 2000) and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

**2. As the result of lifelong trauma and head injuries, Mr. Rogers suffers from serious mental illness and brain damage.**

Mr. Rogers's serious mental illness and brain damage prohibit him from having a rational understanding of his impending execution and the

reasons for it; thus, he is incompetent to be executed. Mr. Rogers presented the federal district court with copious evidence of the extreme trauma he has endured and his serious mental illness and brain damage. Ex. 7 at 1–145, Rogers's Summ. J. Mot. Resp. He attaches it here for the Court's consideration. What follows is a summary of Mr. Rogers's serious mental illness and brain damage.

**a. Mr. Rogers is a severely traumatized person.**

Mr. Rogers had a shockingly abusive childhood, which Bethany Brand, Ph.D., a trauma expert retained during federal habeas corpus proceedings, described as follows:

> [Mr. Rogers's step-father] Big Danny's beatings were so severe Mr. Rogers believed he would be killed. . . . The beatings were so uncontrolled that they reportedly resulted in the loss of consciousness on several occasions, including an incident at age 10 when his stepfather hit him on the head with an aluminum bat. Big Danny employed other forms of terror and humiliation frequently, such as chaining Mr. Rogers to the bed for long periods of time with only a bucket for elimination. Another particularly terrorizing incident involved Big Danny burying Mr. Rogers in a hole in the backyard. Then Big Danny drove a large, loud lawn mower all around Glenn, terrifying him into a state of panic and likely dissociation. Even as a grown man, Mr. Rogers cried and shook as he recounted this incident to me. He began to go into a flashback with observable hyperventilaton and panic as he

> spoke of this sadistic torture three decades later. . . . This level of conditioned terror-based responding is one form of corroboration that an individual has experienced severe trauma. Numerous family members, neighbors, and friends corroborated that Mr. Rogers and his sister Mildred/Sam were chronically and severely abused and neglected by their mother and step mother. . . . In addition to chronic, extreme emotional and physical abuse at home, Mr. Rogers suffered additional abuse at the hands of caretakers, staff, and peers during placements in an authoritarian, unlicensed group home and two juvenile residential facilities. This abuse has been corroborated in newspaper articles, lawsuits, and first-person declarations from former inmates and staff.

Ex. 14 at 7, Dr. Bethany Brand Report.

According to Mr. Rogers's sister Sam, Big Danny started physically abusing them both when Mr. Rogers was only four or five years old. Ex. 15 at 112–13, 138–39, Trial Tr. (Sam Roger). She also reported that Big Danny chained Mr. Rogers to the bed for days on end, and if Mr. Rogers soiled the bed or his pants, Big Danny would rub Mr. Rogers's face in the urine or feces. *Id* at 119–25, 130. Sam also believed that Big Danny forcibly gave Mr. Rogers enemas. *Id.* at 133–36.

Big Danny would pick Mr. Rogers and his sister up by their necks, raise them high, and slam them against a wall and drop them. Sometimes Glenn passed out after being slammed against the wall. Ex. 14 at 12, Dr.

Bethany Brand Report. Big Danny once broke Sam's dog's neck in front of her. *Id.* at 14. Dr. Brand stated,

> While I have encountered extraordinarily abusive families that kill children's pets as a form of one of the most cruel and terrifying acts of abuse, this case is one of the most extreme cases I have encountered during 25 years of specializing in trauma and dissociative disorders. The grown children from families where the abuser(s) were this sociopathic and so utterly invested in control and humiliation of children are among the most damaged of all the victims of abuse I have assessed.

*Id.*

Dr. Brand described the trauma Mr. Rogers has experienced in his life:

> He has an extensive history of well-documented, well-corroborated severe and complex abuse, neglect, and betrayal beginning in his early childhood years and continuing throughout his development into adulthood. The types of abuse he endured throughout his childhood include pervasive emotional abuse, physical abuse, sexual abuse, and parental neglect. His family and home environment was characterized by extreme chaos, instability, violence, and poverty . . . .

Ex. 14 at 7.

After Dr. Brand conducted extensive testing and clinical interviews, and reviewed records, prior testing, and evaluations, she found that Mr.

Rogers experienced all 10 adverse childhood experiences (ACEs), which is only true for 0.1% of the general population; he experienced severe poverty, extreme physical abuse, parental abandonment, a parent's mental illness, a family member's imprisonment, parental domestic violence, parental substance abuse, humiliation by family members, lack of family support, and likely, sexual abuse. *Id.* at 26. His exposure to all 10 ACEs "absolutely devastated his social and emotional development, and his medical well-being." *Id.* Dr. Brand concluded: "Even as an expert in trauma who has assessed hundreds of individuals, I have encountered few people who have experienced this level of abuse and neglect within the family, community, foster care, and juvenile and criminal justice systems." Ex. 14 at 3.

James Garbarino, Ph.D., another trauma expert who evaluated Mr. Rogers during federal habeas proceedings, concluded that he suffered from complex trauma: "Unlike acute traumatic experiences, complex trauma involves early chronic danger and repeated, overwhelming violent and abusive experiences." Ex. 16 at 30, Garbarino Report. "[t]he torture Glenn Rogers experienced growing up was . . . such an insurmountable developmental challenge because it constituted massive doses of psychological maltreatment (as well as physical and sexual abuse)." *Id.* at 9, 18. "[F]or the most part, messages of rejection, terror, humiliation, isolation, and degradation do the bulk of the damage (neurologically, emotionally, cognitively and developmentally)." *Id.* at 20. When psychological maltreatment occurs alongside physical or sexual abuse, the impact is significantly more severe. *Id.* at 21.

As a result of his traumatic upbringing, Mr. Rogers suffers from "severe" PTSD, with "very high levels of intrusive symptoms, including intrusive memories, flashbacks, and nightmares which he attempts to manage by habitual and almost total avoidance of anything related to his traumas, including by dissociating." Ex. 14 at 2, 33, Brand Report; Ex. 17 at 6, Agharkar Report. He is in the 99th percentile for frequency and severity of intrusive, unwanted thoughts or memories related to past trauma, nightmares, and flashbacks. Ex. 14 at 27, Brand Report. He "relives traumatic events so vividly that he loses awareness of where he actually is and the current circumstances of his life." *Id.* Brand saw him go into a flashback during her two-day assessment; she saw "signs of traumatic re-experiencing as he talked about the abuse he experienced as a child. This level of conditioned terror-based responding is one form of corroboration that an individual has experienced severe trauma." *Id.* at 7, 23–24.

**b. Brain scans confirm the extent of Mr. Rogers's brain damage.**

In addition to trauma, Mr. Rogers also experienced multiple serious head injuries, as summarized by developmental neuropsychologist Joette James, Ph.D.:

> He reportedly fell off the top berth of a bunk bed onto a concrete floor as an infant or toddler. . . [H]e received severe beatings by his stepfather that resulted in loss of consciousness on several occasions. . . . [A]t the age of 10, when his stepfather hit him in the back of the head with an

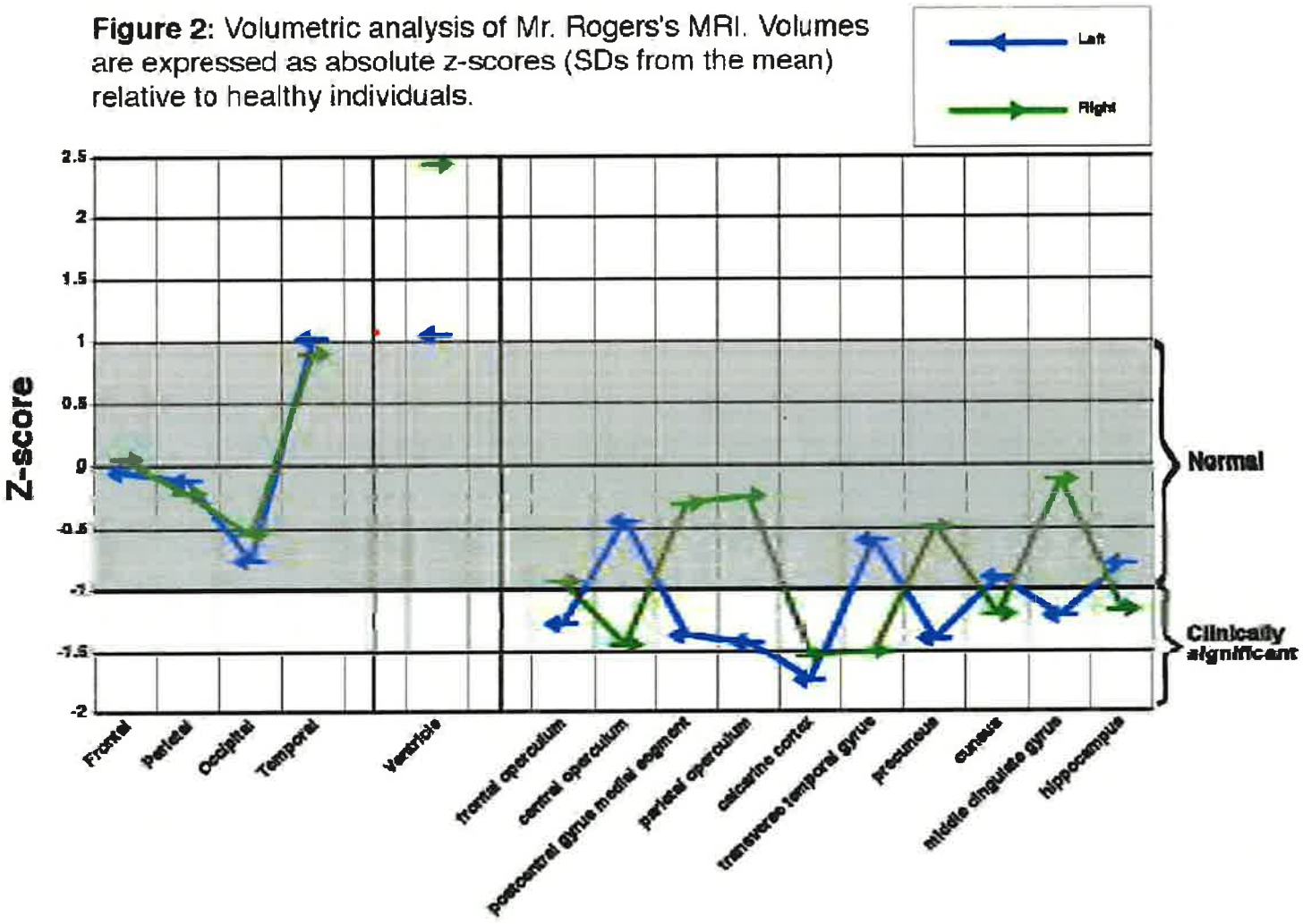
> aluminum bat. He . . . lost consciousness for about four hours. He . . . experienced dizziness and poor balance for approximately two weeks after this incident, and he continued to have throbbing headaches one month later. Mr. Rogers also reported . . . loss of consciousness in late 1982, early 1983 when he was hit in the head by a metal bar during a prison riot; he recalled awaking in the commissary four to five days later. He also reported loss of consciousness during a car accident in 1982, when he fell asleep at the wheel and drove the car into a ditch. He remembers awakening in a hospital in Baton Rouge and being very disoriented and not able to recall his name or personal details. . . . [H]e received a neurological evaluation and later experienced severe headaches. In 1988, Mr. Rogers was . . . struck by a pickup truck, spun around, and then hit by a smaller car. Mr. Rogers lost consciousness and an emergency vehicle transported him to the hospital with a bleeding head. The medical records note that he received sutures in his scalp. While incarcerated in Georgia, Mr. Rogers was involved in several fights which included blows to the face and head. Reports indicate that Mr. Rogers' nose was broken on five separate occasions and that he complained of frequent headaches.

Ex. 18 at 3, James Report.

Vanderbilt University Medical Center performed MRI and PET scans in 2014. The analysis of the MRI conducted by neuropsychologist

Ruben Gur, Ph.D., shows that Mr. Rogers has marked brain abnormalities, particularly on the left side:

**Figure 2:** Volumetric analysis of Mr. Rogers's MRI. Volumes are expressed as absolute z-scores (SDs from the mean) relative to healthy individuals.




Ex. 19 at 2, Gur Report. This graph confirms his brain has "reduced volume" compared to most people to a "clinically significant" degree. *Id.* PET images show abnormal brain activity: Mr. Rogers has too little activity in his limbic structures, most notably the hippocampus, amygdala, and corpus callosum, and too much activity in the cortical structures, particularly in the occipital regions and the thalamus. *Id.* at 3–4.

Dr. Gur's Behavioral Imaging, which depicts the results of neuropsychological testing, shows the areas of Mr. Rogers's neurological impairment: [2]

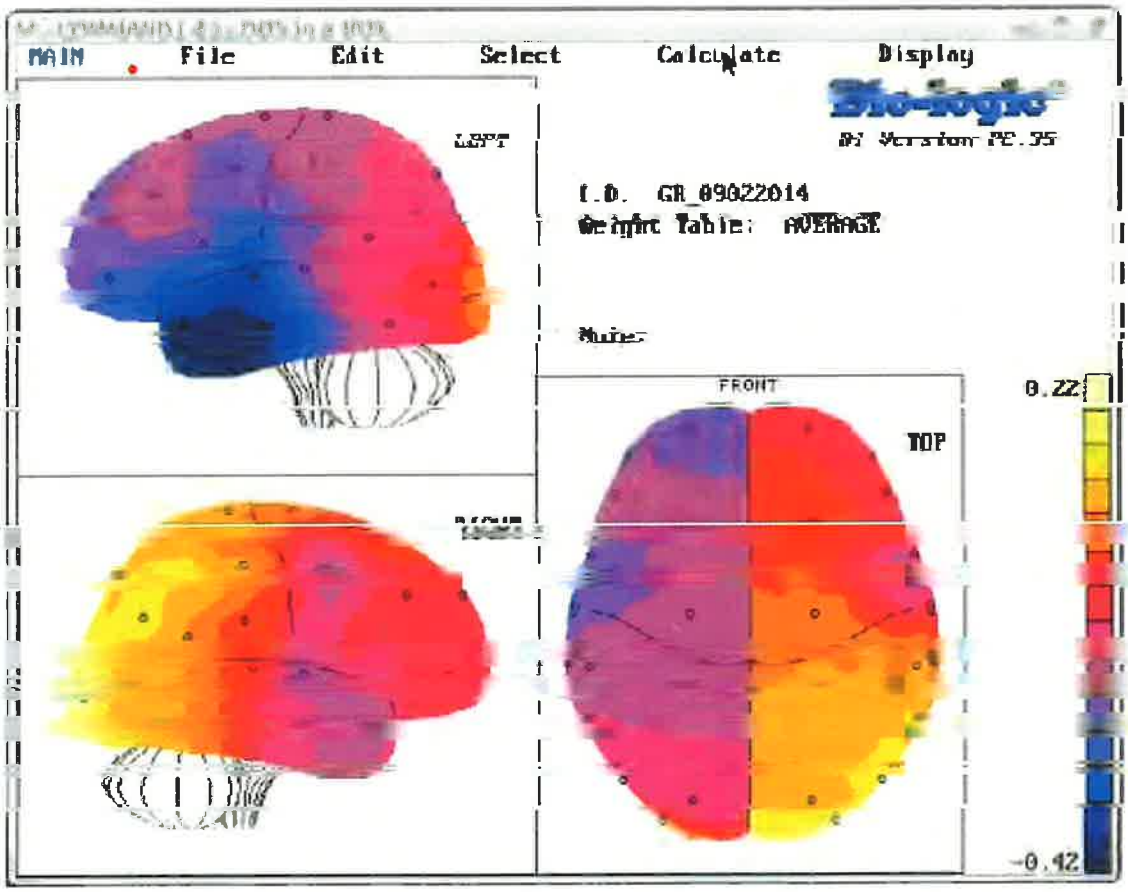



**Figure 1. Behavioral image based on Dr. James' neuropsychological evaluation**

[2] Gur holds a patent on "Behavioral Imaging." Ex. 19 at 54, Gur Report. His CV details his extensive peer-reviewed research publications, awards, editorial and advisory positions, and research funding from agencies such as NASA, NIH, NIMH, DOD), private foundations (including MacArthur), and industry. *Id.* at 51-54.

*Id.* at 1. The areas of greatest impairment are darkest purple, and the least impaired areas are shown in yellow. The "dysfunction is primarily frontal, most pronounced in the left hemisphere and is localized in the inferior and middle temporal regions. Damage appears to extend to the orbitofrontal and prefrontal cortices as well." *Id.* The Behavioral Analysis, MRI, and PET scan show significant brain damage, consistent with traumatic brain injury and trauma. *Id.* at 4.

Neuropsychiatrist Bhushan Agharkar, M.D., summarized Mr. Rogers's history of repeated head trauma; mental health history, multiple suicide attempts, and prescriptions for antipsychotic medications; and extensive mental health problems of his half siblings, both biological parents, and extended family. Ex. 17 at 5, Agharkar Report. He found Mr. Rogers has "significant brain damage, most prominently in the temporal and frontal lobes," and that "he suffers from Minor Neurocognitive Disorder." *Id.* at 2, 6. Such damage "is likely to compromise Mr. Rogers's memory, ability to understand and appreciate the future consequences of his behaviors, weigh and deliberate options effectively, freedom from perseveration, impulse inhibition, and regulate his mood and affect." *Id.*

The experts agree that Mr. Rogers brain damage was caused by head injuries and trauma. According to Dr. James, his neuropsychological impairments are highly consistent with both the damage from child maltreatment and abuse and his genetic, brain-based vulnerabilities. Ex. 18 at 1, 10, James Report. "The early onset of the impact of Mr. Rogers's cognitive impairments on his ability to function

adequately in the real world is reflected by his maladaptive, inappropriate, and disruptive behavior from grade school on." *Id.* at 1. "Mr. Rogers' cognitive impairments have disabled him from early childhood on, including at the time of the crime and at the time of his initial encounter with law enforcement and throughout the legal proceedings in this case." *Id.*

Further, the damage done by severe maltreatment was made even worse by his severe head injuries. "When maltreatment is this severe and endures throughout developmental periods, it causes enduring and complex changes in the child's brain structure and functioning. . . ." Ex. 14 at 3, Brand Report.

**c. Mr. Rogers experiences significant dissociation.**

Mr. Rogers's dissociative experiences started around fifth grade, and Brand noted signs of dissociation from witnesses and his prior psychiatric history. Ex. 14 at 28, Brand Report. Brand personally observed Mr. Rogers dissociate during her evaluation. Mr. Rogers suffers from severe amnesia, severe derealization, moderate depersonalization, and moderate identity alteration. *Id.* at 30–32; Ex. 17 at 2, Agharkar Report. Mr. Rogers has a "severe" level of amnesia; he has frequent gaps in his memory—hours and even days at a time for which he cannot account—going all the way back into childhood. Ex. 14 at 1–2, 29, Brand Report. Mr. Rogers experiences a moderate level of derealization—feeling detached from his surroundings—including daily experiencing the inability to recognize friends and family members. *Id.* at 30–31. Mr. Rogers has a severe level of depersonalization – a sense of disconnection

from his body – at times feelings that parts of his body are "foreign or disconnected from him" or that they have changed size and feeling "as if he were two different people, one going through the motions of life and the other observing quietly." *Id.* Last, he experiences himself as having a fragmented identity such that he experiences dissociated, separate parts of himself with "different feelings, memories, values, and over which he has little awareness or control." *Id.* at 1.

Dissociation causes Mr. Rogers's thinking to become "jumbled and disorganized, especially when he is stressed, which impacts his decision making, behavioral control, and ability to learn and remember." *Id.* He has "amnesia for significant parts of his past and current life," which impairs his ability to assist his defense team. *Id.* He is unable at times to "differentiate reality from fantasy, and whether something happened recently, in the past, or was only a fantasy in his mind or a flashback. This level of profound dissociative disorder impairs Mr. Rogers's daily emotional and behavioral control, as well as his thinking." *Id.* at 2. Brand noted that past psychiatric records "indicate a long, well-documented history of symptoms that are consistent with complex trauma and severe dissociation." *Id.* at 18–21.

**3. Mr. Rogers is entitled to a full and fair hearing. He submits that the procedures created under *Van Tran* do not comport with the guarantees of the Fourteenth Amendment or the Eighth Amendment and should therefore be modified.**

In *Panetti,* the Supreme Court made clear that states must provide due process in the adjudication of competency to be executed claims.

Counsel for Mr. Rogers requests all procedural due process 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 be heard. A recent examination of the very tight time frames envisioned by the *Van Tran* court suggests that the trial court must be given more leeway. *Van Tran*, 6 S.W.3d at 267-72. As counsel reads it, the entire competency adjudication process from the moment of remand to the deadline for the trial court's final order is only thirty-five (35 days)—with experts being given a total of ten (10) days from the date of their appointment to see and assess Mr. Rogers, and to draft and file their final reports. *Id.* at 269. Respectfully, those tight time frames are unrealistic, and risk preventing experts from being able to complete intelligent, thorough, and scientifically valid reports. These time frames similarly compromise 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 ought to be given authority to deviate from the *Van Tran* schedule.

### C. Executing Mr. Rogers would violate the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 16 and 32 of the Tennessee Constitution, because he is seriously mentally ill and cognitively impaired.

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 that his sentence is being fairly applied—a core constitutional requirement for

imposition of the death penalty. In addition, because execution of the mentally ill violates contemporary standards of decency, an exemption would promote the interests of justice. Each of the objective factors set out by the Supreme Court as objective indicia of modern standards of decency weigh in favor of exemption: the national trend away from capital punishment entirely; widespread proposed legislative exemptions for the mentally ill; polling data of American's views; opinions expressed by relevant professional organizations; and the opinion of the international community. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1910); *Rummel v. Estelle*, 445 U.S. 263, 274–275 (1980)).

**1. 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."[3] "People with [severe mental illness] experience both a mental illness *and* a functional disability . . . and often

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[3] Ex. 20, Diagnostic and statistical manual of mental disorders (5th ed., text rev.) at 13.

have a long history of hospitalizations or intensive outpatient treatment due to severe psychological dysfunction."[4]

> According to the American Psychological Association:
>
> [Serious mental illness, or SMI] refers to disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (*e.g.*, lasting at least a year); and that result in comparatively severe impairment in major areas of functioning, such as cognitive capabilities; disruption of normal developmental processes, especially in late adolescence; vocational capacity and social relationships. The [Diagnostic and Statistical Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[5]

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, behavioral, or emotional disorder that causes serious functional impairment that

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[4] Ex. 21, 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).

[5] Ex. 22, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

substantially interferes with or limits one or more major life activities."[6] The National Institute of Mental Health (NIMH)[7] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[8]

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, perception of the environment, accurate interpretation of the environment, and memory.[9]

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[6] Ex. 23, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/find-help/disorders (last visited May 20, 2025); *Mental Health and Substance Use Disorders.*

[7] Ex. 24, *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 May 26, 2025).

[8] Ex. 25, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited June 9, 2025).

[9] *See* Ex. 26, Diagnostic and statistical manual of mental disorders (5th ed., text rev.) at 101 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 27, *Id.* at 216 (Anxiety Disorders); Ex. 28, *Id.* at 329 (Dissociative Disorders).

### 2. An execution date should not be set, because Mr. Rogers suffers from serious mental illness and brain damage.

As described above, Mr. Rogers suffers from brain damage, cognitive impairments, and serious mental illness as a result of head injuries and complex trauma. These conditions caused him to communicate in chaotic and inculpatory ways with law enforcement at the time of the investigation into Jackie Beard's disappearance and has impaired his ability to assist counsel at all stages of his case. As detailed above, Mr. Rogers cannot think rationally or critically.

#### a. Mr. Rogers's mental illness and cognitive impairments render his conviction and death sentence unconstitutionally unreliable.

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

For this reason, in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court identified two categories of defendants who it held could not reliably be sentenced to death: the intellectually disabled and juveniles. Because the Court's rationale resulting in those categorical exclusions applies with *at least* equal force to the seriously mentally ill, execution of individuals who are seriously mentally ill is likewise unconstitutional.

Individualized sentencing is the predicate for any constitutional imposition of the death penalty. In 1976, the Supreme Court held that "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 a significant risk that they will be misused by the sentencer—such that a defendant with those qualities will not 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.[10]

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

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[10] *See*, Ex. 29, 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).

determination. If a particular quality presents too great a risk that the jury cannot properly comprehend and weigh the mitigating evidence, the consequent unreliability means that the death penalty cannot be constitutionally applied. The risk that a jury will fail to appropriately consider such a "double-edged" 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 categorical exemption from the death penalty is required. In exempting intellectually disabled and juvenile defendants from capital punishment in *Atkins* and *Roper*, and juvenile defendants from mandatory life imprisonment 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 those with serious mental illness and other brain impairments as it does to the intellectually disabled and to juveniles.

Mental illness and other brain impairments of the kind suffered by Mr. Rogers (as detailed above) vitiate 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 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 groups:

> [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). There is no rational basis for exempting juveniles from the death penalty and those suffering from serious mentally illness and other brain impairments caused by head injuries and trauma.

**b. Mental illness and brain damage impair a defendant's ability to work with counsel.**

A person suffering from mentally illness and/or other brain impairments is arguably less able to work with counsel than a juvenile or intellectually impaired defendant. Cooperation with counsel is particularly at risk when the mental illness includes 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. Here, Mr. Rogers's severe mental illness and brain dysfunction impaired his ability to work with his counsel.

**c. Mental illness distorted Mr. Rogers'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 assisted suicide. *Id.* at 416 (Hodgesmun, J., dissenting). A result more antithetical to *Woodson* and *Lockett* is hard to imagine.

**d. Mental illness and other brain impairments are double-edged mitigators.**

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

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[11] Ex. 30, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998) (37.9% of jurors stated it would make them "much more likely" and 20% "slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 31, 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 May 20, 2025).

Mr. Rogers's serious mental illness and brain damage were "double-edged" mitigators, as they may have led the jury to conclude he would be a danger in the future.

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

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

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

*Roper*, 543 U.S. at 573.

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

prosecution experts.[12] 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.

**f. Brutality of a crime often unduly overwhelms the mitigating nature of a mental illness or other brain impairments.**

Mental illness and brain damage frequently contribute to the brutality of a crime, resulting in acts that appear particularly unnecessary, aberrant, sadistic, and frightening to the jury.[13] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

Mr. Rogers's state-appointed trial counsel presented constitutionally inadequate evidence of his serious mental illness and

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[12] Ex. 32, 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).

[13] Ex. 33 Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013) (summarizing multiple cases where severely mentally ill defendants have been sentenced to death).

other brain impairments. It was inadequate to mitigate the proof that the jury heard about the crime itself.

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

**g. Mr. Rogers's trial counsel were constitutionally ineffective in failing to present evidence of his complex trauma, brain damage, and serious mental illness.**

Mr. Rogers's court-appointed trial counsel failed to conduct a constitutionally adequate investigation into his complex trauma, brain damage, and serious mental illness. Mr. Rogers presented evidence of his counsel's ineffectiveness in federal habeas court. See ex. 7 at 1–2, 133–35, 140–43, 242–302, Rogers's Redacted Summ. J. Mot. Resp.

The Sixth Circuit panel detailed a few of the mitigation details offered at Mr. Rogers's sentencing hearing. *Rogers*, 43 F.4th at 539–40. The panel concluded that Mr. Rogers's court-appointed state post-conviction proceeding had not fairly presented his ineffective assistance of counsel mitigation claims such that the federal court was entitled to review his claims, but found that it need not reach the issue because it had concluded he was entitled to relief on a different claim. *Id.* at 555. The court stated:

> We note, however, that the evidence before the district court starkly illustrates counsel's derelict investigation into and presentation of what should have been a highly compelling and disturbing account. Although we do not determine the extent to which a federal habeas court can consider any of this evidence, we cannot envision a just or humane system that, in the face of such overwhelming evidence, would provide no relief.

*Id.* at 556. Judge White, concurring in part and dissenting in part, was "in complete agreement with the majority's assessment of the evidence introduced for the first time in district court" in support of Mr. Rogers's IAC-mitigation claims, but found that the United States Supreme Court's decision interpreting AEDPA in *Shinn v. Ramirez*, 596 U.S. 366 (2022), "bars our consideration of this evidence, as compelling as it may be." *Rogers*, 43 F.4th at 569. The Sixth Circuit, sitting en banc, reversed the panel's decision as a result of the Supreme Court's *Shinn* decision that interpreted AEDPA. *Rogers*, 69 F.4th at 381.

This Court, of course, is not constrained by AEDPA, but instead has the authority not to schedule an execution date for Mr. Rogers because of this breakdown in the judicial process. *Moore-Pennoyer*, 515 S.W.3d at 276. It is, of course, within this Court's equitable discretion to decline to set an execution date for any reason, even if Mr. Rogers's trial were not infected with constitutional error. Nonetheless, Mr. Rogers can show that, but for Mr. Rogers's trial counsel's unprofessional errors in failing to adequately investigate and present evidence of his complex trauma, brain damage, and serious mental illness, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland v. Washington*, 466 US. 668, 694 (1984).

### 3. Execution of a mentally ill person violates contemporary standards of decency.

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

Courts must look to the "evolving standards of decency that mark the progress of a maturing society" when tasked with determining whether a punishment is "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court conducts two separate Eighth-

Amendment analyses: (1) whether the death penalty is grossly disproportionate to a certain class of offenders (here, persons with serious mental illness), *see Kennedy v. Louisiana*, 554 U.S. 407 (2008) (rape of a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (non-triggerman); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); and (2) whether the class of offenders categorically lacks the "capacity to act with the degree of culpability associated with the death penalty," *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles).

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

**4. 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: 28 jurisdictions no longer use the death penalty.**

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-three states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and four additional states have an actual or de facto (ten years since an

execution) moratorium on executions..[14] 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..[15]

Additionally, the Supreme Court looks to the consistency of the direction of change. *Atkins*, 536 U.S. at 314. Eleven of the 23 states that have abolished the death penalty have done so since 2004: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2023), New Hampshire (2019), Colorado (2020), and Virginia (2021). Moreover, in

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[14] *See* Ex. 34, *State by State,* Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited May 20, 2025).

[15] *See* Ex. 35, *Gallup Poll – For the First Time, Majority of Americans Prefer Life Sentence To Capital Punishment*, Death Penalty Information Center, https://deathpenaltyinfo.org/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment (last visited May 20, 2025).

February 2025, Ohio joined Oregon (2011), Pennsylvania (2015), and California (2019) in imposing a moratorium on executions..[16]

**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..[17]

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

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[16] *See* Ex. 34, *State by State,* Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited May 20, 2025).

[17] *See* Ex. 36, *The Death Penalty in 2024, Year End Report,* Death Penalty Information Center, https://dpic-cdn.org/production/documents/reports/year-end/YearEndReport2019.pdf?dm=1683576596 (last visited May 20, 2025).

February 11 and assigned to the Criminal Justice Subcommittee on February 13. It was favorably reported out of subcommittee on March 13. SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[18]

**c. Evidence of National Consensus: Of the 29 jurisdictions with the death penalty, 21 specifically address mental illness as a mitigating factor.**

Although twenty-nine jurisdictions (twenty-seven states plus the federal government and the military) still maintain the death penalty, twenty-one jurisdictions 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); 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

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[18] Ex. 37, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 38, *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited May 20, 2025).

defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.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); 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 mental illness. Conn. Gen. Stat. § 53a-46a(h)(2). Four other states instructed their juries to consider mental or emotional disturbance or capacity as a mitigating factor, prior to abolishing the death penalty: Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (capacity and "emotional state"); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance 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).

The fact that so many states with the death penalty 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 be executed.

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..[19]

**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.

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[19] *See* Ex. 29, 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)).

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.[20] Numerous other jurisdictions have eliminated it altogether. In 2018, the Washington Supreme Court held that that the death penalty violates the state constitution, as it is contrary to the evolving standards of decency: "We recognize local, national, and international trends that disfavor capital punishment more broadly." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018). But, even in states where the death penalty continues to be a sentencing option, jurors are increasingly less likely to impose it, particularly against defendants who are seriously mentally

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[20]Ex. 39, 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 May 20, 2025).

ill..[21] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions..[22]

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

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

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[21] Ex. 30, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 40, 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 been presented.").

[22] *Id.*

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:[23]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[24]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[25]
- National Alliance on Mental Illness, *Death Penalty*.[26]

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[23] Ex. 41, 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 May 20, 2025).

[24] Ex. 42

[25] Ex. 43, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf. (last visited May 20, 2025).

[26] Ex. 44, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited May 20, 2025).

- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011)..[27]

The American Bar Association also publicly opposes executing or sentencing to death the defendants with severe mental illness..[28] 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

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[27] Ex. 45, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited May 20, 2025).

[28] Ex. 46, American Bar Association, *ABA Recommendation 122A*, Severe 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 May 20, 2025).

> 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..[29]

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness exemption from the death penalty by a 2 to 1 majority.".[30] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM..[31] 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

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[29] Ex. 47, American Bar Association, *Severe Mental Illness and the Death Penalty (*Dec. 2016)

[30] Ex. 48, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness (last visited May 26, 2025).

[31]Ex. 49, https://arktimes.com/arkansas-blog/2017/10/26/mental-health-professionals-bar-association-ask-governor-for-mercy-for-jack-greene (last checked May 26, 2025).

court to "categorically prohibit the execution of individuals who were suffering from severe mental illness at the time of their crimes."[32]

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.[33] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like schizophrenia, can still be subject to the death penalty in Tennessee."[34] 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

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[32] Ex. 50, ABA Amicus Brief in Nevada Supreme Court.

[33] Ex. 51, 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

[34] Ex. 52, W.J.M. Cody, http://www.commercialappeal.com/story/opinion/contributors/2017/02/12/exclude-mentally-ill-defendants-death-penalty/97613036 THE COMMERCIAL APPEAL, Feb. 12, 2017.

of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.'"[35]

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."[36] In 2006, Amnesty International published a report that comprehensively examined and critiqued the execution of the mentally ill.[37]

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

- Frank R. Baumgartner and Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*" THE WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the death penalty actually targets those who have mental illnesses."), Ex. 55.

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[35] *Id.*

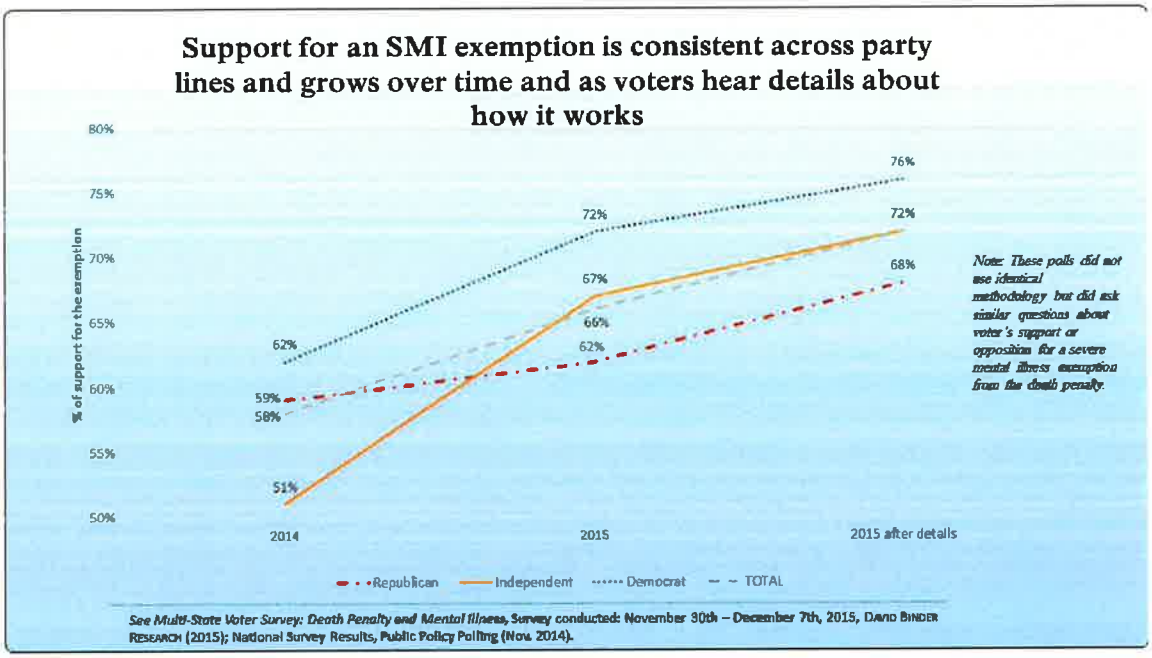
[36] Ex. 53, *Double Tragedies: Victims Speak Out Against the Death Penalty for People with Severe Mental Illness*, Murder Victims' Families for Human Rights, The National Alliance on Mental Illness (2009), http://www.mvfhr.org/sites/default/files/pdf/DoubleTragedies.pdf.

[37] Ex. 54, *USA: The Execution of Mentally Ill Offenders*, Amnesty International (Jan. 2006), https://www.amnesty.org/en/documents/amr51/003/2006/en/.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 56.
- 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. 57.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 58.

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..[38]

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[38] Ex. 59, Public Policy Polling, National Survey Results

- A 2009 poll of Californians found 64% opposed the death penalty for the "severely mentally ill."[39]
- 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..[40]
- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[41] 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

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[39] Ex. 60, 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 May 20, 2025).

[40] Ex. 61, 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 May 20, 2025).

[41] *See* Ex. 62, Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* https://news.gallup.com/poll/1606/death-penalty.aspx, p.12 (last visited May 20, 2025).

the death penalty for the mentally ill (75%) than for juveniles (69%). *Id.*

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with capital punishment to abolish it for people who suffer to "from any form of mental disorder."[42] 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."[43]

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[42] Ex. 63 *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); Ex. 64 *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.").

[43] Ex. 65, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

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."[44] Generally, the EU opposes the death penalty for all crimes.[45]

### 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 nearly all fifty states.[46] At least one hundred of these courts serve felony offenders.[47] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants

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[44] Ex. 66 https://dpw.lawschool.cornell.edu/fr/publication/mental-illness/?version=html#:~:text=5,established%20norm%20of%20international%20law (last visited May 26, 2025).

[45] Ex. 67, https://www.eeas.europa.eu/eeas/eu-statement-death-penalty_en#:~:text=The%20EU%20reaffirms%20its%20strong,is%20incompatible%20with%20human%20dignity (last visited May 26, 2025).

[46] Ex. 68, *https://www.americanbar.org/groups/diversity/disabilityrights/news/look-at-mental-health-courts/* (last visited May 26, 2025).

[47] *Id.*

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."[48] 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.

### 5. 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

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[48] Ex. 69, *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), https://csgjusticecenter.org/publications/mental-health-courts-a-primer-for-policymakers-and-practitioners/ (last visited May 26, 2025).

(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).

**6. It is unconstitutional to impose the death penalty upon Mr. Rogers, because his serious mental illness and brain damage diminished his personal culpability.**

Mr. Rogers's serious mental illness and brain damage diminish his moral responsibility. The chaotic and inculpatory behavior the State presented to the jury was the result of these brain impairments, but his counsel was ineffective in investigating and presenting the facts and expert testimony that would have helped the jury understand those serious impairments. As a result, the death verdict against Mr. Rogers lacks the reliability required to be constitutionally adequate.

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. Rogers may vindicate his claim, and remand his case to the trial court for further proceedings where Mr. Rogers may establish the nature and severity of his mental illness and, thus, his exemption from execution.

## IV. CONCLUSION

For the forgoing reasons, the State's Motion to Set Execution Date should not be granted.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER FOR
THE MIDDLE DISTRICT OF
TENNESSEE
CAPITAL HABEAS UNIT

KELLEY J. HENRY
Chief, Capital Habeas Unit

AMY D. HARWELL
First Assistant Federal Public Defender

Katherine Dix
Drew S. Brazer
Asst. Federal Public Defenders

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: Kelley_Henry@fd.org

BY: 

## CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing Response in Opposition to Motion to Set Execution Date, and Request for Certificate of Commutation was serviced via email and Federal Express to Nicholas W. Spangler, Associate Solicitor General.

Kelley J. Henry

Date of Service: June 10, 2025

## DESIGNATION OF COUNSEL OF RECORD

Kelley J. Henry is counsel of record for this matter. Counsel prefers to be notified via email: kelley_henry@fd.org.

Counsel of Record