IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
	)	
v.	)	No. M1987-00072-SC-DPE-DD
	)	
DONNIE E. JOHNSON,	)	
	)	
Defendant.	)	

DONNIE E. JOHNSON RESPONSE IN OPPOSITION TO STATE'S MOTION FOR EXPEDITED EXECUTION DATES AND REASONS WHY NO EXECUTION DATE SHOULD BE SET

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

Despite this warning, on October 18, 2017, the State began the process of procuring midazolam for use in executions, ultimately purchasing midazolam that

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

expires on June 1, 2018. On October 26, 2017, one of the State's drug-suppliers,[3] emailed the Tennessee Department of Correction, and stated, "I will have my pharmacist write up a protocol." Attachment 3. On November 28, 2017, one of the drug-suppliers sent another email that contained, "revisions to the protocol." Attachment 4.

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

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

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[3] It is not known whether this is the same supplier who had warned Tennessee that midazolam would not work, or a different drug seller.

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

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

The State purchased midazolam in October of 2017 that would only be effective until June 1, 2018. This purchase was made while executions were on hold awaiting the United States Supreme Court's resolution of *Abdur'Rahman, et al. v. Parker, et al.*, Case No. 17-6068. The State knew that they would have very little time between a possibly favorable Supreme Court ruling, and the expiration of their midazolam. The State was aware that (1) applications for executive clemency will not be entertained until after execution dates are set, (2) this Court's practice has been to permit at least three months for the Governor to consider such applications, (3) this Court has traditionally scheduled executions many weeks or months apart, and (4) this Court's precedent demands a full and fair constitutional adjudication of substantively new execution protocols. Yet they purposefully kept their plans under wraps.

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

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

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

Johnson should be given a full opportunity to litigate the constitutionality of the newly proposed lethal injection protocol without the extraordinary pressure of eight execution dates in a compressed, three-month timeframe. Johnson and all similarly situated inmates, should be given adequate time to present petitions for clemency to the Governor of the State of Tennessee. The State's Motion to Set Execution Dates should be denied.

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

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

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

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

that will allow plenty of time for resolution of the declaratory judgment action in the state courts.").

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

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

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

Midazolam is the most controversial, dangerous drug ever to be used in a lethal injection protocol in the State of Tennessee. Of the seven states to use midazolam in a lethal injection, three have abandoned its use. The State of Arizona has agreed to never again use any benzodiazepine, including midazolam, or a paralytic in a lethal injection.

First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al., Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 152 (D. Ariz. Dec. 19, 2016)(Attachment 5)(midazolam); *First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017)(Attachment 6)(paralytic).

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

that the State failed to show a legitimate reason for the use of Pavulon in the lethal injection protocol[.]")

When Tennessee last used a three-drug protocol, it was found to be unconstitutional unless the State implemented sufficient checks to ensure that the inmate would be unable to experience suffocation and pain. Those necessary checks are absent from Tennessee's Midazolam Option, perhaps because the protocol was drafted by the State's for-profit drug supplier.

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

On October 18, 2017, TDOC was told that the midazolam it was purchasing expired on June 1, 2018. Attachment 8, Email. TDOC moved forward with the purchase of midazolam they knew would expire before any challenge to its use could be litigated in court. Emails, W-9's, invoices and photographs of the drugs purchased demonstrate that the State knew well in advance of January 8, 2018, that it intended to use Tennessee's Midazolam Option to execute Johnson. Yet, despite public records requests made throughout that time, the State failed to notify undersigned counsel of any intent to implement a new lethal injection protocol.

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

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

Importantly, and fatal to their request for expedited execution dates, the State does not say that they will be unable to obtain the drugs necessary to carry out executions after June 1, 2018. Rather, the State alleges that their ability to do

so is "uncertain." State's Motion to Set Execution Dates, p. 2. Such vague and unsupported allegations are not enough to overturn Tennessee precedent, particularly where the State could have informed Johnson months earlier that it intended to adopt a new lethal injection protocol that adds a Midazolam Option. Under the circumstances, Johnson has acted with extreme diligence, expediency and transparency. The same cannot be said for the State. *See* Attachment 1.

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

In its motion, the State tells the Court: "The Department's supply of pentobarbital expired while the *West* proceeding was pending." State's Motion to Set Execution Dates, p. 2. This cannot be true. TDOC's numerous responses to Tennessee Public Records Act requests make clear that TDOC never received any pentobarbital (compounded or otherwise) from its supplier(s) and never had any in its possession, thus there was none to expire. The reason TDOC never had pentobarbital is because the 2015 lethal injection protocol, current Protocol A, uses compounded pentobarbital. According to the USP,[8] high-risk sterile compounds, which compounded pentobarbital is, have a beyond use date of 24 hours at controlled room temperature or three days refrigerated. *See West, et al. v. Schofield,*

[7] Although this Court does not resolve factual disputes, and Johnson is not requesting that the Court do so, the following facts are asserted in response to the State's representation regarding pentobarbital. The truth will ultimately be determined in the pending Chancery Court proceedings.
[8] The United States Pharmacopeia sets the world industry standards to "ensure the quality, safety, and benefit of medicines and foods." http://www.usp.org/about (last checked March 1, 2018).

et al., Case No. M2015-01952-COA-R3-CV, Technical Record, Trial Exhibits 5, 6. Testimony from State agents during the previous *West* litigation established that the TDOC had a signed contract with a pharmacist who assured that s/he could obtain the active pharmaceutical ingredient necessary to compound pentobarbital and that the compounder was ready, willing, and able to manufacture and distribute compounded pentobarbital to TDOC upon the setting of an execution date. *See, e.g., West, et al. v. Schofield, et al.,* Case No. M2015-01952-COA-R3-CV, Technical Record, Transcript, Volume III, pp. 823-824; *Id.*, Trial Exhibit 54. On March 2, 2017, Debra Inglis, TDOC legal counsel, told reporters that TDOC was able to obtain the drugs necessary for an execution "as needed." Boucher, *Lethal injections stalled,* The Tennessean, March 3, 2017, p. A3; 2017 WLNR 6714205.

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

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

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

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

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

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

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

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

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

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

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

The cases cited by the State in their motion arise in a stay-posture where the defendants faced a higher burden than the one governing Johnson's pending lawsuit

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

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

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

IV. Scheduling Execution Dates On An Expedited Basis Unduly Burdens And/Or Denies Johnson Fair Access To Meaningful Clemency Proceedings.

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

Johnson has a statutory and constitutional right to seek executive clemency. As the United States Supreme Court has observed

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

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

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

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

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

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

V. Donnie Johnson's Death Sentence Is Constitutionally Disproportionate

A. Don Johnson's Death Sentence Is Constitutionally Disproportionate In Relation to the State's Treatment Of Ronnie McCoy

After reviewing the record on direct appeal, the Tennessee Supreme Court concluded: "From this record there is no question but that appellant or one Ronnie McCoy killed her." *State v. Johnson*, 743 S.W.2d 154, 155 (Tenn. 1987). An

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

independent review of the record confirms that after Connie Johnson died, McCoy acted like a man guilty of murder.

McCoy, a prisoner on work release, and Johnson worked at Force Camping, a Memphis retailer of camping-type vehicles. (T.R. at 350-51: Testimony of McCoy). Both testified at Donnie Johnson's trial. While they agreed that Connie was killed in the Force Camping sales office, they disagreed on who killed her.

McCoy's story to the jury went as follows:

On December 8, 1984, at approximately 5:30 p.m. Connie came to visit Johnson at the Force Camping sales office (T.R. at 357: Testimony of McCoy);

Johnson asked McCoy to perform a chore, and McCoy left the sales office (T.R. at 359: Testimony of McCoy);

When McCoy returned to the sales office approximately seven minutes later, Johnson took him to a room where Connie's lifeless body lay on a couch (T.R. at 359-60: Testimony of McCoy);

McCoy and Johnson carried Connie's body outside, put it in a van, and then went back inside to clean up the sales office (T.R. at 362-63, 366: Testimony of McCoy);

Johnson drove the van to the Mall of Memphis, and McCoy followed in Johnson's pickup truck (T.R. at 371: Testimony of McCoy);

Johnson parked the van on the Mall of Memphis parking lot, and Johnson drove McCoy back to the Shelby County Penal Farm in the pickup truck. (T.R. at 371-72: Testimony of McCoy).

Johnson's testimony closely tracked McCoy's story, save for the identity of Connie's killer. Specifically, Johnson testified that:

After Force Camping closed for the day, he and Connie were alone in the sales office (T.R. at 507: Testimony of Johnson);

He left Connie to perform a chore (T.R. at 508: Testimony of Johnson);

When he returned to the sales office, McCoy was present and Connie was dead (T.R. 508-10: Testimony of Johnson);

He and McCoy put Connie's body in the van, and thereafter they cleaned up the sales office (T.R. at 511-12: Testimony of Johnson);

McCoy drove the van to the Mall of Memphis, Johnson followed in his pickup truck (T.R. at 512: Testimony of Johnson);

McCoy parked the van on the Mall of Memphis parking lot, McCoy got into the pickup truck, and Johnson drove McCoy back to the Shelby County Penal Farm (T.R. at 513: Testimony of Johnson).

McCoy admitted that upon his return to the Penal Farm, when he was safely in State custody, he did not say anything about Connie's murder. He told the jury he refrained from doing so because he was scared of Johnson. (T.R. at 370: Testimony of McCoy). Johnson likewise acknowledged that when police questioned him, he failed to inform them that McCoy killed Connie. Johnson explained that McCoy told him he would never see his children again if he implicated McCoy in the murder. (T.R. at 511: Testimony of Johnson).

A review of the record confirms that it is unclear whether Johnson or McCoy killed Connie, and the evidence is sufficient to support a finding that McCoy killed her. McCoy himself admitted that he helped dispose of Connie's body and cover up her murder. The evidence thus makes McCoy a candidate for a murder prosecution, and it establishes beyond any doubt McCoy's guilt as an accessory after the fact to murder. The former charge carries a potential death sentence, the latter a potential sentence of five years and certain revocation of McCoy's work release status. *See,* Tenn. Code Ann. §§ 39-2-203(a) (Michie) (repealed); 39-1-106, 107 (Michie) (repealed); 40-28-123; 41-2-136 (Michie). McCoy, however, never faced any of these serious felony charges, and the State continued releasing him daily into the community.

Donnie Johnson faces execution. Ronnie McCoy, a viable candidate for Connie's killer and a man guilty of, at the least, accessory after the fact to murder, received no punishment. Commuting Johnson's death sentence provides the only mechanism for remedying this troubling difference.

B. Don Johnson's Death Sentence Is Disproportionate In Relation to the Sentences Imposed on Other Men Convicted of First-Degree Murder for Spousal Homicide.

Setting aside Johnson's disparate treatment with regard to McCoy, it is exceedingly rare for anyone who causes the death of his or her spouse to receive the death sentence in Tennessee. In fact, as the attached charts reflect in the past forty years 161 persons have been convicted of first-degree murder for homicide of a spouse. Of those, however, 152, or over 94%, do not face execution. Attachment 10.

C. This Court Should Set Aside Mr. Johnson's Disproportionate Sentence, Or Alternatively Issue A Certificate of Commutation.

As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI §1 of the Tennessee Constitution, *In Re Burson*, 909 S.W.2d 768, 772 (Tenn. 1995)), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§16-3-503 & 504, *See Burson*, 909 S.W.2d at 772-773, to deny the Attorney General's motion to set an expedited execution date and instead vacate Mr. Johnson's death sentence and modify it to life. *See Ray v. State*, 67 S.W.553 (1901)(modifying death sentence to life); *Poe v. State*, 78 Tenn. 673 (1882)(modifying death sentence to life). This Court also has the statutory authority to recommend that the Governor commute Mr. Wright's sentence by issuing a certificate of commutation under Tenn. Code Ann. §40-27-106,[15] order a new sentencing hearing, or recall the post-conviction mandate and grant post-conviction relief.

VI. Empirical Data Establishes that the Tennessee Death Penalty System is Broken, Arbitrary and Violates Tennessee's Evolving Standards of Decency.

Tennessee's capital sentencing system operates in an unconstitutionally arbitrary and capricious manner. As the sharp decline in new death sentences over the past sixteen years demonstrates, capital punishment is contrary to Tennessee's evolved standard of decency. An extensive survey, conducted over the past three-plus years by attorney H.E. Miller, Jr., of all Tennessee first-degree murder cases since the inception of Tennessee's current capital sentencing system in 1977

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

provides empirical proof that the Tennessee's death penalty is arbitrary, capricious and violates evolving standards of decency. Attachment 11. Mr. Miller's survey process is described in his report. An article written by Bradley MacLean and Mr. Miller analyzing the data from Mr. Miller's survey titled *Tennessee's Death Penalty Lottery* that has been accepted for publication in the upcoming issue of the *Tennessee Journal of Law and Policy*. A copy of this article is attached as Attachment 12.

Comprehensive evidence of the Tennessee death penalty's capricious nature was not available prior to Mr. Miller's study. Because trial judges breach Rule 12's reporting requirements in at least 46% of adult murder cases, there has not previously been a reliable centralized collection of statewide data on first degree murder cases.[16] Furthermore, this kind of statistically based evidence necessarily accumulates and develops over time, and it continues to accumulate and develop through the present. Until now, no party has been in a position to statistically review the 40-year history of Tennessee's capital sentencing system; and until now, no court has been in a position to properly adjudicate these claims.

As discussed in *Tennessee's Death Penalty Lottery*, the premise underlying the Supreme Court's Eighth Amendment death penalty jurisprudence, established in *Furman v. Georgia*, 408 U.S. 238 (1972), is that the death penalty must be analyzed in the context of how the entire capital sentencing system operates. *Furman's* bedrock principle is that, under the Eighth Amendment, a capital

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[16] Mr. Miller's Report (Attachment 11) and the article *Tennessee's Death Penalty Lottery* (Attachment 12) discuss the astounding Rule 12 noncompliance rate. *See* Attachment 26 at 26-31.

punishment sentencing system must not operate in an arbitrary or capricious manner, and its operation must comport with "evolving standards of decency." Each of the Justices in the *Furman* majority cited statistical evidence to support their conclusions that discretionary capital punishment systems are unconstitutionally arbitrary. In light of this framework, Mr. Miller most salient findings from his survey of Tennessee's first degree murder cases include:

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

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

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

- Over the past 40 years, at least 339 defendants were convicted of multiple counts of first degree murder (*i.e.*, involving multiple murder victims), many involving extraordinarily egregious crimes, but only 33 of those defendants (10%) received sustained death sentences, while the remaining 306 defendants (90%) received life or life without parole sentences. Of the seventeen defendants found guilty of mass murder (four or more victims), only two mass-murder defendants (12%) received sustained death sentences; the other fifteen mass-murder defendants (88%) were sentenced to life or life without parole.

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

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

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

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

From the statistical data, it cannot be reasonably disputed that Tennessee's capital sentencing system operates arbitrarily and capriciously. A number of factors contribute to the arbitrariness of the system, including: geographical disparity, infrequency of application, timing and natural deaths, error rates, quality of defense representation, prosecutorial discretion and misconduct, defendants' impairments, race, and judicial disparity. [17]

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

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

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

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[17] *See* Attachment 12, *Tennessee's Death Penalty Lottery*, at 32-71.

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

Attachment 12, *Tennessee's Death Penalty Lottery*, at 78-79.

Mr. Johnson's arguments are brought under both the United States Constitution (the Eighth and Fourteenth Amendments) and the Tennessee Constitution (Article I, §§ 8, 13 and 16). While the discussion of these issues mostly revolves around the protection against cruel and unusual punishment afforded by the Eighth Amendment, the Tennessee Constitution ought to provide greater protection against excessive or cruel punishments, for at least three reasons.

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

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

And third, this Court has long recognized that, "as the final arbiter of the Tennessee Constitution, [it] is always free to expand the minimum level of

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

VII. Conclusion

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

As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI §1 of the Tennessee Constitution, *In Re*

Burson, 909 S.W.2d 768, 772 (Tenn. 1995)), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§16-3-503 & 504, *See Burson*, 909 S.W.2d at 772-773, to deny the Attorney General's motion to set an expedited execution date and instead vacate Mr. Johnson's death sentence and modify it to life. *See Ray v. State*, 67 S.W.553 (1901)(modifying death sentence to life); *Poe v. State*, 78 Tenn. 673 (1882)(modifying death sentence to life). This Court also has the statutory authority to recommend that the Governor commute Mr. Johnson's sentence by issuing a certificate of commutation under Tenn. Code Ann. §40-27-106,[18] order a new sentencing hearing, or recall the post-conviction mandate and grant post-conviction relief.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER FOR THE
MIDDLE DISTRICT OF TENNESSEE

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Fax: (615) 736-5265
Email: kelley_henry@fd.org

BY: _____
Counsel for Donnie E. Johnson

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

DESIGNATION OF ATTORNEY OF RECORD

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

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Ms. Henry prefers to be notified of orders or opinions of the Court by means of email.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2018, a correct copy of the foregoing was served by email and United States Mail on:

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

KELLEY J. HENRY

ATTACHMENTS

Attachment 1:	Chronology of Events relevant to State's Motion to Expedite Execution dates
Attachment 2:	September 7, 2017 email between State's drug supplier and the State of Tennessee
Attachment 3:	October 26, 2017 email between State's drug supplier and The Tennessee Department of Correction
Attachment 4:	November 28, 2017 email to Tennessee Department of Correction from one of the drug suppliers with "revisions to the protocol" attached.
Attachment 5:	*First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 152 (D. Ariz. Dec. 19, 2016)
Attachment 6:	*First Amendment Coalition of Arizona, Inc., et al. v. Ryan, et al.*, Case No. 2:14-CV-01447-NVW-JFM, Stipulated Settlement Agreement, Docket Entry No. 186 (D. Ariz. June 21, 2017)
Attachment 7:	Chronology of Public Records Requests During Past Six Months
Attachment 8:	October 18, 2017 Email between TDOC and drug supplier
Attachment 9:	Pharmacy Services Agreement
Attachment 10:	Spousal Homicide Charts
Attachment 11:	Ed Miller Report
Attachment 12:	Tenneessee'

Attachment 1

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

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

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

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

Attachment 2

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

[redacted]

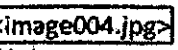
From: [redacted]
Sent: Thursday, September 07, 2017 12:58 PM
To: [redacted]
Subject: RE: Updtae

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

Hello [redacted]

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

Regards,



Attachment 3

[redacted]

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

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

Sent from my iPhone

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

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

[redacted]

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

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

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

Regards,

[redacted]

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

Attachment 4

[redacted]

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

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

[redacted]

[redacted]

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

[redacted]

Regards,

Attachment 5

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS THEREFORE STIPULATED AND AGREED that:

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

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

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

Dated: December 19, 2016

Sidley Austin LLP

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

Dated: December 19, 2016

Office of the Arizona Attorney General

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

Attorneys for Defendants

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

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

* * *

ORDER

IT IS SO ORDERED.

DATED this ___ day of _____, 2016.

Neil V. Wake
United States District Judge

Attachment 6

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[additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS THEREFORE STIPULATED AND AGREED that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO STIPULATED.

Dated: June 21, 2017

Sidley Austin LLP

s/ Mark E. Haddad
Mark E. Haddad

Attorneys for Plaintiffs

Dated: June 21, 2017

Office of the Arizona Attorney General

s/ Jeffrey L. Sparks
Jeffrey L. Sparks

Attorneys for Defendants

CERTIFICATE OF SERVICE

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

/s/ Barbara Cunningham
Barbara Cunningham
Legal Secretary

Attachment 7

Chronology of Public Records Requests

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

Attachment 8

[redacted]

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

I believe we do I will double check on it.

Sent from my iPhone

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

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

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

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

Attachment 9

PHARMACY SERVICES AGREEMENT

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

WITNESSETH:

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

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

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

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

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

Article 1
SERVICES

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

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

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

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

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

Article 2
OBLIGATIONS OF DEPARTMENT

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

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

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

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

Article 3
TERM AND TERMINATION

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

3.2 Termination.

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

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

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

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

3. Department declares bankruptcy.

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

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

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

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

3. Pharmacy declares bankruptcy.

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

Article 4
REPRESENTATION

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

Article 5
Miscellaneous

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[redacted]

By: [redacted]

Name: [redacted]

Title: [redacted]

Date: [redacted]

Address: [redacted]

By:

Name: Tony Parker

Title: TDOC Commissioner

Date: 12/4/17

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

Attachment 10

A	B	C	D	E	F
		WIVES KILLING HUSBANDS			
Name	**Trial/Plea**	**Sentence**	**Year**	**County**	**Facts**
e Lovera	Plea on Sentence	Life	1998	Sevier	Wife and her lover kill husband by beating him to death with a blunt instrument
ueger	Trial	Life	1990	Knox	Wife shoots husband in the head
er	Trial	Life	2013	Tipton	Wife kills husband
Powell	Trial	Life	2009	Gibson	Wife shoots husand in the neck with a shotgun
inia Tipton	Trial	Life	1983	Grainger	Wife induces her lover to shoot and kill husband
man	Trial	Life	1994	Shelby	Wife induces another to kill husband for t insurance money
	Trial	Life	1992	Lincoln	Wife shoots husband in the head with a shotgun
ckland	Trial	Life	1993	Jackson	Wife shoots husband in the head while he was asleep
on	Trial	Life	1999	Knox	Wife induces husband into a trailer where wife's lover kills husband.
ae Furlough	Trial	Life	1992	Sumner	Wife shoots husband in head and neck w a pistol and once with a rifle while husba lays beside a campfire
nam Smith	Trial	Life	2000	Cocke	Wife hires another to kill her husband, w is shot three times, twice in the head
. Smith	Trial	Life	1992	Lincoln	Wifes shoots husband in the chest (back) with a shotgun
	Plea	Life	2002	Rutherford	Wife shoots husband in the head twice w a 357 magnum
Mosher	Trial	Life	1987	Hamilton	Wife hires another to kill her husband. H does so by stuffing a plastic drop cloth in husband's throat

A	B	C	D	E	F
atson	Trial	Life	2004	Hamblen	Wife shoots husband in the head 6 times
th Hall	Trial	Life	1999	Lincoln	Wife has another shot her husband twice killing him.
	Plea	Life	1989	Shelby	Wife kills husband
ia Byrd	Trial	Life	1980	Knox	Wife has husband beaten to death - husband's nose and skull fractured - he w gagged, and his hands and feets were tie behind his back. He was stuffed into a sn closet.
ise England	Trial	Life	1982	Greene	Wife kills husband
nnon	Trial	Life	2010	Davidson	Wife strangles husband and stuffs him in closet
n Ross	Plea	Life	2008	Bedford	Wifes takes part in plan where another shoots husband in the head, chest, and lower back.
e Owens	Trial	Death (Commuted to Life)	1986	Shelby	Wifes hires another to kill her husband, w is beaten to death. Kids discover husban body
vis	Tril	Life	1986	Hamilton	Wife kills husband
rd	Trial	Life	2008	Shelby	Wife shoots husband, chops off his head and his penis
ate	Trial	Life	1987	Hancock	Wife shoots husband in the head while h lay in bed
Hill	Trial	Life	2008	Hamblen	Wife shoots husband four times with a .3
Oakley	Plea	Life	1989	Hardeman	Wife kills husband
Howard	Trial	Life	2005	Bradley	Wife shoots husband in the side and back killing him
chtgarn	Plea	Life	1986	Cheatham	Wife kills husband and brother-in-law

A	B	C	D	E	F
man	Trial	Life	2006	Davidson	Wife and another tie up husband, beat hi strangle him to death, wrap a plastic bag around his head, and stick him in a sleepi bag
ckey	Trial	Life	1978	Union	Wife kills husband
odd	Trial	Life	2002	Rutherford	Wife convinces nephew to shoot and kill husband
McBride	Trial	Life	1989	Rutherford	Wife kills husband
ssett Leath	Trial	Life	2011	Knox	Wife shoots husband in the head
rdson	Trial	Life	1991	Lauderdale	Wife hires another to shoot and kill her husband
Leming	Trial	Life	1997	Humphreys	Wife shoots husband in the head while h lay sleeping
lls	Trial	Life	2012	Bedford	Wife hires persons to kill her husband
ing	Trial	Life	1992	Davidson	Wife takes out a life insurance policy on husband and then conspires with anothe kill him
rd	Trial	Life	1989	Montgomery	Wife sets fire to trailer while husband sle inside
den	Trial	Life	1990	Trousdale	Wife shoots husband in the head
pellman	Plea	Life	1988	Tipton	Wife sets fire to trailer while husband is inside
nings	Jury	Life	1981	Wilson	Wife kills husband
VICTED'S NAME = 42					
= 41					
P = 0					
TH = 1					

ng Wives					
ame	Trial/Plea	Sentence	Year	County	Facts
y	Trial	Life	2014	Sevier	Husband shoots and kills wife
	Trial	Life	2006	Putnam	Husband strangles wife and puts her in a barrel
ly	Trial	Life	2017	Sevier	Husband shoots estranged wife
	Plea	Life	2010	Benton	Husband kills wife
slie	Trial	Life	1988	Davidson	Husband decapitates wife
yner	Trial	Life	1994	Sullivan	Husband stabs wife to death at the VFW Club
erg	Trial	Life	2007	Williamson	Husband beats and stabs wife
	Trial	LWOP	1996	Wayne	Husband shoots and kills pregnant wife
ed	Trial	Life	1997	Rhea	Husbands fires mutiple shots at car wife was driving
pe	Trial	Life	2003	Davidson	Husband shoots wife and mother-in-law in presence of children
	Plea	Life	1980	Rutherford	Husband kills wife
chell	Plea	LWOP	1997	Hamblen	Husband beats wife with a hose filled with lead and shoots her in the head
ckins		Life	2008	Union	Husband kills wife
nes	Trial	Life	2013	Shelby	Husband beats, burns, and buries body of his estranged wife
an	Trial	Life	2001	Giles	Husband bludgeons wife to death with a metal pipe
	Trial	Life	1987	Madison	Husband shoots wife
n	Plea	Life	1988	Shelby	Husband kills wife & children
rd	Trial	LWOP	2008	Shelby	Husband stabs wife twelve times - victim's daughter watches
rty	Plea	Life	2011	Bradley	Husband kills wife
Haft	Trial	Life	1990	Hamilton	Husband runs over wife with pickup truck
rdan	Trial	Death	2007	Madison	Husband killed three people: Renee Jordan, his thirty-one-year-old wife who was employed at TDOT; Jerry Hopper, an employee of the Tennessee Division of Forestry who was at the TDOT office; and David Gordon, a motorist Defendant ran off the road en route to the TDOT garage. Defendant also shot and injured two other TDOT employees, James Goff and Larry Taylor.
	Trial	Life	1985	Davidson	Husband shoots wife with a shotgun
Rayfield	Trial	Life	2012	Wayne	Husband shoots estranged wife in the head
son	Plea	Life	1994	Grainger	Husband beats wife to death with a baseball bat, beats friend to death with a hammer, chops off friend's penis, puts penis in friend's mouth, and then decapitates friend
on	Trial	Death	1995	Shelby	Husband asphixiates wife
as Kendrick	Trial	Life	1994	Hamilton	Husband shoots wife in front of the couple's children
	Plea	Life	1997	Shelby	Husband kills wife
r	Trial	Life	1997	McNairy	Husband shoots wife and step-daughter in the head
mas	Trial	Life	2011	Shelby	Husband shoots wife multiple time
	Plea	Life	1993	Shelby	Husband kills wife
ny Braddock	Trial	Life	2004	Houston	Husband shoots wife
d	Trial	Life	2009	Shelby	Husband hits wife in the head, wife drive off, crashes car, husband drags wife out of car and beats her to death with a tire iron
tandolph	Trial	Life	1981	Sumner	Husband kills wife
Gregg	Plea	Life	1997	Knox	Husband shoots wife and step-son multiple times, including in their heads
ohnson	Trial	Life	1997	Sullivan	Husband shoots wife in the face with a shotgun
n	Trial	Life	2013	Rutherford	Husband beats and strangles wife
	Plea	LWOP	2011	Lincoln	Husband kills wife and four others by multiple stab wounds
	Trial	Life	2010	Shelby	Husband shoots wife in the head
s	Trial	Life	2009	Putnam	Husband shoots wife 9 times and wife's boyfriend 6 times in fron tof two children

lame	Trial/Plea	Sentence	Year	County	Facts
d Grady	Plea	Life	2002	Davidson	Husband kicks down door and shoots wife and her friend with a shotgun
e Kimbrough	Trial	LWOP	2003	Davidson	Husband rapes wife vaginally and anally with an aerosol can and an unopened beer bottle. The ME finds the can up around wife's rib cage. Husband also beat wife about her face, manually strangled her, ran over her legs with a car, and forced her underwear and feminine pad down her throat.
, Jr.	Trial	Life	1987	Weakley	Husband runs down wife and shoots her four times
w	Trial	Life	1996	Shelby	Husband kills wife and son
ne	Trial	Life	1999	Jefferson	Husband stabs wife to death
	Trial	Life	1990	Cocke	Husband shoots wife in the head
Smith	Plea	Life	1992	Rutherford	Husband stabs wife 40 times and stabs 16 year old son as well
	Trial	Life	2009	Claiborne	Husband beats wife to death with a metal baseball bat
ey	Trial	Life	2002	Hardeman	Husband shoots wife and friend at least four times each with rifle and beats them both in the head with the gun.
	Trial	Life	1986	Rutherford	Husband Kills wife
d	Trial	Life	2002	Hamilton	Husband shoots wife and then sets her on fire
Ottinger	Trial	Life	1981	Jefferson	Husband kills wife
oe	Trial	Life	1996	Shelby	Husband shoots wife in the temple
s	Plea	Life	2012	Shelby	
rd Sims	Trial	Life	1985	Sullivan	Husband shoots wife in the chest
	Trial	Death	1997	Madison	Husband beats wife in front of children and drowns her in a kiddie pool
sley	Trial	Death	2003	Cocke	Husband lures wife into the woods where he shoots her with a rifle
as	Trial	Life	2007	Sullivan	Husband shoots wife three times, says "Die bitch die," and then shoot her three more times.
na	Trial	Life	2008	Shelby	Husband strangles wife and leave her body in a car
	Trial	Life	1992	Macon	Husband beats and stabs wife - leaves her body in a car
ny Rivera	Trial	Life	2010	Knox	Husband stragles wife with a vacuum cleaner cord
n Thurman	Trial	Life	1997	Marion	Husband strangles wife and sets fire to trailer home containing her body
omas	Trial	Life	1999	Madison	Husband shoots pregnant wife in the back with a shotgun with children present
Colvett	Trial	Life	2012	Marshall	Husband repeatedly stabs wife
	Trial	Life	2006	Shelby	Husband shoots wife in the face after ordering children to leave the couple's bedroom
bert	Trial	Life	2009	Montgomery	Husband stabs wife and fractures her skull
	Trial	Life	2000	Rutherford	Husband shoots wife twice in the head
ckerson	Trial	Life	2001	Crockett	Husband shoots wife twice with a rifle
	Plea	Life	1991	Bradley	Husband kills wife and son
ck	Plea	Life	1987	Gibson	Husband shoots wife with a pistol and a shotgun
		Life	1978	Fayette	Husband kills wife
d	Trial	LWOP	1994	Davidson	Husband stabs wife over 25 times
y	Trial	Life	2009	Shelby	Husband shoots wife five times; twice in the back
White	Trial	Life	2003	Marion	Husband shoots wife and sister-in-law
e Jones	Trial	Life	1990	Shelby	Husband shoots wfie 6 times and friend once
raschiello	Trial	Life	1995	Montgomery	Husband shoots wife in the head. Chest, and abdpmen with a shotgun
ge Medina	Trial	Life	2001	Smith	Husband shoots wife in the head with child present
o	Trial	LWOP	1997	Davidson	Husband shoots wife in the face
Vance	Trial	Life	2008	Rutherford	Husband shoots wife in the head
wers	Trial	Life	1998	Shelby	Husband hits wife , ties her up with a rope, chokes her with a ligature, stuffs a sock into her mouth, ties a bandana around her mouth, then chokes her again until she dies.
urant	Trial	Life	2012	Montgomery	Husband shoots wife

lame	Trial/Plea	Sentence	Year	County	Facts
n Smith	Trial	Death	1990	Davdison	Husband shoots and stabs wife and stepson, stabs another stepson
	Trial	LWOP	1998	Coffee	Husband beats wife to death - multiple blows to the chest which produced "blood and air in the space around the lungs compressing the lungs and causing her to be unable to breathe." After the fractured rib punctured her lung the victim slowly bled to death, struggling to breathe and having a "very tough way to die." From the examination it appeared that the victim had been beaten over a period of time, and it was likely that she died "over many hours or a couple of days."
Manning	Trial	Life	2002	Dekalb	Husband shoots wife with a shotgun in the presence of the couple's son
s Seals	Trial	Life	2009	Anderson	Husband shoots (1) wife in the center of her chest, in her abdomen, and in her left arm; and (2) wife's friend in the chest and four times in the back.
ilgore	Trial	Life	1979	Davidson	Husband kills wife
Beall	Trial	Life	1986	Montgomery	Husband shoots wife
ael	Trial	Life	2013	Tipton	Husband shoots wife in the chest with a rifle
ell	Trial	Life	1993	Davidson	Husband stabs wife to death
ns	Trial	Life	2000	Shelby	Husband beats, sexually assaults, stabs and strangles wife.
ford	Trial	Life	2005	Sullivan	Husband shoots and kills uncle and then shots wife twice, the second shot in wife's head.
on	Trial	Death	2005	McMinn	Husband shoots wife's female cousin. Husband then shoots wife as she runs from him with 8 month old son in her arms. Son crawls out from under wife. Husband walks into trailer and sets it on fire. All in the presence of wife's five year old daughter.
er	Trial	Death	2002	Shelby	Husband beats wife to death. Wife suffers at least thirteen blows to her head, most of them to her face. She had numerous bruises and tears to the skin and fractures of the facial bones. The injuries produced bruising of the brain, and some of the bone fragments cut into the base of her brain. The wife's facial bones were so fragmented that Dr. Smith could not count the fractures or determine the sequence of the blows. The wife's upper denture plate had been split in half. One piece was found on the floor; the other was still in her mouth. In addition, after inhaling her own blood, the wife's efforts to breathe caused a red frothy foam to obstruct her airway. The wife also swallowed over a pint of blood.
er	Trial	LWOP	2001	Shelby	Husband throws wife against the wall, ties her up, tortures her, beats her, and strangles her with a rope.
	Trial	Death	1997	Shelby	Husband attacks wife and friend with a bayonet; kills wife by slashing her throat.
ing	Trial	Life	1982	Robertson	Husband shoots wife in the head
	Trial	LWOP	1999	Chester	Husband shots wife twice with a Winchester 30/30 as she lay asleep in bed
	Trial	Life	2003	Blount	Husband beats wife and stages her fake suicide
thony	Trial	Life	1995	Tipton	Husband fires shotgun at car containing wife and a friend. Husband chases wife and friend down. Husband shoots wife three times, once in the head, with the shotgun.
s	Plea	Life	1986	Shelby	Husband beats wife, sending her to the hospital; then shoots and kills wife in the hospital
	Plea	LWOP	1999	Davidson	Husband shoots and kills wife and a police detective
inson	Trial	Life	2000	Davidson	Husband adminsters cyanide gas to wife as she sleeps
s	Trial	Life	1980	Sequatchie	Husband shoots and kills estranged wife and her boyfriend
ee	Trial	Life	2008	Shelby	Husband hits wife in the head with a hammer 12 times
rdson	Trial	Life	2005	Shelby	Husband pours gasoline on wife and sets her on fire while she sleeps. Wife's fourteen year old son sees wife consumed in flames, tries to help, but can't.
ver	Trial	Life	1983	Fayette	Husband kills wife
n	Trial	Life	2006	Overton	Husband blows up wife with a stick of dynamite
a	Trial	Life	2010	Davidson	Husband hires another to shoot and kill his estranged wife
s	Trial	Life	1986	Sullivan	Husband shoots wife
ope	Plea	LWOP	2006	Hamilton	Husband beats wife and 5 week old son to death. Strangles his 13 year old step daughter.
w	Plea	LWOP	2012	Shelby	Husband stabs wife over 60 times
	Trial	Life	2009	Wilson	Husband beats and strangles wife
rdson	Trial	Life	1983	Shelby	Husband shoots wife

ame	Trial/Plea	Sentence	Year	County	Facts
urham	Trial	Life	1996	Washington	Husband shoots his wife in a convenience store
in Cooper	Trial	Life	1985	Hamilton	Husband shoots wife four times with a pump shotgun at her place of employment, a self-service gasoline station. Gets IAC relief from CCA. No further information.
w	Trial	Life	2010	Montgomery	Husband shoots wife's friend in the head then beats wife, causing a skull fracture, and repeatedly stabs wife.
ogus	Trial	Life	1995	Dyer	Husband strangles wife
ham		Life	1991	Anderson	Husband kills wife
close	Trial	Life	2000	Shelby	Husband hires another to kill his wife
ns	Trial	Death	2000	Davidson	Husband hires another to kill his wife and mother-in-law. Wife is strangled. Mother-in-law is stabbed and strangled.
CTED'S	TOTAL LIFE FOR WIFE'S DEATH	TOTAL LWOP FOR WIFE'S DEATH	TOTAL DEATH FOR WIFE'S DEATH		
119	97	13	9		

Attachment 11

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

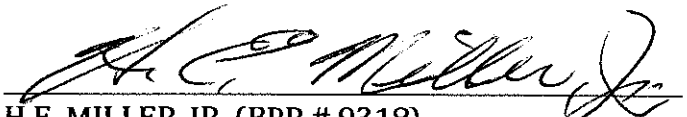
DECLARATION UNDER PENALTY OF PERJURY
OF H.E. MILLER, JR.

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

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

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

Respectfully submitted,



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

Dated: 2/27/18

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

By H. E. Miller, Jr.

Dated: February 7, 2018[1]

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

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

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

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

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

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

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

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

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

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

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

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

THE SURVEY PROCESS

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

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

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

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

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

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

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

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

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

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

- Sentence imposed for each first degree murder conviction; and

- Whether a Rule 12 Report was filed.

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

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

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

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

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

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

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

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

Appendix G: Chart of Adult Multi-Murder Cases.

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

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

Caveats

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

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

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

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

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

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

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

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

SUMMARY OF FINDINGS

I. DEFINITIONS

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

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

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

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

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

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

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

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

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

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

LWOP: Life without parole sentence.

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

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

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

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

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

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

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

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

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

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

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

II. SUSTAINED ADULT FIRST DEGREE MURDER CASES

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

TABLE 1

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

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

TABLE 2

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

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

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

TABLE 3

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

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

TABLE 4

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

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

TABLE 5

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

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

BREAKDOWN OF SUSTAINED ADULT FIRST DEGREE MURDER CASES ACCORDING TO RACE AND RULE 12 COMPLIANCE

TABLE 6

Statewide Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop)[14]	Rule 12 Reports Filed[15] (Compliance Rate)	Rule 12 Reports Not Filed[16] (Non-Compliance Rate)	Total Cases	% of Total Cases[17]
Black (17%)	646 (54% Filed)	543 (46% Not Filed)	1,189	47%
White (78%)	665 (53% Filed)	602 (47% Not Filed)	1,267	50%
Other (5%)	37 (64% Filed)	21 (36% Not Filed)	58	2%
TOTALS	**1,348 (54% Filed)**	**1,166 (46% Not Filed)**	**2,514**	100%

[14] In this column, the percentages designate the percentage of that race in the general population according to the 2010 Census. For example, according to the 2010 Census, 17% of Tennessee's general population was black.

[15] This column represents the numbers and percentages of cases in which Rule 12 Reports were filed in cases involving defendants in the designated races. For example, among the total of 1,189 cases involving black defendants, Rule 12 Reports were filed in 646 of those cases for a Rule 12 Compliance Rate of 54%.

[16] This column represents the numbers and percentages of cases in which Rule 12 Reports were not filed in cases involving defendants in the designated races. For example, among the total of 1,166 cases involving black defendants, Rule 12 Reports were not filed in 543 of those cases for a Rule 12 compliance rate of 46%.

[17] This column represents the percentage of defendants of the designated race. Thus, 47% of all Sustained Adult First Degree Murder Cases throughout the state during the 40-Year Period involved black defendants.

TABLE 7
Shelby County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (52%)	271 (52% Filed)	252 (48% Not Filed)	523	88%
White (41%)	38 (57% Filed)	29 (43% Not Filed)	67	11%
Other (7%)	5 (83% Filed)	1 (17% Not Filed)	6	1%
TOTALS	**314 (53% Filed)**	**282 (47% Not Filed)**	**596**	100%

TABLE 8
Davidson County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop.)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (28%)	136 (62% Filed)	85 (38% Not Filed)	221	58%
White (61%)	81 (58% Filed)	59 (42% Not Filed)	140	37%
Other (11%)	12 (71% Filed)	5 (29% Not Filed)	17	5%
TOTALS	**229 (60% Filed)**	**149 (40% Not Filed)**	**378**	100%

TABLE 9
Knox County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop.)	Rule 12 Reports Filed	Rule 12 Reports Not Filed	Total Cases	% of Total Cases
Black (8%)	42 (58% Filed)	30 (42% Not Filed)	72	42%
White (86%)	56 (59% Filed)	39 (41% Not Filed)	95	55%
Other (6%)	4 (67% Filed)	2 (33% Not Filed)	6	3%
TOTALS	**102 (59% Filed)**	**71 (41% Not Filed)**	**173**	100%

III. MULTI-MURDER CASES

Sentences imposed in the Multi-Murder Cases break down as follows:

TABLE 10: Multi-Murder Cases - Statewide

Sentences for Multi- Murder Convictions During the 40-Year Period Statewide - Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	230	68%
Life Without Parole (LWOP)	76	22%
Sustained Death Sentence	33	10%
TOTAL	339	100%

TABLE 11: Multi-Murder Cases – Shelby County

Sentences for Multi- Murder Convictions During the 40-Year Period Shelby County – Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	30	54%
Life Without Parole (LWOP)	14	25%
Sustained Death Sentence	12	21%
TOTAL	56	100%

TABLE 12: Multi-Murder Cases – Davidson County

Sentences for Multi- Murder Convictions During the 40-Year Period Davidson County – Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	35	66%
Life Without Parole (LWOP)	11	21%
Sustained Death Sentence	7	13%
TOTAL	53	100%

TABLE 13: Multi-Murder Cases – Knox County

Sentences for Multi- Murder Convictions During the 40-Year Period Knox County- Adult	Number of Defendants	% of the Total Multi-Murder Cases
Life	19	79%
Life Without Parole (LWOP)	4	27%
Sustained Death Sentence	1	4%
TOTAL	24	100%

TABLE 13A

Multi-Murder Cases - Breakdown By Number of Victims & Sentences

Number of Victims	Life or LWOP Sentences	Sustained Death Sentences	Totals
2	259 (92% of 2-Victim cases)	24 (8% of 2-Victim cases)	283
3	32 (82% of 3-Victim cases)	7 (18% of 3-Victim cases)	39
4	11 (92% of 4-Victim cases)	1 (8% of 4-Victim cases)	12
5	1 (100% of 5-Victim cases)	0 (0% of 5-Victim cases)	1
6	3 (75% of 6-Victim cases)	1 (25% of 6-Victim cases)	4
TOTALS	306 (90% of Multi-Murder Cases)	33 (10% of Multi-Murder Cases)	339

The total of single-murder cases during the 40-Year Period was 2,175. Among those, 53 (2.4%) received Sustained Death Sentences

PRE-OCTOBER 21, 2001 MULTI-MURDER CASES

On October 18, 2001, the Office of the District Attorney General for the 20th Judicial District issued its Death Penalty Guidelines. Since that date through June 30, 2017, no death sentences have been imposed in Davidson County. The breakdown of single and Multi-Murder Cases, before and after October 18, 2001, can be set forth as follows:

TABLE 14

Pre-October 2001 Multi-Murder Cases
By Largest Counties

Sentence	Shelby County	Davidson County	Knox County
Life	23	18	9
LWOP	6	4	1
Sustained Death	9	7	0
TOTALS	38	29	10
% Sustained Death Sentences	24%	24%	0%

TABLE 15

Pre-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

Sentence	West	Middle	East	Statewide Totals
Life	23	56	58	137
LWOP	11	10	13	34
Sustained Death	10	12	4	26
TOTALS	44	78	75	197
% Sustained Death Sentences	22%	15%	5%	13%

POST-OCTOBER 2001 MULTI-MURDER CASES

TABLE 16

Post-October 2001 Multi-Murder Cases
By Largest Counties

Sentence	Shelby County	Davidson County	Knox County
Life	7	17	10
LWOP	8	7	3
Sustained Death	3	0	1
TOTALS	**18**	**24**	**14**
% Sustained Death Sentences	**17%**	**0%**	**7%**

TABLE 17

Post-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

Sentence	West	Middle	East	Statewide
Life	18	37	29	84
LWOP	9	22	11	42
Sustained Death	4	0	2	6
TOTALS	**31**	**59**	**42**	**132**
% Sustained Death Sentences	**13%**	**0%**	**5%**	**5%**

IV. CAPITAL CASES

A. Basic Capital Case Statistics During the 40-Year Period
TABLE 18

Separate Capital Trials resulting in death sentences[18]	221	
Defendants who received death sentences[19]	192	
Defendants with Sustained Death Sentences	86	(45% of total def's)
Defendants whose death sentences were not Sustained	106	(55% of total def's)[20]
Trials resulting in Conviction Relief	28	(13% of total trials)
Trials resulting in Sentence Relief	104	(47% of total trials)
Total Trials resulting in Relief	132	(60% of total trials)[21]
Defendants with Pending Death Sentences	56	(29% of total def's)[22]
Defendants who died of natural causes with Sustained Death Sentences	24	(12% of total def's)
Multi-Murder Defendants with Sustained Death Sentences	32	(37% of Sust. Death Sent.)
Single-Murder Defendants with Sustained Death Sentences	54	(63% of Sust. Death Sent.)
Awaiting Retrial	8	(4% of total def's)
Executions in Tennessee	6	(3% of total def's)

[18] These include all Initial Trials and Retrials.

[19] One defendant (Paul Reid) is listed with three Initial Capital Trials and another (Stephen Laron Williams) with Two Initial Trials, all on separate murder charges, which were not Retrials. Eighteen other defendants are listed with two trials on the same charges resulting in death sentences (i.e., an Initial Trial and a Retrial); and four are listed with three trials on the same charges (i.e., an Initial Trial and two Retrials), leaving a total of 26 Retrials. Of those Retrials, in 14 cases the death sentences were reversed or vacated (54%), and in 12 cases they were sustained (46%), which closely corresponds with the overall ratio of reversed vs. sustained death sentences.

[20] This is the overall Death Sentence Reversal Rate among defendants who received death sentences, after accounting for Retrials. Commutations are counted here as reversals.

[21] This is the overall reversal rate of trials resulting in death sentences.

[22] This is the size of Death Row as of June 30, 2017, based on the definitions set forth in Part I, *supra*. Additionally, eight defendants whose convictions or sentences were vacated were awaiting retrial.

B. Exonerations

During the 40-Year Period, there have been three exonerations of death row inmates, as follows:

Michael Lee McCormick (acquitted in his retrial)
Sentenced in 1988; Exonerated in 2008; 20 years on death row.

Paul Gregory House (charges dismissed based on evidence of actual innocence)
Sentenced in 1986; Exonerated in 2009; 23 years on death row.

Gussie Willis Vann (charges dismissed based on evidence of actual innocence)
Sentenced in 1994; Exonerated in 2011; 17 years on death row.

Additionally, Ndume Olatushani (formerly Erskine Johnson), who was sentenced to death in 1985, was granted a new trial in his *coram nobis* proceeding, in which he claimed actual innocence. He was released in 2012 on an *Alford* plea after being incarcerated for 26 years.

C. Commutations

Governor Bredesen commuted the death sentences of three defendants, as follows:

Michael Boyd (*a.k.a. Mika'eel Abdullah Abdus-Samad)* was granted a commutation of his sentence to life without parole on September 14, 2007, after being on death row for 19½ years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case where the grossly inadequate legal representation received by the defendant at his post-conviction hearing, combined with procedural limitations, has prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial..."

Gaile K. Owens' sentence was commuted to life on July 10, 2010, after being on death row for 2 ½ years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case in which the defendant admitted her involvement in the murder of her husband and attempted to accept the district attorney's conditional offer of life imprisonment. This acceptance was ineffective only because of her co-defendant's refusal to accept such an agreement..."

Edward Jerome Harbison's sentence was commuted to life without parole on January 11, 2011, after being on death row for 26 years. The Certificate of Commutation stated:

> "[T]his appears to me an extraordinary death penalty case where grossly inadequate legal representation received by the defendant at the direct appeal phase, combined with procedural limitations, have prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial...."

D. Executions

During the 40-Year Period, six defendants were executed:

TABLE 19

Executed Defendant	Sentencing Date	Execution Date	Time on Death Row
Robert Glenn Coe	Feb. 2, 1981	Apr. 19, 2000	19 years, 2 months
Sedley Alley	Mar. 18, 1987	June 28, 2006	19 years, 3 months
Philip Workman	Mar. 31, 1982	May 9, 2007	25 years, 1 month
Daryl Holton	June 15, 1999	Sept 12, 2007	8 years, 3 months[23]
Steve Henley	Feb. 28, 1986	Feb. 4, 2009	22 years, 11 months
Cecil C. Johnson, Jr.	Jan. 20, 1981	Dec. 2, 2009	28 years, 10 months

E. Residency on Death Row

Among the 56 defendants with Pending Death Sentences, the lengths of time they resided on death row (from sentencing date in the Initial Capital Trial to June 30, 2017), can be summarized as follows:

TABLE 20

Length of Time on Death Row	Number of Defendants (as of 6/30/2017)
> 30 Years	10
20 – 30 Years	20
10 – 20 Years	16
< 10 Years	10

The median residency on Death Row (as of June 30, 2017) was 21½ years.

The longest residency on Death Row (as of June 30, 2017) was 35 years, 3 months.

[23] Daryl Holton waived his rights to post-conviction and federal habeas review, which accounts for the shortened period between his sentencing and execution dates.

F. Geographic / Racial Distribution of Sustained Death Sentences

During the 40-Year Period, 48 of the 95 Tennessee Counties (51%) conducted Capital Trials, although only 28 of the 95 (29%) counties imposed Sustained Death. The 28 counties that imposed Sustained Death Sentences represent 64% of Tennessee's general.

TABLE 21
SUSTAINED DEATH SENTENCES BY COUNTY/RACE DURING 40-YEAR PERIOD

County	Grand Division	Race of Def: Black	Race of Def: White	Race of Def: Other	Totals	Most Recent Crime Date[24]
Dyer	West	1	1	0	2	1/2/00
Fayette	West	1	0	0	1	5/2/97
Hardeman	West	0	1	0	1	1/17/02
Henderson	West	0	1	0	1	2/5/97
Lake	West	0	1	0	1	2/3/86
Madison	West	2	3	0	5	1/11/05
Shelby	West	18	10	2	30	1/19/12
Tipton	West	1	0	0	1	6/1/10
Weakley	West	0	1	0	1	9/7/79
Bedford	Middle	0	1	0	1	11/30/97
Cheatham	Middle	0	1	0	1	3/3/85
Coffee	Middle	1	0	0	1	1/1/85
Davidson	Middle	4	7	0	11	7/8/99
Jackson	Middle	0	1	0	1	7/24/85
Montgomery	Middle	0	1	0	1	7/8/96
Robertson	Middle	0	1	0	1	4/23/83
Stewart	Middle	0	2	1	3	8/20/88
Williamson	Middle	0	1	0	1	9/24/84
Blount	East	0	2	0	2	2/22/92
Bradley	East	0	1	0	1	12/9/98
Campbell	East	0	2	0	2	8/15/88
Cocke	East	0	1	0	1	12/3/89
Hamilton	East	0	3	0	3	9/6/01
Knox	East	1	5	0	6	1/7/07
Morgan	East	0	1	0	1	1/15/85
Sullivan	East	1	2	0	3	11/27/04
Union	East	0	1	0	1	3/17/86
Washington	East	0	2	0	2	10/6/02
TOTALS		30 (35%)	53 (62%)	3 (3%)	86 (100%)	

Western Grand Division = 23 Blacks + 18 Whites + 2 Other = 43 (50% of statewide total)
Middle Grand Division = 5 Blacks + 15 Whites + 1 Other = 21 (24% of statewide total)
Eastern Grand Division = 2 Blacks + 20 Whites + 0 Other = 22 (26% of statewide total)

[24] The "Most Recent Crime Date" is the date of the most recent offense in the county that resulted in a Sustained Death Sentence.

Since October 2001[25], 14 New Death Sentences, that have been sustained, were imposed in 8 counties – or in 8% of the counties representing 34% of Tennessee's general population (according to the 2010 Census).

TABLE 22

SUSTAINED DEATH SENTENCES BY COUNTY/RACE SINCE OCTOBER 2001

County	Grand Division	Race of Def: Black	Race of Def: White	Race of Def: Other	Totals
Hardeman	West	0	1	0	1
Madison	West	1	0	0	1
Shelby	West	7	0	0	7
Tipton	West	1	0	0	1
Hamilton	East	0	1	0	1
Knox	East	1	0	0	1
Sullivan	East	0	1	0	1
Washington	East	0	1	0	1
Totals		10 (71%)	4 (29%)	0	14 (100%)

Western Grand Division = 9 Blacks + 1 White = 10 Total (71% of statewide total)
Middle Grand Division = 0 Total
Eastern Grand Division = 1 Black + 3 Whites = 4 Total (29% of statewide total)

As indicated in Table 21, above, for each of the three Grand Divisions, the last murder resulting in a Sustained Death Sentence occurred on the following dates:

West Grand Division: January 19, 2012 (Shelby County)
Middle Grand Division: July 8, 1999 (Davidson County)
East Grand Division: January 7, 2007 (Knox County)

[25] As mentioned above, in October 2001 the Office of the District Attorney General for the 20th Judicial District issued its Death Penalty Guidelines. Since then, no death sentences have been imposed in Davidson County, or the entire Middle Grand Division of the State. Also, the frequency of death sentences throughout the State since October 2001 is markedly lower than during the prior 24 year period. Accordingly, it may be useful to compare certain statistics from the two different periods before and after October 2001.

G. Frequency and Decline

During the 40-Year Period, the frequency of trials resulting in New Death Sentences reached a peak around 1990. Beginning around 2005, we have seen a steady and accelerating decline, as follows:

TABLE 23

FREQUENCY OF TENNESSEE DEATH SENTENCES IN 4-YEAR INCREMENTS

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[26]	Ave. New Death Sentences per Year	1st Degree Murder Cases[27]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25 per year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25 per year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00 per year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25 per year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45 per year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00 per year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00 per year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00 per year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50 per year	284	2%	1.7%
7/1/13 – 6/30/17	3	1	1	0.25 per year	Incomplete Data[28]	Incomplete Data	Incomplete Data
TOTALS	**221**	**195[29]**	**89[30]**	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

[26] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.

[27] Counted by defendants, not murder victims.

[28] Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to T.B.I. statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See* Table 25.

[29] One defendant had 3 separate "new" trials each resulting in "new" and "sustained" death sentences; another defendant had 2 such trials. *See* footnote 1, *supra*. Accordingly, there were 195 "new" trials involving a total of 192 defendants, and 89 "sustained" death sentences involving a total of 86 defendants.

[30] See note 28. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

Totals for the first 24 years, from July 1, 1977, to June 30, 2001:

168 "New" death sentences =>
7 "New" death sentences per year (13.2% of First Degree Murder Cases)

74 "Sustained" death sentences =>
4 "Sustained" death sentences per year (5.8% of First Degree Murder Cases)

Totals for the most recent 16 years, from July 1, 2001, to June 30, 2017:

27 "New" death sentences =>
1.7 "New" death sentences per year (3.5% of First Degree Murder Cases)

15 "Sustained" death sentences =>
0.9 "Sustained death sentences per year (< 2.0% of First Degree Murder Cases)

Throughout the state, no new death sentences were imposed during the most recent three-year period (from 6/15/2014 to 6/30/2017).

The decline in death sentences is also reflected in the numbers of counties that have imposed death sentences, which can be broken down in 4-year increments as follows:

TABLE 24

NUMBER OF COUNTIES CONDUCTING CAPITAL TRIALS BY 4-YEAR INCREMENTS

4-Year Period	Number of Counties Conducting Capital Trials[31] During the Indicated 4-Year Period
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11
7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

[31] These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.

The annual rate of "New Death Sentences" has declined while the annual number of murder cases has remained relatively constant.

TABLE 25

NEW DEATH SENTENCES COMPARED TO MURDERS
2002 - 2016

Year	"Murders"[32]	New Death Sentences	% New Death Sentences per Murders	Sustained New Death Sentences	% Sustained New Death Sentences per Murders
2002	385	6	1.6 %	1	0.3 %
2003	394	3	1.0 %	3	1.0 %
2004	350	4	1.1 %	0	0 %
2005	430	2	0.4 %	1	0.2 %
2006	409	1	0.3 %	1	0.3 %
2007	395	1	0.3 %	1	0.3 %
2008	408	1	0.3 %	1	0.3 %
2009	461	1	0.4 %	1	0.4 %
2010	360	2	0.6 %	2	0.6 %
2011	375	2	0.6 %	1	0.3 %
2012	390	1	0.3 %	1	0.3 %
2013	333	0	0 %	0	0 %
2014	375	1	0.3 %	1	0.3%
2015	406	0	0 %	0	0 %
2016	470	0	0 %	0	0 %
TOTALS	**5,941 (Ave = 396/year)**	**25 (1.7/year)**	**0.4 %**	**14 (0.9/year)**	**0.2 %**

During the 10-year period 2003 – 2012:
Total non-negligent homicides = 3,972 => (397 / year)
Total New Death Sentences = 18 => (1.8 / year)
% New Death Sentences per non-neg. homicides = 0.5%
Total sustained New Death Sentences = 12 => (1.2 / year)
% sustained new death sentences per non-neg. homicides = 0.3%

During the 4-year period 2013 – 2016:
Total non-negligent homicides = 1,584 => (396 / year)
Total New Death Sentences = 1 => (0.25 / year)
% New Death Sentences per non-neg. homicides = 0.06%

Of the 19 defendants who received New Death Sentences over this 14-year period, none have been executed, and six have had their sentences vacated. The remaining Pending Cases are under review and could ultimately result in reversals.

[32] The "Murders" statistics come from the T.B.I. annual reports, which date back to 2002. For statistical purposes, T.B.I. defines "Murders" as non-negligent homicides.

Attachment 12

TENNESSEE'S DEATH PENALTY LOTTERY

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I. INTRODUCTION

Imagine entering a lottery in which you are given a list of Tennessee's 2,514 adult first-degree murder cases since 1977, when our modern death penalty system was installed, along with a description of the facts and circumstances surrounding each case in whatever detail you request. You are not told what the final sentences were – whether Life, Life Without Parole (LWOP), or Death. Your job is to make two guesses. First, you must guess which 86 defendants, out of the 2,514, received sustained death sentences (*i.e.*, death sentences sustained on appeal and in post-conviction and federal habeas review). Second, you must guess which six defendants were actually executed during the 40-year period from 1977 to 2017. What are the odds that your guesses would be correct?

We submit that the odds would be close to nil. Even with an abundance of information about the cases, trying to figure out who was sentenced to death, and who was actually executed, would be nothing but a crapshoot.

And what would you look for to make your guesses? The egregiousness of the crime? Maybe, but the vast majority of the most egregious cases (including rape-murder cases and multiple murder cases involving children) resulted in Life or LWOP sentences. Perhaps it would make sense to look for other factors, such as the county where the case occurred (with a strong preference for Shelby County); the race of the defendant (choosing black for the most recent cases would be a very good strategy); the prosecutor (because some prosecutors like the death penalty, and others do not; and some prosecutors cheat, while others don't); the defense lawyers (because some know how to effectively try a capital case, and others do not); the wealth or appearance of the defendant (virtually all capital defendants were indigent at the time of trial, and all defendants on death row are indigent); the publicity surrounding the trial;

the trial judge (because some judges are more prosecution oriented, and others are more defense oriented); or the judges who reviewed the case on appeal or in post-conviction or federal habeas (because some judges are more inclined to reverse death sentences, and others almost always vote the other way); or the year of the sentencing (because a defendant convicted of first-degree murder during the mid-1980's was at least ten times more likely to be sentenced to death than a defendant convicted over the most recent years). In guessing who may have been executed, perhaps the age of the defendant and his health would be relevant (because at current rates a condemned defendant is four times more likely to die of natural causes than to suffer the fate of execution).

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

The intent of this article is to bring to light a survey conducted by one of the co-authors, attorney H.E. Miller, Jr., of Tennessee's first degree murder cases over the 40-year period from July 1, 1977, when Tennessee's current capital sentencing scheme went into effect, through June 30, 2017. Mr. Miller conducted his survey in order to address the issue of arbitrariness in Tennessee's capital sentencing system. Mr. Miller's report is attached as Appendix 1.

Before turning to a discussion of Mr. Miller's survey, we need to set the stage with the historical context of Tennessee's system. Accordingly, in Part II we discuss the legal background of Tennessee's scheme beginning with the seminal United States Supreme Court decision in Furman v. Georgia[1] through the enactment of Tennessee's scheme in response to

[1] 408 U.S. 238 (1972).

Furman. In Parts III and IV we discuss two important developments in Tennessee's scheme. In Part III we discuss the expansion of the class of death eligible defendants resulting from two sources: (i) the Tennessee Supreme Court's liberal interpretation of the "aggravating circumstances" that define the class, and (ii) the General Assembly's addition over the years of new "aggravating circumstances." In Part IV we discuss the Tennessee Supreme Court's evisceration of its "comparative proportionality review" of death sentences. In Part V, we return to our lottery analogy by comparing two extreme cases, one resulting in the death sentence and the other in a life sentence. Then, having set the historical stage, in Part VI we turn to a description and evaluation of the results of Mr. Miller's survey. Finally, in Part VII, we look at what others have said about our capital sentencing system, and we state our conclusion that Tennessee's death penalty system is nothing more than a capricious lottery.

II. BACKGROUND

We tend to forget the reason behind Tennessee's current capital sentencing scheme. It stems from the 1972 case of Furman v Georgia,[2] where the United States Supreme Court expressed three principles that underlie the Court's death penalty jurisprudence under the Eighth Amendment Cruel and Unusual Punishments Clause.

The first principle is that death is different. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.

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[2] Id.

And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[3]

The second principle is that the constitutionality of a punishment is to be judged by contemporary, "evolving standards of decency that mark the progress of a maturing society."[4]

And third, viewing how the sentencing system operates as a whole, the death penalty must not be imposed in an arbitrary and capricious manner. Justices Stewart and White issued the decisive opinions in Furman that represent the Court's holding – the common denominator among the concurring opinions constituting the majority.[5] Justice Stewart explained it this way:

> [T]he death sentences now before us are the product of a **legal system** that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone. These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, **the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed**. My concurring

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[3] Id. at 306 (Stewart, J., concurring). The Supreme Court has reiterated this principle. The death penalty "is different in kind from any other punishment imposed under our system of criminal justice." Gregg v. Georgia, 428 U.S. 153, 188 (1976). "From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357 (1977).

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

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

Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[6]

And Justice White explained:

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

...

[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.[7]

...

It is also my judgment that **this point has been reached with respect to capital punishment as it is presently administered** under the statutes involved in these cases.... I cannot avoid the conclusion that as the statutes before us are now administered, the penalty **is so infrequently imposed** that the threat of execution is too attenuated to be of substantial service to criminal justice.[8]

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[6] 408 U.S. at 309-10. (internal citations omitted; emphasis added).

[7] Id. at 311-12 (emphasis added).

[8] Id. at 312-13 (emphasis added).

Since Furman and Gregg, the Court has repeatedly emphasized that the judicial system must guard against arbitrariness in the imposition of the death penalty; and the qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions. *See, e.g.,* Gardner v. Florida[9] ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Zant v. Stephens [10] ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'"); California v. Ramos[11] ("The court ... has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Ford v. Wainwright[12] ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."); Spaziano v. Florida,[13] ("[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."). Therefore, courts must "carefully scrutinize ... capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a

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[9] 430 U.S. 349, 357 (1977).

[10] 462 U.S. 862, 884-85 (1983).

[11] 463 U.S. 992, 998-99 (1983).

[12] 477 U.S. 399, 411 (1986).

[13] 468 U.S. 447, 468 (1984).

valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."[14]

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

(i) Courts must view how the entire sentencing system operates – *i.e.*, how the few are selected to be executed from the many murderers who are not - and not just focus on the particular case under review. As the Supreme Court explained, we must "look[] to the sentencing system as a whole (as the Court did in Furman ...)";[15] "a constitutional violation is established if a defendant demonstrates a "pattern of arbitrary and capricious sentencing."[16] It is worth noting that in Furman, Justice Stewart's opinion makes no reference to the facts or circumstances of the individual cases under review, and Justice White's opinion only referred to the dates of the trials in the cases in a footnote.[17] Their opinions, along with the other three concurring opinions, dealt with the operation of the death penalty system under a discretionary sentencing scheme, and not with the merits of the individual cases.

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[14] Id. at 460 n. 7.

[15] Gregg v. Georgia, 428 U.S. 153, 200 (1976) (emphasis added).

[16] Id. at 195 n. 46 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[17] Indeed, there is virtually no reference to the facts of the cases under review in any of the nine Furman opinions.

(ii) How the capital sentencing system operates as a whole, as well as evolving standards of decency, will change over time and eventually can reach a point where the system is operating in an unconstitutional manner – as was the case in Furman.[18]

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

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

And, indeed, that is exactly what the majority did in Furman. Each of the concurring opinions in Furman relied upon various forms of statistical evidence that purported to demonstrate patterns of inconsistent or otherwise arbitrary sentencing.[19] Evidence of such inconsistent results, of sentencing decisions that could not be explained on the basis of individual culpability, indicated that the system operated arbitrarily and therefore violated the Eighth Amendment.

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[18] Post-Furman, by virtue of our evolving standards of decency, the Court has removed "various classes of crimes and criminals from death penalty eligibility. Examples include those who rape adults, Coker v. Georgia, 433 U.S. 584 (1977); the insane, Ford v. Wainwright, 477 U.S. 399 (1986); the intellectually disabled, Atkins v. Virginia, 536 U.S. 304 (2002); juveniles, Roper v. Simmons, 543 U.S. 551 (2005); and those who rape children, Kennedy v. Louisiana, 554 U.S. 407 (2008)." State v. Pruitt, 415 S.W.3d 180, 224 n. 6 (Tenn. 2013) (Koch, J., concurring and dissenting).

[19] Furman, 408 U.S. at 249-52 (Douglas, J., concurring); Id. at 291-95 (Brennan, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 313 (White, J., concurring); id. at 364-66 (Marshall, J., concurring).

The death penalty statutes under review in Furman, and virtually all then-existing death penalty statutes, were "discretionary."[20] Under those sentencing schemes, if the jury decided that the defendant was guilty of a capital offense, then either the jury or judge would decide whether the defendant would be sentenced to life or death. The sentencing decision was completely discretionary, with no narrowing of discretion or guidance in the exercise of discretion if the defendant was found guilty. Furman determined that under those kinds of discretionary sentencing schemes, the death penalty was being imposed capriciously, in the absence of consistently applied standards, and accordingly any particular death sentence under such a system would be deemed unconstitutionally arbitrary. This problem arose in large measure from the infrequency of the death penalty's application and the irrational manner by which so few defendants were selected for death.

In response to Furman, various states enacted two different kinds of capital sentencing schemes, which the Court reviewed in 1976. The two leading decisions were Woodson v. North Carolina,[21] and Gregg v. Georgia, [22]

In Woodson, the Court examined a mandatory sentencing scheme – if the defendant was found guilty of the capital crime, a death sentence followed automatically. Presumably, a mandatory scheme would eliminate the Furman problem of unfettered sentencing discretion. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that

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[20] In 1838,Tennessee was the first state to convert from a "mandatory" capital sentencing scheme to a "discretionary" scheme, purportedly to mitigate the strict harshness of a mandatory approach. Eventually all states with the death penalty followed course and converted to discretionary schemes. Stuart Banner, The Death Penalty – An American History 139 (Harvard Univ. Press, 2002).

[21] 428 U.S. 280 (1976).

[22] 428 U.S. 153 (1976).

North Carolina's mandatory death penalty statute "fail[ed] to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. ... [W]hen one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to Furman have simply papered over the problem of unguided and unchecked jury discretion."[23] (Again, the Court looked at the historical record.) The mandatory statute merely shifted discretion away from the sentencing decision to the guilty/not-guilty decision, which historically had involved an excessive degree of discretion - and therefore arbitrariness - in capital cases. The Court emphasized that mandatory sentencing schemes "do[] not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." [24]

In Gregg, the Court upheld a "guided discretion" sentencing scheme. This type of scheme, patterned in part after the American Law Institute Model Penal Code, §210.6 (1962), was designed to address Furman's concern with arbitrariness by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision; (ii) narrowing the class of death-eligible defendants by requiring the prosecution to prove aggravating circumstances, thereby narrowing the range of discretion that could be exercised; (iii) allowing the defendant to present mitigating evidence, to ensure that the sentencing decision is individualized, another constitutional requirement; (iv) guiding the jury's exercise of

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[23] 423 U.S. at 302.

[24] Id. at 303 (emphasis added).

discretion within that narrowed range by instructing the jury on the proper consideration of aggravating and mitigating circumstances; and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions. The Court explained the fundamental principle of Furman, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[25]

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

In 1977, Tennessee responded to Furman, Woodson, and Gregg by enacting its version of a guided discretion capital sentencing scheme.[26] Tennessee's scheme was closely patterned after the Georgia scheme upheld in Gregg and included the same elements itemized above. While the Tennessee General Assembly subsequently amended Tennessee's statute a number of times, its basic structure remains.[27] As was the case in Georgia, under Tennessee's scheme a

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[25] 428 U.S. at 189.

[26] See Tenn. Code Ann. §§ 39-13-204 and 206.

[27] In 1993, the General Assembly provided for life without parole as an alternative sentence for first degree murder. T.C.A. § 39-13-204(f). In 1995, as part of the "truth-in-sentencing" movement the General Assembly amended the provisions of Tenn. Code. Ann. § 40-35-501pertaining to release eligibility, which has been interpreted to require a defendant sentenced to life for murder to serve a minimum of 51 years before release eligibility. *See* Vaughn v State, 202 S.W.3d 106 (Tenn. 2006). In 1999 the General Assembly adopted lethal injection as the preferred method of execution and subsequently, in 2014, allowed for electrocution as a fallback method if lethal injection drugs are not

death sentence can be imposed only in a case of "aggravated" first degree murder upon a "balancing" of statutorily defined aggravating circumstances[28] proven by the prosecution and any mitigating circumstances presented by the defense.[29] The Tennessee Supreme Court is statutorily required to review each death sentence "to determine whether (A) the sentence of death was imposed in any arbitrary fashion; (B) the evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) the evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[30] The Court's consideration of whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases" is referred to as "comparative proportionality review."

III. AGGRAVATORS AND THE EXPANDED CLASS OF DEATH-ELIGIBLE DEFENDANTS

The thesis of this article is that Tennessee's capital punishment system operates as a capricious lottery. To put into proper context the lottery metaphor and recent trends in Tennessee's capital sentencing, it is important to understand how the Tennessee General Assembly and the Tennessee Supreme Court have gradually expanded the class of death-eligible

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available. Tenn. Code Ann. § 40-23-114. Additionally, over the years the General Assembly has broadened the class of death-eligible defendants by adding and changing the definition of certain aggravating circumstances, discussed in Part III below.

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

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

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

defendants. The expansion of this class has correspondingly broadened the range of discretion for prosecutors in deciding whether to seek death, and for juries in making capital sentencing decisions at trial. This in turn has increased the potential for arbitrariness.[31]

A fundamental feature of the capital sentencing scheme approved in Gregg, and adopted by Tennessee, is the narrowing of the class of first degree murder defendants who are eligible for the death penalty, by requiring proof of the existence of one or more statutorily defined "aggravating circumstances" that characterize the crime and/or the defendant. As the Court in Gregg explained, "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[32] A central part of the majority opinion in Gregg specifically addressed whether the statutory aggravating circumstances in that case effectively limited the range of discretion in the capital sentencing decision.[33] The Court has repeatedly stressed that a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"[34]

In addition to defining the class of death eligible defendants, aggravating circumstances also provide the prosecution with a means of persuading the jury to impose a death sentence.

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[31] This phenomenon – the expansion over time of the class of death-eligible defendants – has occurred in a number of states and is sometimes referred to as "aggravator creep." *See* Edwin Colfax, Fairness in the Application of the Death Penalty, 80 Ind. L.J. 35, 35 (2005).

[32] Gregg, 428 U.S. at 189.

[33] Id. at 200-04.

[34] Lowenfied v. Philps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

At sentencing, the jury is called upon to "weigh" the aggravating circumstances against the mitigating circumstances, and if the jury finds that the aggravators outweigh the mitigators, then the sentence "shall be death."[35] The more aggravators the prosecution can prove, the more likely the jury will give greater weight to the aggravators and return a death verdict. Moreover, along with expanding the number and definitional range of aggravators, the Court and the legislature have also expanded the range of evidence that the prosecution can present to the jury at the sentencing hearing, which also enhances the prosecution's case for death.[36]

The Tennessee statute enacted in 1977 defined eleven aggravating circumstances that set the boundary around the class of death-eligible defendants.[37] Over the years, the Tennessee

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[35] Tenn. Code Ann. § 39-13-204(g)(1).

[36] Tenn. Code Ann. § 39-13-204(c) allows the prosecution to introduce, among other things, evidence relating to "the nature and circumstances of the crime" or "the defendant's character and background." The Court has broadly interpreted this provision by holding that this kind of evidence "is admissible regardless of its relevance to any aggravating or mitigating circumstance." State v. Sims, 45 S.W.3d 1, 13 (Tenn. 2001). The legislature also amended § 39-13-204(c) to allow introduction of evidence relating to a defendant's prior violent felony conviction, which is discussed below in connection with the (i)(2) aggravator. Additionally, following Payne v. Tennessee, 501 U.S. 808 (1991), the legislature amended § 39-13-204(c) to permit victim impact testimony in the sentencing hearing. *See* State v. Nesbit, 978 S.W.2d 872, 887-94 (Tenn. 1998).

[37] The original version of the sentencing statute, Tenn .Code Ann. § 39-2404(i) (1997), defined the eleven aggravating circumstances as follows:

> (1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.
> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.
> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
> (4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny,

General Assembly has added six aggravators to the original list, bringing the total number to 17, and it has amended other aggravators to further expand the class of death eligible defendants.[38]

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kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.
(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.
(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

See, Houston v. State, 593 S.W.2d 267, 274 n.1 (Tenn. 1980).

[38] Tenn. Code Ann. § 39-13-204(h) (2017) now defines the aggravators as follows (the important changes from the 1977 version are italicized);

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older;
(2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, *whose statutory elements* involve the use of violence to the person;
(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;
(5) The murder was especially heinous, atrocious, or cruel, in that it involved torture or *serious physical abuse beyond that necessary to produce death*;
(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
(7) The murder was *knowingly* committed, *solicited, directed, or aided by the defendant*, while the defendant *had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit*, any first degree murder, arson, rape, robbery, burglary, *theft*, kidnapping, *aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child*, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
(8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;
(9) The murder was committed against any *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker,*

While the Tennessee legislature's expansion of aggravators is significant, it is perhaps more significant that the Tennessee Supreme Court has interpreted a number of the most frequently used aggravators in a broad fashion. The important interpretations are as follows:

(i)(2) Aggravator – Prior Violent Felony Conviction

In a large number of murder cases, the defendant was previously convicted of a violent felony, and prosecutors frequently use the prior violent felony conviction as an aggravator in seeking death sentences. The Tennessee Supreme Court has broadened the application of this aggravator in a number of ways.

First, notwithstanding the plain language of the statute as amended, which requires that the "statutory elements" of the prior conviction involve the use of violence to the person, it is not necessary for the statutory elements of the prior crime to explicitly involve the use of

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emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that the victim was a *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic* or firefighter engaged in the performance of official duties;
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general, due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;
(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;
(12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period;
(13) The defendant knowingly mutilated the body of the victim after death;
(14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability;
(15) The murder was committed in the course of an act of terrorism;
(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant; or
(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.

violence. Instead, according to the Court, in cases involving a prior crime which statutorily may or may not involve the use of violence, it is only necessary for the prosecution to prove to the judge (not the jury), based upon the record of the prior conviction, that as a factual matter the prior crime actually did involve the defendant's use of violence to another person.[39]

Thus, for example, in State v. Cole the defendant had been convicted of robbery and other crimes for which "the statutory elements of each of the crimes may or may not involve the use of violence, depending on the facts of the underlying conviction."[40] The Court sustained the use of the prior violent felony aggravator upon the trial judge's determination that the evidence underlying the prior convictions established that in fact the crimes involved the defendant's use of violence.[41]

Second, the Court has held that the "prior conviction" need not relate to a crime that occurred before the alleged capital murder; it is only necessary that the defendant be "convicted" of that crime before his capital murder trial.[42] The "prior convicted" crime may have occurred after the murder for which the prosecution seeks the death penalty. It is not unusual for the prosecution to obtain a conviction for a more recent crime in order to create an aggravator for use in the capital trial on a prior murder.

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[39] State v. Ivy, 188 S.W.2d 132, 151 (Tenn. 2006) (holding that the prior conviction may be used as an aggravator if the element of "violence to the person" was set forth in "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, [or] any explicit factual finding by the trial judge to which the defendant assented") (quoting Shepard v. United States, 544 U.S. 3, 16 (2005)).

[40] 155 S.W.3d 885, 899 (2005).

[41] Id. at 899-905. Arguably the procedure by which the trial judge made the finding of violence to the person was modified by the Court in Ivy, *supra* note 39.

[42] State v. Allen, 69 S.W.3d 181, 186 (Tenn. 2002); State v. Fitz, 19 S.W.3d 213, 214 (Tenn. 2000).

Third, a prior conviction of a violent felony that occurred when the defendant was a juvenile, if he was tried as an adult, can qualify as an aggravator to support a death sentence for a murder that occurred later when the defendant was an adult,[43] even though juvenile offenders are not eligible for the death penalty.[44]

Additionally, in 1998 the legislature expanded the range of permissible evidence the prosecution can introduce relating to a prior violent felony conviction. The 1998 amendment permits introduction of evidence "concerning the facts or circumstances of the prior conviction" to "be used by the jury in determining the weight to be accorded the aggravating factor."[45] The amendment gives the prosecution extremely broad license to use such evidence because "[s]uch evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party."[46]

(i)(5) Aggravator – Heinous, Atrocious or Cruel

A murder defendant is eligible for the death penalty if "[t]he murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death"[47] – often referred to as the "HAC aggravator." Any murder, by definition, is a heinous crime that can evoke in a normal juror a strong, visceral negative reaction. In most premeditated murder cases the prosecution can allege the HAC aggravator.

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[43] State v. Davis, 141 S.W.3d 600, 616-18 (Tenn. 2004).

[44] Roper v. Simmons, 543 U.S. 551 (2005).

[45] Tenn. Code Ann. § 39-13-204(c).

[46] Id.

[47] Tenn. Code Ann. § 39-13-204(c).

But under Furman and Gregg, most murder cases should not be eligible for capital punishment. The challenge is to create a meaningful, rational, and consistently applied distinction between first degree murder cases in general, all of which are "heinous" in some sense of the term, and the supposedly few murders that are "especially heinous, atrocious or cruel" justifying a death sentence, in order for this aggravator to serve the function of meaningfully narrowing the class of death eligible defendants.

What constitutes an "especially heinous, atrocious or cruel" murder is ultimately a subjective determination without clearly delineated criteria. In the early period following Furman, the United States Supreme Court struck down similar kinds of aggravators as unconstitutionally vague.[48] The Tennessee Supreme Court responded to those cases by applying a "narrowing construction" of the statutory language, stipulating that the HAC aggravator is "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[49] In Cone v. Bell a Sixth Circuit panel declared Tennessee's HAC aggravator to be unconstitutionally vague.[50] The Supreme Court, however, reversed the Sixth Circuit and upheld Tennessee's version based upon the narrowing construction.[51] Although the Supreme Court

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[48] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980) (invalidating Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravator); Maynard v. Cartwright, 486 U.S. 356 (1988) (invalidating Oklahoma's "especially heinous, atrocious or cruel" aggravator).

[49] State v. Dicks, 615 S.W.2d 126 (Tenn. 1981); State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982). The Court's narrowing construction included language purportedly defining the term "torturous." The Tennessee legislature followed suit by amending the language of the HAC aggravator to provide that it must involve "torture or serious physical abuse beyond that necessary to produce death."

[50] Cone v. Bell, 359 F.3d 785, 794-97 (2004).

[51] Bell v. Cone, 543 U.S. 447 (2005) (*per curiam*).

upheld Tennessee's HAC aggravator, it was a close call, and the criteria for its application remains subjective.

Even with its narrowing construction in response to early U.S. Supreme Court decisions, the Tennessee Supreme Court manages to give the HAC aggravator a very broad definition. The Court's fullest description of this aggravator can be found in State v. Keen, where the Court explained:

> The "especially heinous, atrocious or cruel" aggravating circumstance "may be proved under either of two prongs: torture or serious physical abuse." This Court has defined "torture" as the "infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." The phrase "serious physical abuse beyond that necessary to produce death," on the other hand, is "self-explanatory; the abuse must be physical rather than mental in nature." The word 'serious' alludes to a matter of degree," and the term "abuse" is defined as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'"
>
> Our case law is clear that '[t]he anticipation of physical harm to oneself is torturous" so as to establish this aggravating circumstance. Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within the meaning of the statute."[52]

The Court has also held that although the HAC aggravator now contains two prongs – "torture" or "serious physical abuse" – jurors "do not need to agree on which prong makes the murder 'especially heinous, atrocious, or cruel.'"[53]

The case of State v. Rollins[54] illustrates the broad scope of the Court's definition of the HAC aggravator. The defendant was found guilty of stabbing the victim multiple times. In the guilt phase the medical examiner testified to the cause of death, describing in detail the multiple stab wounds. In the sentencing hearing, the medical examiner testified again, largely repeating

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[52] 31 S.W.3d 196, 206-07 (Tenn. 2000) (internal citations omitted).

[53] Id. at 208-09. *See also* State v. Davidson, 509 S.W.3d 156, 219 (Tenn. 2016).

[54] 188 S.W.3d 553, 572 (Tenn. 2006).

his evocative guilt-phase testimony and further describing some of the stab wounds as "defensive," meaning that the victim was conscious and experienced physical and mental suffering during the assault. According to the Court, this evidence was sufficient to establish the HAC aggravator. It follows that, in any murder case in which the victim was aware of what was happening and/or suffered physical pain during the assault, it may be possible to find the existence of the HAC aggravator. Certainly the prosecution can allege it in a wide range of cases. With the Court's nebulous definition, it is difficult to see how the HAC aggravator meaningfully narrows the class of death eligible defendants.

(i)(6) Aggravator – Avoiding Arrest or Prosecution

The (i)(6) aggravator applies when "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." This aggravator can be alleged in any case in which the murder occurred during the commission of another crime, because in any such case the prosecution can argue that a motivating factor in the murder was to eliminate the victim as a witness. As with other aggravators, the Tennessee Supreme Court has broadly defined this aggravator.

Although this aggravator addresses the defendant's motivation, not much is required to prove it. While "t]he defendant's desire to avoid arrest or prosecution must motivate the defendant to kill, [] it does not have to be the only motivation. Nor does it have to be the dominant motivation. The aggravating circumstance is not limited to the killings of eyewitnesses or those witnesses who know or can identify the defendant."[55]

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[55] Penny J. White, Tennessee Capital Case Handbook, at 15.43 (Tennessee Association of Criminal Defense Attorneys, 2010) (citing Terry v. State, 46 S.W.3d 147, 162 (Tenn. 2001); State v. Bush, 942 S.W.2d 489, 529 (Tenn. 1997); State v. Evans, 838 S.W.2d 185 (Tenn. 1992); State v. Ivy, 188 S.W.3d 132, 144 (Tenn. 2006); and State v. Hall, 976 S.W.2d 121, 133 (Tenn. 1998)).

As one scholar has explained, "When applied broadly to any victim who could have possibly identified the defendant, this aggravating circumstance applies to almost all murders, in violation of the narrowing principle."[56]

Aggravator (i)(7) – Felony Murder

Many murders are committed during the commission of another crime, and a "felony murder" can be prosecuted as first degree murder even if the defendant was not the assailant and lacked any intent to kill.[57] Also a defendant who caused the victim's death during the commission of another felony can be guilty of felony murder even if the defendant neither premeditated nor intended the victim's death.[58] If the defendant is guilty of felony murder, then the prosecution can allege and potentially prove the (i)(7) aggravator.[59]

In the felony murder case of State v. Middlebrooks, 840 S.W.2d 317, 341 (Tenn. 1992), the Court invalidated the earlier version of this aggravator, because there was no distinction between the elements of the crime of felony murder and the felony murder aggravator. The Court held that in such a case, the felony murder aggravator was unconstitutional because, by merely duplicating the elements of the underlying felony murder, it did not sufficiently narrow the class of death eligible defendants.

The legislature responded by amending the statute in 1995 to add two elements to the felony murder aggravator: that the murder was "knowingly" committed, solicited, directed, or

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[56] Id. at 15.45.

[57] *See* Tenn. Code Ann. § 39-13-202(a) for the elements of first degree premeditated murder and first degree felony murder.

[58] State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013).

[59] The other felonies that support this aggravator are "first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb[.]" 39 Tenn. Code Ann. § 39-13-204(i)(7).

aided by the defendant; and that the defendant had a "substantial role" in the underlying felony while the murder was committed.[60] In State v. Banks, the Court upheld the amended felony murder aggravator because its elements did not merely duplicate the elements of felony murder, and therefore, according to the Court, the aggravator satisfied the constitutional requirement to narrow the class of death eligible defendants.[61]

Although the legislature amended the (i)(7) felony murder aggravator in response to the Middlebrooks problem, it is not clear how this amendment created a practical difference in the statutory definition. The "knowing" and "substantial role" elements in the amended statute are relatively easy to prove and potentially could apply to virtually every felony murder, and these elements do not effectively perform a narrowing function.[62]

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Because the Court and legislature have expanded the number and meaning of aggravating circumstances that could support a death sentence, we submit that a large majority of first degree murder cases are now death eligible. It is hard to imagine a case in which the prosecution could not allege and potentially prove the existence of an aggravator. With this development, it is especially significant that, as discussed in Part VI below, Tennessee has experienced a sharp decline in sustained death sentences over the past ten to twenty years, notwithstanding the availability of death as a sentencing option in a larger number of first

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[60] Tenn. Code Ann. § 39-13-204(i)(7) (1995).

[61] 271 S.W.3d 90, 152 (Tenn. 2008). *See also* Carter v. State, 958 S.W.2d 620, 624 (Tenn. 1997) (upholding the aggravator when defendant was charged with both premeditated and felony murder relating to the same murder); State v. Robinson, 146 S.W.3d 469, 501 (Tenn. 2004) (upholding felony murder aggravator when the defendant did not kill the victim).

[62] *See, e.g.*, State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013) (upholding felony murder aggravator when, although defendant caused victim's death during a carjacking, there was no proof that he intended the death or knew that death would ensue).

degree murder cases. This not only implicates the problem of arbitrariness, it also strongly indicates that Tennessee's evolving standard of decency is moving away from the death penalty.

IV. COMPARATIVE PROPORTIONALITY REVIEW AND RULE 12

Another important development in Tennessee's death penalty jurisprudence has been the evisceration of any kind of meaningful "comparative proportionality review" of death sentences by the Tennessee Supreme Court.

As noted above, in an effort to protect against the "arbitrary and capricious" imposition of the death penalty, and following Georgia's lead, the Tennessee scheme requires the Tennessee Supreme Court to conduct a "comparative proportionality review" in every capital case. Tenn. Code Ann. § 39-13-206(c)(1)(D) provides that the Court shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." According to the Court, the statute's purpose is to ensure "rationality and consistency in the imposition of the death penalty."[63] Justice Aldolpho A. Birch, Jr., explained, "The principle underlying comparative proportionality review is that it is unjust to impose a death sentence upon one defendant when other defendants, convicted of similar crimes with similar facts, receive sentences of life imprisonment (with or without parole). ... Thus, proportionality review serves a crucial role as an 'additional safeguard against arbitrary or capricious sentencing.'"[64] This follows from the

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[63] *See, e.g.*, State v. Barber, 753 S.W.2d 659, 665-66 (Tenn. 1988).

[64] State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001) (Birch, J., concurring and dissenting).

principle that a State's "capital sentencing scheme ... must reasonably justify the imposition of a more severe sentence on the defendant *compared to others found guilty of murder.*"[65]

To facilitate comparative proportionality review, the Court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47) in 1978, requiring that "in all cases ... in which the defendant is convicted of first-degree murder," the trial judge shall complete and file so-called Rule 12 reports to include information about each of the cases.[66] Rule 12 was intended to create a database of first-degree murder cases for use in comparative proportionality review in capital cases. In State v. Adkins,[67] the Court stated that "our proportionality review of death penalty cases ... has been predicated largely on those reports *and has never been limited to the cases that have come before us on appeal.*" (Emphasis added.) On January 1, 1999, the Court issued a press release announcing the use of CD-ROMS to store copies of Rule 12 forms, in which then Chief Justice Riley Anderson was quoted as saying, "The court's primary interest in the database is for comparative proportionality review in [capital] cases, which is required by court rule and state law, ... The Supreme Court reviews the data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process."[68]

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[65] Lowenfield v. Phelps, 484 U.S. 321, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)) (emphasis added).

[66] As of June 30, 2017, the Rule 12 report included 67 detailed questions plus sub-questions divided into six parts, as follows: A. Data Concerning the Trial of the Offense (12 questions); B. Data Concerning the Defendant (17 questions); C. Data Concerning Victims, Co-Defendants, and Accomplices (15 questions); D. Representation of the Defendant (10 questions); E. General Considerations (3 questions); and E. Chronology of Case (10 questions). Additionally, the prosecutor and the defense attorney are given the opportunity to submit comments to be appended to the report.

[67] 725 S.W.2d 660, 663 (Tenn. 1987).

[68] Available at http://tncourts.gov/press/1999/01/01/court-provides-high-tech-tool-legal-research-murder-cases (last visited 11/17/17).

The collection of Rule 12 data for comparative proportionality review was based on the idea, derived from Furman, that capital cases must be distinguishable in a meaningful way from non-capital first-degree murder cases. If there is no meaningful and reliable way to distinguish between capital and non-capital first-degree murder cases, then the capital punishment system operates arbitrarily, contrary to constitutional principles and modern notions of human decency.

Under this concept of arbitrariness, Rule 12 data collection can make sense. By gathering and analyzing this kind of data, we can begin to see statistically whether our judicial system is consistently and reliably applying appropriate criteria or standards for selecting only the "worst of the bad" defendants for capital punishment,[69] or whether there are other inappropriate criteria (such as race, poverty, geographic location, prosecutorial whim, or other factors) that play an untoward influence in capital sentencing decisions.

Unfortunately, the history of the Court's comparative proportionality review, and of Rule 12, has been problematic.[70] Rule 12 data has rarely, if ever, entered into the Court's comparative proportionality analysis. There was no effort by the Court or any other public agency to organize or quantify Rule 12 data in any comprehensive way. All we have now are CD-ROMS with copies of more than a thousand Rule 12 reports that have been filed, with no indices, summaries, or sorting of information. There exist no reported Tennessee appellate court opinions that cite or use any statistical data compiled from the Rule 12 reports. And

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[69] Members of the Tennessee Supreme Court have used the term "worst of the bad" in reference to the proposition that the death penalty should be reserved only for the very worst cases. *See* State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994); State v. Howell, 868 S.W.2d 238, 265 (Tenn. 1993) (Reid, C.J., concurring); State v. Middlebrooks, 840 S.W.2d 317, 350 (Tenn. 1992) (Drowota, J., concurring and dissenting).

[70] In only one case has the Tennessee Supreme Court set aside a death sentence based on comparative proportionality review. *See* State v. Godsey, 60 S.W.3d 759 (Tenn. 2001).

perhaps most significantly, in more than one-third of first degree murder cases, trial judges have failed to file Rule 12 reports, leaving a huge gap in the data.[71]

In the 1990's, Tennessee Supreme Court Justices Lyle Reid[72] and Adolpho A. Birch, Jr.[73] began dissenting from the Court's decisions affirming death sentences because of what they perceived to be inadequate comparative proportionality review. Justice Reid criticized the majority for conducting comparative proportionality review "without a structured review process."[74]

Then in 1997, the Court decided State v. Bland,[75] which dramatically changed the Court's purported methodology for conducting a comparative proportionality review. Among other things, the Court narrowed the pool of cases to be compared in the analysis. Under Bland, the Court now compares the capital case under review only with other capital cases it has previously reviewed, and not with the broader pool of all first degree murder cases, including those that resulted in sentences of life or life without parole. Justices Reid and Birch dissented in Bland. Justice Reid repeated his earlier complaints that the Court's comparative proportionality review analysis lacks proper standards.[76] Justice Birch agreed with Justice Reid

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[71] See discussion of H.E. Miller, Jr.'s survey in Part VI, below. A copy of Mr. Miller's report is attached as Appendix 1.

[72] Justice Reid retired from the bench in 1998.

[73] Justice Birch retired from the bench in 2006.

[74] State v. Hodges, 944 S.W.2d 346, 363 (Tenn. 1997) (Reid, J., dissenting).

[75] 958 S.W.2d 651 (Tenn. 1997).

[76] Id. at 674-79.

and further dissented from the Court's decision to narrow the pool of cases to be considered.[77] Thereafter Justice Birch repeatedly dissented from the Court's decisions affirming death sentences, on the ground that the Court's comparative proportionality analysis was essentially meaningless.[78] Justice Birch stated: "I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective."[79]

More recently, in the 2014 decision of State v. Pruitt, Justices William C. Koch, Jr.[80] and Sharon G. Lee dissented from the Court's comparative proportionality methodology.[81] Justice Koch pointed out the problems with Bland as follows:

> [T]he Bland majority changed the proportionality analysis in a way that deviates not only from the language of Tenn. Code Ann. § 39-13-206(c)(1)(D) but also from the relevant decisions of the United States Supreme Court.
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> First, the Court narrowed the pool of cases to be considered in a proportionality analysis. Rather than considering all cases that resulted in a conviction for first-degree murder (as the Court had done from 1977 to 1997), the Court limited the pool to "only those cases in which a capital sentencing hearing was actually conducted... regardless of the sentence actually imposed." State v. Bland, 958 S.W.2d at 666. By narrowly construing "similar cases" in Tenn. Code Ann. § 39-13-206(c)(1)(D), the Court limited

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[77] *Id. at 679.* Because of the meaningless of the Court's comparative proportionality analysis, Justice Birch consistently dissented when the Court affirmed death sentences. *See, e.g.,* State v. Leach, 148 S.W.3d 42, (Tenn. 2004) (Birch, J., concurring and dissenting) ("I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in State v. Bland. [Case citations omitted.] As previously discussed, I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.")

[78] *See* State v. Davis, 141 S.W.3d 600, 632-33 (Tenn. 2004) (Birch, J., concurring and dissenting), in which Justice Birch presented a list of such cases.

[79] Id. at 633.

[80] Justice Koch retired from the bench in 2014.

[81] State v. Pruitt, 415 S.W.3d 180, 225 (Tenn. 2013) (Koch, J., concurring and dissenting).

proportionality review to only a small subset of Tennessee's murder cases – the small minority of cases in which a prosecutor actually sought the death penalty.

The second limiting feature of the State v. Bland proportionality analysis is found in the Court's change in the standard of review. The majority opinion held that a death sentence could be found disproportionate only when "the case, taken as a whole, is *plainly lacking* in circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Bland, 958 S.W.2d at 665 (emphasis added). This change prevents the reviewing courts from determining whether the case under review exhibits the same level of shocking despicability that characterizes the bulk of our death penalty cases or, instead, whether it more closely resembles cases that resulted in lesser sentences.

The third limiting feature of the State v. Bland analysis is the seeming conflation of the consideration of the circumstances in Tenn. Code Ann. § 39-13-206(c)(1)(B) and Tenn. Code Ann. § 39-13-206(c)(1)(C) with the circumstance in Tenn. Code Ann. § 39-13-206(c)(1)(D). When reviewing a sentence of death for first-degree murder, the courts must separately address whether "[t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances;" whether '[t]he evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances;" and whether '[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."

As applied since 1997, State v. Bland has tipped the scales in favor of focusing on the evidentiary support for the aggravating circumstances found by the jury and on whether these circumstances outweigh the mitigating circumstances. Instead of independently addressing the evidence regarding "the nature of the crime and the defendant," Bland's analysis has prompted reviewing courts to uphold a death sentence as long as the evidence substantiates the aggravating circumstance or circumstances found by the jury, as well as the jury's decision that the aggravating circumstance or circumstances outweigh any mitigating circumstances.[82]

In an earlier case, Justice Birch pointedly summarized the problem with the Court's comparative proportionality jurisprudence: "Because our current comparative proportionality review system lacks objective standards, comparative proportionality analysis seems to be little more than a 'rubber stamp' to affirm whatever decision the jury reaches at the trial level."[83]

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[82] Id. at 227-28.

[83] State v. Chalmers, 28 S.W.3d 913, 924 (Tenn. 2000) (Birch, J., concurring and dissenting).

V. SIMPLIFYING THE LOTTERY: A TALE OF TWO CASES

As the legislature and the Court have expanded the opportunity for arbitrariness by expanding the class of death eligible defendants, and as the Court has removed a check against arbitrariness by declining to conduct meaningful comparative proportionality review, it is time to ask how Tennessee's capital punishment system operates in fact. Returning to the lottery scenario, let us simplify the problem by considering just two cases and asking two questions: (i) which of the two cases is more deserving of capital punishment? and, (ii) which of the two cases actually resulted in a death sentence?[84]

Case #1

The two defendants were both convicted of six counts of first degree premeditated murder. They shot a man and a woman in the head. They strangled to death two women, one of whom was pregnant, thus also killing her unborn child. They also "stomped" a 16-month old child to death.

Both of the defendants had previously served time in jail or prison. When one of the defendants was released from prison, the two of them got together and dealt drugs including marijuana, cocaine, crack cocaine, and pills. Their drug business was successful, progressing from selling to "crack heads" and addicts to selling to other dealers. One of the defendants, the apparent leader of the two, was described as intelligent.

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[84] The description of Case #1 is a summary of the facts described in State v. Moss, No. 2014-00746-CCA-R3-CD (Tenn. Crim. App. 2016); and Burrell v. State, No. M2015-2115-CCA-R3-PC (Tenn. Crim. App. 2017). The description of Case #2 is a summary of the facts described in State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013).

The defendants planned to rob WC, a male who also dealt drugs. On the night of the crime, WC and AM, a female, went to WC's mother's house. The defendants were together in Huntsville, Alabama, and one of them telephoned WC. After receiving the call, WC and AM left WC's mother's house and went to pick up the defendants. The four of them left Huntsville with one of the defendants driving the car, WC sitting in the front passenger seat, the other defendant sitting behind WC, and AM sitting behind the driver. They drove to a house where the defendants kept their drugs. When the car pulled into the garage, the defendant in the back seat shot WC in the back of the head three times. The killer then shot AM in the head. The defendants pulled AM out of the back seat, dragged her into the utility room and put a piece of plywood over the doorway to conceal her body.

The defendants then went inside the house and found CC, a pregnant woman. They bound her hands behind her back and dunked her head in a bathtub to force her to reveal where WC kept his drugs and money. When CC was unwilling or unable to tell them, they strangled her to death. When the defendants killed CC, they also killed her unborn child. After killing CC and her unborn child, they stomped to death the sixteen-month-old child who was also in the house.

The defendants then drove to another house where WC kept drugs. WC's body was still in the car. They found JB, a woman who was inside the house, and strangled her to death in the same manner that they had killed CC. After killing JB, the defendants ransacked the house, looking for money and drugs. They took drugs from one or both houses, and they took WC's AK-47s from the second house. According to the

prosecution's theory, the defendants intended to "pin" the killing on WC, so they spared the lives of his two children and disposed of his body in the woods.

The aggravators that would support death sentences in these cases included: (i)(1) (murder against a person less than twelve years old); (i)(5) (the murders were heinous, atrocious or cruel); (i)(6) (the murders were committed for the purpose of avoiding arrest or prosecution); (i)(7) (the murders were committed while the defendants were committing other felonies including first degree murder, robbery, burglary, theft, kidnapping, and aggravated child abuse); (i)(12) (mass murder); and (i)(16) (one of the victims was pregnant).

Case #2

Defendant was convicted of first degree felony murder for causing the death of an elderly man in the course of carjacking the victim's car. There was no evidence that the defendant intended the victim's death.

The defendant had prior convictions for aggravated burglary, robbery, criminal intent to commit robbery, and theft over $500. His I.Q was tested at 66 and 68, in the intellectual disability range; but the court found that he was not sufficiently deficient in adaptive behavior to meet the legal definition of intellectual disability that would have exempted him from the death penalty.[85]

Defendant planned to rob a car. He went to the Apple Market and stood outside the store's door. An older man, the victim, came out of the market with groceries in his arms and walked to his car. As the man reached the driver's side door, defendant ran up behind him, and there ensued a short scuffle lasting about 15 seconds. The defendant

[85] See Adkins v. Virginia, 536 U.S. 304 (2002) (disqualifying the intellectually disabled from the death penalty); Tenn. Code Ann. § 39-13-203 (same).

threw the man into the car and/or pavement, causing severe injuries including brain trauma, fractured bones, and internal bleeding. Defendant slammed the car door and drove away. The man was taken to the hospital where he died of his head injuries the following day.

The aggravators that would support a death sentence in this case were: (i)(2) (prior violent felonies); (i)(7) (felony murder); and (i)(14) (victim over 70 years old).

We submit that the majority of persons presented with these two case scenarios, without any further information about the operation of Tennessee's death penalty system, would choose Case #1 as the more appropriate and likely candidate for the death penalty. In fact, however, in Case #1 neither defendant received a death sentence - one received six consecutive life sentences, and the other received four concurrent and two consecutive life sentences. On the other hand, the defendant in Case #2, who did not premeditate or intend the victim's death, was sentenced to death.

These cases are not comparable. How could the single felony murder case result in a death sentence while the premeditated multi-murder case resulted in life sentences? They are both fairly recent cases. The multi-victim premeditated murder case was in a rural county in the Middle Grand Division of the State, where no death sentences have been imposed since 2001. By contrast, the single-victim felony murder case, involving a borderline intellectually disabled defendant, was in Shelby County which has accounted for 52% of all new Tennessee death sentences since mid-2001, of which 86% involved black defendants. These may not be the only factors that could explain the disparity between these cases, but they stand out.

These cases may represent an extreme comparison – although 90% of all multi-murder cases resulted in life or LWOP sentences – but this comparison most clearly illustrates a

problem with our death penalty system. Geographic location, differing prosecutorial attitudes, and the prejudicial influences of defendants' mental impairments are arbitrary factors that, along with other arbitrary factors discussed below, too often determine the application of capital punishment. In the next part, we review Mr. Miller's survey of first degree murder cases since 1977, which we believe supports the proposition that arbitrariness permeates the entire system.

VI. MR. MILLER'S SURVEY OF FIRST DEGREE MURDER CASES

A. The Survey Process

Given the Tennessee Supreme Court's abandonment of the original purpose behind Rule 12 data collection, how can we systematically evaluate the manner by which Tennessee has selected, out of more than two thousand convicted first degree murderers, only 86 defendants to sentence to death – and only six defendants to execute – during the 40 years the system has been in place? Is there a meaningful distinction between death-sentenced and life-sentenced defendants? Are we imposing the death penalty only upon those criminals who are the "worst of the bad"? Does our system meet the constitutional demand for heightened reliability, consistency, and fairness? Or is our system governed by arbitrary factors that should not enter into the sentencing decision?

To test the degree of arbitrariness in Tennessee's death penalty system, attorney H. E. Miller, Jr., undertook a survey of all Tennessee first-degree murder cases decided during the 40-year period beginning July 1, 1977, when the current system was installed. Mr. Miller devoted

thousands of hours over several years in conducting his survey. His Report is attached as Appendix 1.[86]

Mr. Miller began his survey by reviewing the filed Rule 12 reports. He soon discovered, however, that in close to one-half of first-degree murder cases, trial judges failed to file Rule 12 reports – and for those cases, there is no centralized data collection system. Further, many of the filed Rule 12 reports were incomplete or contained errors.[87]

Mr. Miller found that Rule 12 reports were filed in 1,348 adult first-degree murder cases. He has identified an additional 1,166 first-degree murder cases for which Rule 12 reports were not filed, bringing the total of adult first degree murder cases that he has been able to find to 2,514.[88] Thus, trial judges failed to comply with Rule 12 in at least 46% of adult first degree murder cases.[89] This astounding statistic is perhaps explainable by the fact that Rule 12 data has never been used by the Court in a meaningful way and has become virtually obsolete since

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[86] The appendices to Mr. Miller's Report, which include all of the data he collected, are not included in the attachment to this article but are available on request.

[87] In 2004, the Tennessee Comptroller of the Treasury noted: "Office of Research staff identified a number of cases where defendants convicted of first-degree murder did not have a Rule 12 report, as required by law. ... Rule 12 reports are paper documents, which are scanned and maintained on CD-ROM. The format does not permit data analysis." John G. Morgan, Tennessee's Death Penalty: Costs and Consequences (Comptroller of the Treasury Office of Research, July 2004) (found at https://deathpenaltyinfo.org/documents/deathpenalty.pdf, last visited 11/17/17). The situation with Rule 12 reports has not improved since the Comptroller's report.

[88] There undoubtedly exist additional first-degree murder cases, for which Rule 12 reports were not filed, that Mr. Miller did not find. For example, some cases are settled at the trial court level and are never taken up on appeal; and without filed Rule 12 reports, these cases are extremely difficult to find. Certainly a fair number of recent cases were not found because of the time it takes for a case to proceed from trial to the Court of Criminal Appeals before an appellate court record is created. It also is possible that cases decided on appeal were inadvertently overlooked, despite great effort to be thorough. To the extent there are additional first degree murder cases that were not found, statistics including those cases would more strongly support the infrequency of death sentences and the capricious nature of our death penalty lottery.

[89] The Rule 12 noncompliance rate is 50% in juvenile first degree murder cases.

Bland v. State[90] when the Tennessee Supreme Court decided to limit its comparative proportionality review only to other capital cases that it had previously reviewed.[91]

Because of problems with the Rule 12 reports, Mr. Miller found it necessary to greatly broaden his research to find and review the first degree murder cases for which Rule 12 reports were not filed, and to verify and correct information contained in the Rule 12 reports that were filed. As described in his Report, Mr. Miller researched numerous sources of information including cases reported in various websites, Tennessee Department of Correction records, Tennessee Administrative Office of the Courts reports, and original court records, among other sources.

Mr. Miller compiled information about each case, to the extent available, including: name, gender, age and race of defendant; date of conviction; county of conviction; number of victims; gender, age and race of victims (to the extent this information was available); and results of appeals and post-conviction proceedings – information that should have been included in Rule 12 reports.

B. Factors Contributing to Arbitrariness

Mr. Miller's survey reveals that Tennessee's capital sentencing scheme fails to fulfill Furman's basic requirement to avoid arbitrariness in imposing the ultimate penalty. Capital sentencing in Tennessee is not "regularized" or "rationalized." The statistics, and the

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[90] *See* notes 75-77, *supra*, and accompanying text.

[91] The perpetuation of Rule 12 on the books gives rise to two unfortunate problems. First, Rule 12 creates a false impression of meaningful data collection, which clearly is not the case when we realize the 46% noncompliance rate and the lack of evidence that Rule 12 data has served any purpose under the current system. Second, the 46% noncompliance rate among trial judges who preside over first degree murder cases tends to undermine an appearance of integrity. We should expect judges to follow the Court's rules.

experience of attorneys who practice in this area, demonstrate a number of factors that contribute to system's capriciousness.

(1) Infrequency & downward trend

As pointed out above, frequency of application is the most important factor in assessing the constitutionality of the death penalty. As the death penalty becomes less frequently applied, there is an increased chance that capital punishment becomes "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[92] Infrequency of application sets the foundation for analysis of the system.

Since July 1, 1977, among the 2,514 Tennessee defendants who were convicted of first-degree murder, only 192 of those defendants received death sentences. Among those 192 defendants, only 86 defendants' death sentences had been sustained as of June 30, 2017, while the death sentences imposed on 106 defendants had been vacated or reversed. Accordingly, over the span of the past 40 years only approximately 3.4% of convicted first degree murderers have received sustained death sentences – and most of those cases are still under review. Of those 86 defendants whose death sentences have been sustained, only six were actually executed, representing less than 0.2% of all first degree murder cases – or less than one out of every 400 cases. In other words, the probability that a defendant who commits first degree murder is arrested, found guilty, sentenced to death, and executed is miniscule. Even if Tennessee were to hurriedly execute the approximately dozen death row defendants who are

[92] Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring).

currently eligible for execution dates,[93] the percentage of executed defendants as compared to all first-degree murder cases would remain extremely small.

Additionally, over the past twenty years there has been a sharp decline in the frequency of capital cases. Table 23 from Mr. Miller's Report tells the story:

[93] Tennessee Supreme Court Rule 12.4 provides that an execution date will not be set until the defendant's case has completed the "standard three tiers" of review (direct appeal, post-conviction, and federal habeas corpus), which occurs when the defendant's initial habeas corpus proceeding has run its full course through the U.S. Supreme Court. The Tennessee Administrative Office of the Courts lists eleven "capital cases that have, at one point, neared their execution date." http://www.tsc.state.tn.us/media/capital-cases (last visited 11/17/2017).

FREQUENCY OF TENNESSEE DEATH SENTENCES
FREQUENCY OF TENNESSEE DEATH SENTENCES IN 4-YEAR INCREMENTS

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[94]	Ave. New Death Sentences per Year	1st Degree Murder Cases[95]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25 per year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25 per year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00 per year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25 per year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45 per year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00 per year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00 per year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00 per year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50 per year	284	2%	1.7%
7/1/13 – 6/30/17	3	1	1	0.25 per year	Incomplete Data[96]	Incomplete Data	Incomplete Data
TOTALS	**221**	**195[97]**	**89[98]**	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

[94] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.

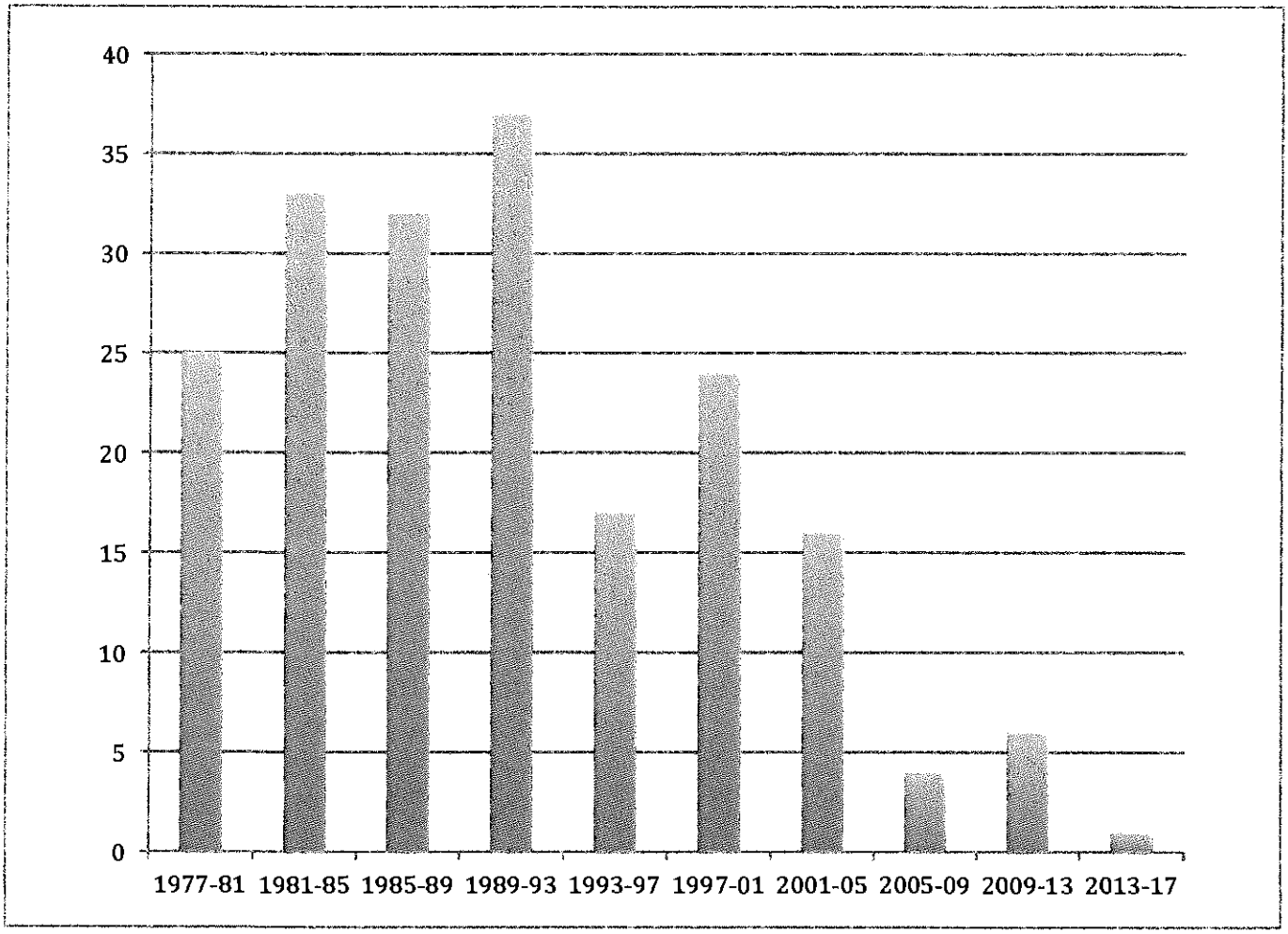
[95] Counted by defendants, not murder victims.

[96] Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to T.B.I. statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See* Table 25.

[97] One defendant had 3 separate "new" trials each resulting in "new" and "sustained" death sentences; another defendant had 2 such trials. *See* footnote 1, *supra*. Accordingly, there were 195 "new" trials involving a total of 192 defendants, and 89 "sustained" death sentences involving a total of 86 defendants.

[98] See note 96. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

GRAPH OF NEW DEATH SENTENCES[99]
IN TENNESSEE
BY 4-YEAR INCREMENTS



As we can see, disregarding cases that were subsequently reversed or vacated, the frequency of new death sentences has fallen from a high of 9.25 per year from 1989 to 1993, to a low of 0.25 per year during the most recent 4-year period of 2013 to 2017 – a 97% reduction in the rate of new death sentences. Moreover, no new death sentence was imposed in Tennessee over the three-year period from July 2014 through June 2017; and over the 16-year period from February 2001 through June 2017, no death sentence had been imposed in the

[99] This graph includes all original capital trials resulting in "new" death sentences, including those that were subsequently reversed or vacated.

Middle Grand Division of the State (which includes Nashville-Davidson County and 40 other counties, representing more than one-third of the State's population).[100]

Mr. Miller broke down the statistics into two groups – cases originally tried during the first 24 years, before June 30 2001; and those originally tried during the most recent 16 years, through June 30, 2017. Mr. Miller used 2001 as a dividing line because it was during the period leading up to that year when Tennessee began experiencing its steep decline in the frequency of new death sentences. Also, 2001 was the year when the Office of the District Attorney General for Davidson County issued its *Death Penalty Guidelines*,[101] setting forth the procedure and criteria that Office would use in determining when to seek a death sentence.

During the initial 24-year period, Tennessee imposed sustained death sentences on 5.8% of the defendants convicted of first-degree murder, at the average rate of 4 sustained death sentences per year. Since 2001, the percentage of first degree murder cases resulting in death sentences has dropped to less than 2%, at a rate of less than 1 sustained death sentence per year.

At this level of infrequency, it is impossible to conceive how Tennessee's death penalty system is serving any legitimate penological purpose. No reasonable scholar could maintain that there is any deterrence value to the death penalty when it is imposed with such infrequency.[102] And there is minimal retributive value when the overwhelming percentage of

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[100] *See* Appendix 2, *Chart of Tennessee Capital Trials.*

[101] A copy of these Guidelines is on file with the authors and available upon request. The current Davidson County District Attorney confirmed to one of the authors that the Guidelines remain in effect. Based on our inquiries, no other district attorney general office has adopted written guidelines or standards for deciding when to seek death.

[102] Although a small minority of studies have purported to document a deterrent effect, none have documented such an effect in a state like Tennessee where the vast majority of killers get Life or LWOP

first degree murder cases (now more than 98%) end up with Life or LWOP.[103] Any residual deterrent or retributive value in Tennessee's sentencing system is further diluted to the point of non-existence by the other factors of arbitrariness listed below. As Justice White stated in Furman, "[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[104]

The decline in the frequency of new death sentences in Tennessee also evidences Tennessee's evolved standard of decency away from capital punishment. As further explained below, in the vast majority of Tennessee Counties, including all counties within the Middle Grand Division, the death penalty is essentially dead.[105]

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sentences, and where those who do receive death sentences long survive their sentencing date, usually until they die of natural causes, and are rarely executed. In fact, "the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate." D. Beschle, Why Do People Support Capital Punishment? The Death Penalty as Community Ritual, 33 Conn. L. Rev. 765, 768 (2001). *See, e.g.*, National Research Council of the National Academies, Deterrence and the Death Penalty 2 (2012) ("[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.")

[103] The role of retribution in our criminal justice system is a debatable issue. "Retribution is no longer the dominant objective of the criminal law." Williams v. New York,, 337 U.S. 241, 248 (1949). Over time, "our society has moved away from public and painful retribution toward ever more humane forms of punishment." Baze v. Rees, 553 U.S. 35, ___ (2008) (Stevens, J., concurring in the judgment). The United States Supreme Court has cautioned that, of the valid justifications for punishment, "retribution ... most often can contradict the law's own ends. This is of particular concern ... in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 554 U.S. 407, ___ (2008).

[104] 408 U.S. at 311.

[105] The decline in new death sentences in Tennessee mirrors a nationwide trend. According to the Death Penalty Information Center, the nationwide number of death sentences has declined from a total of 295 in 1998 to a total of just 31 in 2016 – a 90% decline.
https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited 11/13/2017).

(2) Geographic disparity

Death sentences are not evenly distributed throughout the state. Whether it is a function of differing crime rates, political environment, racial tensions, the attitude of prosecutors, the availability of resources, the competency of defense counsel, or the characteristics of typical juries, a few counties have zealously pursued the death penalty in the past, while others have avoided it altogether. Over the 40-year period, only 48 of Tennessee's 95 counties (roughly one-half), have conducted trials resulting in death sentences,[106] but as indicated above, the majority of death sentences were reversed or vacated. More significantly, only 28 counties, representing 64% of Tennessee's population, have imposed sustained death sentences;[107] and since 2001, only eight counties, representing just 34% of Tennessee's population, have imposed sustained death sentences.[108] In the most recent five-year period, from July 1, 2012, to June 30, 2017, Shelby County was the only county to impose death sentences.

The decline in the number of counties resorting to the death penalty is illustrated by the following table taken from Mr. Miller's report, which gives the number of counties that conducted capital trials (*i.e.*, trials resulting in death sentences) during each of the ten four-year increments during the 40-year period:[109]

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[106] *See* Appendix 2, *Chart of Tennessee Capital Trials.*

[107] Appendix 1, *Miller Report,* Table 21.

[108] Id., Table 22. *See also* Appendix 2, *Chart of Tennessee Capital Trials* 8.

[109] Id., Table 24.

4-Year Period	Number of Counties Conducting Capital Trials[110] During the Indicated 4-Year Period
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11
7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

It is costly to maintain a capital punishment system.[111] As the number of counties that impose the death penalty declines, an increasing majority of Tennessee's taxpayers are subsidizing the system that is not being used on their behalf, but instead is being used only by a diminishingly small number of Tennessee's counties.

Shelby County stands at one end of the spectrum. Since 1977, it has accounted for 37% of all sustained death sentences; over the past 10 years, it has accounted for 57% of Tennessee

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[110] These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.

[111] There has been no study of the of Tennessee's system. *See* Tennessee's Death Penalty Costs and Consequences, *supra* note 87, at i-iv (concluding that capital cases are substantially more expensive than non-capital cases, but itemizing reasons why the Comptroller was unable to determine the total cost of Tennessee's capital punishment system). Studies from other states, however, have concluded that maintaining a death penalty system is quite expensive, costing millions of dollars per year. For a general discussion of costs, see Brandon L. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, 95-100 (Harvard University Press, 2017) (citing studies from several states). The Death Penalty Information Center website lists and describes a number of cost studies at https://deathpenaltyinfo.org/costs-death-penalty (last visited 11/15/2017).

death sentences during that period; and, as mentioned above, it has accounted for all of Tennessee's death sentences during the most recent 5-year period.[112]

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County over the past 39 years, there have been ten first-degree murder cases involving eleven defendants and 22 victims (an average of 2.2 victims per case). No death sentences were imposed, even in two mass murder cases. For example, in the recent case of State v. Moss,[113] discussed in Part V above, the defendant and his co-defendant were each convicted of six counts of first-degree premeditated murder; the murders were egregious; but the defendants received life sentences, not death. According to the Rule 12 reports, in another Lincoln County case, State v. Jacob Shaffer, on July 22, 2011, the defendant, who had committed a prior murder in Alabama, was convicted of five counts of first-degree murder and was sentenced to LWOP, not death.

Indeed, in the entire Middle Grand Division, over the past 25 years, since January 1, 1992, only six defendants received sustained death sentences – a rate of only one case every four years, and no cases since February 2001.

There is a statistically significant disparity between the geographic distribution of first-degree murder cases, on the one hand, and the geographic distribution of capital cases, on the other. Mere geographic location of a case makes a difference, contributing an indisputable element of arbitrariness to the system.

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[112] Appendix 2, *Chart of Tennessee Capital Trials* 8.

[113] No. 2013-CR-63 (Tenn. Crim. App., Sep. 21, 2016).

(3) Timing and natural death

To the consternation of many, capital cases take years to work through the three tiers of review – from trial and direct appeal through post-conviction and federal habeas – and further litigation beyond that. Perhaps that is as it should be, given the heightened need for reliability in capital cases and the exceedingly high capital sentencing reversal rate due to trial errors, as discussed below. But the long duration of capital cases, combined with natural death rates among death row defendants, contributes an additional form of arbitrariness in determining which defendants are ultimately executed.

As of June 30, 2017, among the 56 surviving defendants on death row, the average length of time they had lived on death row was more than 21 years, and this average is increasing as the death row population ages while fewer new defendants are entering the population.[114] Only ten new defendants were placed on death row during the most recent 10 years, equal in number to the ten surviving defendants who had been on death row for over 30 years. One surviving defendant had been on death row for more than 35 years. Mr. Miller's Report breaks down the surviving defendants' length of time on death row as follows:[115]

Length of Time on Death Row	Number of Defendants (as of 6/30/2017)
> 30 Years	10
20 – 30 Years	20
10 – 20 Years	16
< 10 Years	10

[114] Appendix 1, *Miller Report* 17.

[115] Id., Table 20.

Of the six whom Tennessee has executed, their average length of time on death row was 20 years, and one had been on death row for close to 29 years.[116]

The length of time defendants serve on death row facing possible execution further diminishes any arguable penological purpose in capital punishment to the point of nothingness. With the passage of time, the force of deterrence disappears, and the meaning of retribution is lost.[117]

Moreover, during the 40-year period, 24 condemned defendants died of natural causes on death row. This means that, so far at least, a defendant with a sustained death sentence is four times more likely to die of natural causes than from an execution. Even if Tennessee hurriedly executes the approximately dozen death-sentenced defendants who have completed their "three tiers" of review,[118] with the constantly aging death row population the number of natural deaths will continue to substantially exceed deaths by execution.

Given the way the system operates, a high percentage of natural deaths among the death row population is an actuarial fact affecting the carrying out of the death penalty. Consequently, the timing of a case during the 40-year period, along with the health of the defendant, is an arbitrary factor determining not only whether a defendant will be sentenced to death, but also whether he will ever be executed. Furthermore, if a death-sentenced defendant

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[116] This includes Daryl Holton who waived his post-conviction proceedings and was executed in 1999 when he had been on death row only 8 years.

[117] *See* Johnson v. Bredesen, 130 S.Ct. 541, 543 (2009) (Stevens, J., dissenting from denial of certiorari immediately before Tennessee's execution of Cecil Johnson, who had been on death row for close to 29 years) ("[D]elaying an execution does not does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death.").

[118] *See* note 92, *supra*.

is four times more likely to die of natural causes than by execution, then the death penalty loses any possible deterrent or retributive effect for that reason as well.

(4) Error rates

Of the 192 Tennessee defendants who received death sentences during the 40-year period, 106 defendants had seen their sentences or convictions vacated because of trial error, and only 86 defendants had sustained death sentences (of whom 56 were still living as of June 30, 2017) – and most of their cases are still under review.[119] This means that during the 40-year period the death sentence reversal rate was 55%. Among those reversals, three defendants were exonerated of the crime, and a fourth was released upon the strength of new evidence that he was actually innocent.[120]

If 55% of General Motors automobiles over the past 40 years had to be recalled because of manufacturing defects, consumers and shareholders would be outraged, the government would investigate, and the company certainly would go out of business. One of the fundamental principles under the Eighth Amendment is that our death penalty system must be reliable.[121] With a 55% reversal rate, reliability is lacking.

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[119] During the 40-year period 24 defendants died of natural causes while their death sentences were pending. These are counted as "sustained" death sentences, along with the six defendants who were executed and the 56 defendants on death row as of June 30, 2017.

[120] *See* Appendix 1, *Miller Report*, at 16.

[121] *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("[M]any of the limits this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.").

The existence of error in capital cases and the prospect of reversal is a random factor that introduces a substantial element of arbitrariness into the system. Two causes of error, ineffective assistance of counsel and prosecutorial misconduct, are discussed below.[122]

(5) Quality of defense representation

We have identified 45 defendants whose death sentences or convictions were vacated by state or federal courts on grounds of ineffective assistance of counsel.[123] In other words, courts have found that 23% of the Tennessee defendants sentenced to death were deprived of their constitutional right to effective legal representation. This is an astounding figure, especially given the difficulty in proving both the "deficiency" and "prejudice" prongs under the Strickland standard for determining ineffective assistance of counsel under the Sixth Amendment.[124] In two additional cases affirmed by the courts, Governor Bredesen commuted the death sentences based, in part, on his determination that the defendants suffered from "grossly inadequate defense representation" at trial and/or during the post-conviction process.[125] These are findings of legal malpractice.[126] If a law firm were judicially found to have committed

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[122] Other reversible errors have included unconstitutional aggravators, erroneous evidentiary rulings, improper jury instructions, insufficient evidence to support the verdict, among other grounds for reversed. *See* The Tennessee Justice Project, Tennessee Death Penalty Cases Since 1977 (Oct 2007) (copy on file with the authors and available upon request).

[123] These cases are listed in Appendix 3, *List of Capital IAC Cases*.

[124] Strickland v. Washington, 466 U.S. 668 (1984). The difficulty of proving ineffective assistance of counsel is embodied in the following oft-quoted passage from Strickland: "Judicial scrutiny of counsel's performance must be highly deferential.... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; ..." Id. at 689 .

[125] See Appendix 1, *Miller Report* 16.

[126] There are additional capital cases in which courts have vacated death sentences on grounds of ineffective assistance of counsel, only to be reversed on appeal. See, *e.g.*, Abdur'Rahman v. Bell, 226 F.3d

malpractice in more than 23% of their cases over the past 40 years, the firm would incur substantial liability and dissolve. How can we tolerate a capital punishment system that yields these results?

The reasons for deficient defense representation in capital cases are not hard to locate. The problem begins with the general inadequacy of resources available to fund the defense in indigent cases. In a recently published report, the Tennessee Indigent Defense Task Force, appointed by the Tennessee Supreme Court, found:

> There is a strongly held belief in the legal community that attorneys do not receive reasonable compensation when representing clients as counsel appointed by the State. The Task Force was repeatedly reminded that, in almost every trial situation, the attorney for the defendant will be paid less than every other person with the trial associated in a professional capacity – less than the testifying experts, the investigators,, and interpreters.
>
> Attorneys and judges from across the state, in a variety of different roles and stages of their careers, as well as other officials and experts in the field were overwhelmingly in favor of increasing the compensation for attorneys in appointed cases. Concern regarding compensation is not new.[127]

According to the Task Force, there is a general consensus among lawyers and judges that "the current rates for paying certain experts ... are below market rate."[128]

Virtually all defendants in capital cases are indigent and must rely upon appointed counsel for their defense.[129] A typical capital defendant has no role in choosing the defense

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696 (6th Cir. 2000) (affirming deficient performance finding, but reversing on the prejudice prong); Morris v. Carpenter, 802 F.3d 825 (6th Cir. 2015) (reversing by applying a strict standard of reviewing state court decisions). These cases illustrate differing judicial viewpoints on capital punishment, which is another arbitrary factor discussed below.

[127] Indigent Representation Task Force, Liberty & Justice for All: Providing Right to Counsel Services in Tennessee 35 (Apr2017) (the "Task Force Report") (available at http://tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf, last visited on 11/18/17).

[128] Id. at 52.

attorneys who will represent him. Capital cases are unique in many respects and place peculiar demands on the defense, involving mitigation investigation, extensive use of experts, "death qualification" and "life qualification" in jury selection, and the sentencing phase trial – the only kind of trial in the Tennessee criminal justice system in which a jury makes the sentencing decision. Thus, capital defense representation is regarded as a highly specialized area of law practice.[130] As noted by the American Bar Association:

> [D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases. ...
>
> > Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[131]

Handling a death case is all consuming, requiring extraordinary hours and nerves. It is difficult for a private attorney to build and maintain a successful law practice while effectively

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[129] See note 142 , *infra*.

[130] Tenn. S. Ct. R. 13, Section 3, acknowledges the specialized nature of capital defense representation by imposing special training requirements on appointed capital defense attorneys. This is the only area of law in which the Tennessee Supreme Court imposes such a requirement. Unfortunately, the Tennessee training requirements for capital defense attorneys is inadequate. *Cf.* William P. Redick, Jr., et al., Pretend Justice – Defense Representation in Tennessee Death Penalty Cases, Mem. L. Rev. 303, 328-33 2008).

[131] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition), 31 Hofstra L. Rev. 913, 923 (2003) (quoting Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329, 357-58 (1995)) (hereinafter referred to as the ABA Guidelines).

defending a capital case at billing rates that do not cover overhead.[132] Most public defender offices have excessive caseloads without having to take on capital cases.[133] For these and other reasons, capital defense litigation is a surpassingly difficult, highly specialized field of law, requiring extensive training and experience and the right frame of mind – as well as sufficient time and resources. In Tennessee, especially with the sharp decline in the frequency of capital cases, few attorneys have acquired any meaningful experience in actually trying capital cases through the sentencing phase, and the training is sparse. Moreover, given the constraints on compensation and funds for expert services, Tennessee offers inadequate resources to properly defend a capital case, or to attract the better lawyers to the field.[134]

On the other hand, some highly effective attorneys, willing to suffer the harsh economics and emotional stress of capital cases, do handle these kinds of cases, often with great success and at great personal and financial sacrifice.[135] Unfortunately, there simply are not enough of these kinds of lawyers to go around.

With a reversal rate based on inadequate defense representation exceeding 23%, Tennessee's experience confirms the conclusion reached by the American Bar Association several years ago:

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[132] *See* Tenn. S. Ct. R. 13, Section 3(k) (setting maximum billing rates for appointed counsel and funding for investigators and experts).

[133] *See* Task Force Report, *supra* note 126, at 40-43.

[134] For a thorough discussion of the problems with capital defense representation in Tennessee, *see* Pretend Justice, *supra* note 129.

[135] Effective capital defense representation requires defense counsel to expend their own funds to cover investigative services, because funding provided under Tenn. S. Ct. R. 13, Section 3(k) is grossly inadequate.

> Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." As Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings" of the death penalty system as a whole.[136]

It goes without saying that the quality of defense representation can make a difference in the outcome of a case. A defendant's life should not turn on his luck of the draw in the lawyers appointed to his case, but we know that it does – yet another source of arbitrariness in the system.

(6) Prosecutorial discretion and misconduct

Prosecutors vary in their attitude towards the death penalty. Some strongly pursue it, while others avoid it. In more sparsely populated districts, the costs and burdens of prosecuting a capital case may be prohibitive. In other districts (such as Shelby County), the political environment and other factors may encourage the aggressive pursuit of the death penalty.[137] In a 2004 report on the death penalty, Tennessee's Comptroller of the Treasury concluded:

> Prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme

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[136] ABA Guidelines, *supra* note 130, at 928-29 (internal citations omitted).

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

> cases, or the "worst of the worst." However, prosecutors in other jurisdictions make it a standard practice on every first-degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a bargaining chip to secure plea bargains for lesser sentences. Many prosecutors also indicated that they consider the wishes of the victim's family when making decisions about the death penalty.[138]

In 2001, the Office of the District Attorney General for Davidson County, Tennessee, issued a set of Guidelines that Office would follow in deciding whether to seek the death penalty in any case.[139] Unfortunately, other district attorneys have not followed suit as they resist any written limitations in the exercise of their prosecutorial discretion. There are no uniformly applied standards or procedures among the different district attorneys in deciding whether to seek capital punishment. The lack of uniform standards, combined with the differing attitudes towards the death penalty among the various district attorneys throughout the state, injects a substantial degree of arbitrariness in the sentencing system.

In addition to the vagaries of prosecutorial discretion, the occurrence of prosecutorial misconduct adds another element of capriciousness. Prosecutorial misconduct is a thorn in the flesh of the death penalty system that can influence outcomes.[140] Sixth Circuit Judge Gilbert Merritt has written: "[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance – an old, widespread, and persistent habit. The Supreme

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[138] Note 87, *supra*, at 13.

[139] *See* note 100, *supra.*

[140] For a discussion of the prevalence of prosecutorial misconduct throughout the country, *see* Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson* (March 2016) (available at https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf, last visited on 11/14/17). In a recent study, the Fair Punishment Project found that the Shelby County district attorney's office had the highest rate of prosecutorial misconduct findings in the nation. Fair Punishment Project, The Recidivists: New Report on Rates of Prosecutorial Misconduct (July 2017) (available at http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/, last visited on 11/14/2017).

Court and the lower federal courts are constantly confronted with these so-called *Brady* exculpatory and mitigating evidence cases. ... In capital cases, this malfeasance violates both due process and the Eighth Amendment."[141]

We have located at least eight Tennessee capital cases in which either convictions or death sentences were set aside because of prosecutorial misconduct, and at least three other cases in which courts found prosecutorial misconduct but affirmed the death sentences notwithstanding.[142] Presumably capital cases are handled by the most experienced and qualified prosecutors, so there is no excuse for this level of judicially found misconduct. And we can reasonably assume that undetected misconduct, potentially affecting convictions and sentences, has occurred in other cases. Suppressed evidence is not always discovered. Although inexcusable, some degree of misconduct is explainable, because prosecutors are elected officials, and capital cases are fraught with emotion and often highly publicized. These kinds of circumstances can lead to excessive zeal.

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[141] *See* Judge Gilbert Stroud Merritt, Jr., Prosecutorial Error in Death Penalty Cases, 76 Tenn. L. Rev. 677 (2008-2009) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); other internal citations omitted).

[142] See State v. Buck, 670 S.W.2d 600 (Tenn. 1984) (improper closing argument and *Brady* violation); State v. Smith, 755 S.W.2d 757 (Tenn. 1988) (improper closing argument); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (improper closing argument); Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) (*Brady* violation); Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) (improper closing argument); House v. Bell, 2007 WL 4568444 (E.D. Tenn. 2007) (*Brady* violation); Christopher A. Davis v. State, Davidson County No. 96-B-866 (April 6, 2010) (*Brady* violation); Gdongalay Berry v. State, Davidson County No. 96-B-866 (April 6, 2010)(*Brady* violation). There are other cases of Brady violations which did not serve as grounds for reversal. See, e.g., Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1088-1090 (1998) (*Brady* violations found not material, sentence vacated on IAC grounds, reversed by the 6th Cir.); Rimmer v. State, Shelby Co. 98-010134, 97-02817, 98-01003 (Oct. 12, 2012) (while the prosecution suppressed evidence, the conviction was vacated on IAC grounds); Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017) (*Brady* violation).

(7) Defendants' impairments

From our personal experiences, combined with our research, we submit that the vast majority of capital defendants are impaired due to mental illness and/or intellectual disability.[143] On the one hand, these kinds of impairments can serve as powerful mitigating circumstances that reduce culpability in support of a life instead of death sentence, although too frequently defendants' impairments are inadequately investigated and presented to the sentencing jury by defense counsel. On the other hand, a defendant's impairments can create obstacles in effective defense representation and can further create, in subtle ways, an unfavorable appearance to the jury during the trial. Too often, a defendant's impairments can unjustly aggravate the jurors' and the court's attitude towards the defendant, which is another factor contributing to the arbitrariness of the system.

(i) Mental illness

Mental illness is rampant among criminal defendants. A study published in 2006 by the United States Department of Justice, Bureau of Justice Statistics, found that, nationwide, 56% of state prisoners, 45% of federal prisoners, and 64% of those incarcerated in local jails, suffered from a serious mental health problem.[144] Other studies indicate that the percentage of mentally

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[143] Poverty is another cause of mental impairment, which unfortunately is not discussed in the case law. According to a 2007 report, every Tennessee death-sentenced defendant who was tried since early 1990 was declared indigent at the time of trial and had to rely on court-appointed defense counsel; and a large majority of those who were tried before then were also declared indigent. The Tennessee Justice Project, Tennessee Death Penalty Cases Since 1977, note120 *supra*. There is a growing body of social science research demonstrating the adverse psychological and cognitive effects of poverty. *See, e.g.,* William Julius Wilson, When Work Disappears (Vintage Books, 1997); Sendhil Mullainathan & Eldar Shafir, Scarcity: The New Science of Having Less and How It Defines Our Lives (Picador, 2013).

[144] Doris J. James and Lauren E. Glaze, Mental Health Problems of Prison and Jail Inmates (Bureau of Justice Statistics Special Report, September 2006) (found at https://www.bjs.gov/content/pub/pdf/mhppji.pdf, last visited 11/15/2017).

ill inmates is particularly high on death row. For example, one study found "that of the 28 people executed in 2015, seven suffered from serious mental illness, and another seven suffered from serious intellectual impairment or brain injury."[145] Another study concluded: "Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of severe mental illness."[146]

From examining Tennessee capital post-conviction cases, where evidence of mental illness among death-sentenced defendants is often investigated and developed in support of claims of ineffective assistance of counsel, we can conclude that a significant number of defendants on Tennessee's death row suffer from severe mental disorders. The following cases illustrate the issue.

> Cooper v. State,[147] was the first Tennessee case in which a death sentence was vacated on grounds of ineffective assistance of counsel. Trial counsel inadequately investigated the defendant's social history and mental condition. In post-conviction, expert testimony was presented that the defendant suffered from an affective disorder with recurrent major depression over long periods of time, and at the time of the homicide his condition had deteriorated to a full active phase of a major depressive episode.

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[145] Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses*, n. 9 (June 14, 2016) (citing Death Penalty Information Center, *Report: 75% of 2015 Executions Raised Serious Concerns About Menatl Health or Innocence*, archived at https://perma-archives.org/warc/QQJ8-DDQD/http://www.deathpenaltyinfo.org/category/categories/issues/mental-illness (last visited 12/15/17).

[146] Id. (citing Robert J. Smith, et al., *The Failure of Mitigation?*, 65 Hastins L.J. 1221, 1245 (2014).

[147] 847 S.W.2d 521 (Tenn. Crim. App. 1992).

In Wilcoxson v. State,[148] the defendant had been diagnosed at different times with schizophrenia, schizo-affective disorder, and bipolar disorder. The Court of Criminal Appeals found trial counsel's performance to be deficient in failing to raise the issue of the defendant's competency to stand trial, and in failing to present evidence of the defendant's psychiatric problems to the jury as mitigating evidence in sentencing. While the Court found that post-conviction counsel failed to carry their burden of retrospectively proving the defendant's incompetency to stand trial, the Court vacated the death sentence on grounds of ineffective assistance of counsel for their failure to present social history and mental health mitigation evidence at sentencing.

In Taylor v. State,[149] the post-conviction court set aside the defendant's conviction and death sentence on the ground that his trial counsel were deficient in their investigation and presentation of defendant's psychiatric disorders pre-trial, in connection with his competency to stand trial, and during the trial, in connection with his insanity defense and his sentencing hearing. The evidence included an assessment by a forensic psychiatrist for the state, who was not discovered by defense counsel and therefore did not testify at trial, that the defendant was psychotic.

In Carter v. Bell,[150] according to expert testimony presented in federal habeas, the defendant suffered from psychotic symptoms involving hallucinations, paranoid delusions and thought disorders consistent with paranoid schizophrenia or an organic delusional disorder. His death sentence was vacated on grounds of ineffective assistance

[148] 22 S.W.3d 289 (Tenn. Crim. App. 1999).

[149] 1999 WL 512149 (Tenn. Crim. App. 1999).

[150] 218 F.3d 581 (6th Cir. 2000).

of counsel because his trial lawyers failed to investigate his social and psychiatric history.

In Harries v. Bell,[151] the federal habeas court found that the defendant's trial counsel failed to investigate and develop evidence of the defendant's abusive childhood background; his frontal lobe brain damage, which impaired his mental executive functions; and his mental illness, which had been variously diagnosed as bipolar mood disorder, anxiety disorder, and post-traumatic stress disorder. The federal court vacated the death sentence on the basis of ineffective assistance of counsel.

Adverse childhood experiences and severe mental illness can profoundly affect cognition, judgment, impulse control, mood and decision-making. Unfortunately, these cases are typical in the death penalty arena.[152] A defendant's mental illness, if not fully realized by defense counsel, and if not properly presented and explained to the jury at trial, can prejudice the defendant both in his relationship with his defense counsel, and in his demeanor before the jury.[153]

Regarding the effect of mental illness on the attorney-client relationship, the ABA Guidelines explain:

> Many capital defendants are ... severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they

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[151] 417 F.3d 631 (6th Cir. 2005).

[152] One of the authors, Mr. MacLean, has worked on a number of capital cases in state post-conviction and federal habeas proceedings. In every case he has worked on, the defendant has been diagnosed with a severe mental disorder.

[153] For a discussion of the potential effects of a defendant's impairments on his legal representation, see Bradley A. MacLean, Effective Capital Defense Representation and the Difficult Client, 76 Tenn. L. Rev. 661 (2009).

> may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired." [154]

Regarding the potential effect of a defendant's mental illness at trial, Justice Kennedy's comment in Riggins v. Nevada,[155] involving the side-effects of antipsychotic medication in a capital case, is instructive:

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, ..., his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights.[156]

(ii) Intellectual disability

In Atkins v. Virginia, decided in 2000,[157] the United States Supreme Court declared that if a defendant fits a proper definition of intellectual disability (or mental retardation, as the term was used at the time), he is ineligible for the death penalty under the Eighth Amendment Cruel and Unusual Punishments Clause. The Court left it to the states to formulate an appropriate definition and procedure for determining intellectual disability.

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[154] ABA Guidelines, *supra* note 130, at 1007-08 (quoting Rick Kammen & Lee Norton, Plea Agreements: Working with Capital Defendants, The Advocate, Mar 2000, at 31).

[155] Riggins v. Nevada, 504 U.S. 127 (1992).

[156] Id. at 142.

[157] Atkins v. Virginia, 536 U.S. 304 (2002); Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014).

Before Atkins was decided, in 1991 the Tennessee General Assembly enacted Tenn. Code Ann. § 39-13-203 to exempt from the death penalty those defendants who fit the statutory definition of "mental retardation." The statute has since been amended to change the label from "retardation" to "intellectual disability," but the three statutory elements to the definition remain the same: "(1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age."[158] Many Tennessee capital defendants have low intellectual functioning, and a number of them can make viable arguments that they fit within the statutory definition of intellectual disability and therefore should be exempt from capital punishment, although often they do not prevail on this issue.[159]

A defendant's low intellectual functioning can lead to two additional avenues of arbitrariness in Tennessee's capital punishment system.

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[158] State v. Pruitt, 415 S.W.3d 180, 202 (Tenn 2013) (quoting Tenn. Code Ann. § 39-13-203(a). *See also* Van Tran v. Colson, 764 F.3d 594, 605 (6th Cir. 2014).

[159] A number of capital defendants have reported I.Q.'s in the borderline range of intellectual disability, even if many of them did not qualify for the intellectual disability exemption. *See, e.g.,* Nesbit v. State, 452 S.W.3d 779, 794 (Tenn. 2014) (reported I.Q. of 74); State v. Pruitt, 415 S.W.3d 180, 202 (Tenn. 2013) (reported I.Q. of 66 and 68); Keen v. State, 398 S.W.3d 594, 617 (Tenn. 2012) (Wade, J., dissenting) (reported I.Q. of 67); Cribbs v. State, 2009 WL 1905454, at *17 (Tenn. Crim. App. 2009) (reported I.Q. of 73); State v. Strode, 232 S.W.3d 1, 5 (Tenn. 2007) (reported I.Q. of 69); State v. Rice, 184 S.W.3d 646, 661 (Tenn. 2006) (reported I.Q. of 79); Howell v. State, 151 S.W.3d 450, 459 (Tenn. 2004) (reported I.Q. of between 62 and 73, with a high score of 91); State v. Carter, 114 S.W.3d 895, 900 (Tenn. 2003) (reported I.Q. of 78); State v. Dellinger, 79 S.W.3d 458, 465-66 (Tenn. 2002) (reported I.Q. of between 72 and 83); Van Tran v. State, 66 S.W.3d 790, 793 (Tenn. 2001) (reported I.Q. of between 65 and 72); State v. Blanton, 975 S.W.2d 269, 278 (Tenn. 1998) (reported I.Q. of 74); State v. Smith, 893 S.W.2d 908, 912 (Tenn. 1994) (reported I.Q. ranging from 54 to 88); Cooper v. State, 847 S.W.2d 521, 525 (Tenn. Crim. App. 1992) (I.Q. in the "sixties and seventies"); State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (reported I.Q. of 76); State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990) (reported I.Q. of 78 to 82).

First, the statutory category of intellectual disability is arbitrarily and vaguely defined. Intellectual disability is determined on a multi-dimensional set of sliding or graduated scales, and the condition can manifest itself in a multitude of ways. How are we to measure those scales, and how are we to draw a fine line in identifying those who fall within the category of defendants who shall be exempted from capital punishment? For example, what is the practical difference between a functional I.Q. of 71 versus 69? In many cases, the defendant has been administered several I.Q. tests at different points in his life yielding different scores. How are those scores to be reconciled? Moreover, the measure of each scale cannot be ascertained strictly from raw test scores but requires the application of an expert witness's "clinical judgment."[160] In a battle of testifying experts, whose clinical judgment are we to trust? As the Tennessee Supreme Court has acknowledged, "Without question, mental retardation is a difficult condition to define. The U.S. Supreme Court, in Atkins v. Virginia, admitted as much, stating: '[t]o the extent there is serious disagreement about the execution of the mentally retarded offenders, it is in determining which offenders are in fact retarded.'"[161] With reference to the I.Q. element of the statutory definition, the Howell Court went on to say, "The statute does not provide a clear directive regarding which particular test or testing method is to be used."[162] Consequently, the proper interpretation of the definition, and its application to

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[160] In Coleman v. State, 341 S.W.3d 221, 221 (Tenn. 2011), the Court held that the statutory definition "does not require that raw scores on I.Q. tests be accepted at their face value and [] the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q."

[161] Howell v. State, 151 S.W.3d, at 547 (quoting Atkins, 536 U.S., at 317).

[162] Id. at 459.

specific cases, has generated considerable litigation.[163] These cases involve a battle of the experts, and whether a defendant is found to be intellectually disabled under the statutory definition and therefore exempt from the death penalty may well depend on the quality of his defense counsel, the personality and persuasiveness of the expert testimony, and the disposition and receptivity of the judge making the ultimate determination. In close cases, the issue has a markedly subjective aspect, leaving room for arbitrary decision-making.

The second factor contributing to arbitrariness relates to one of the reasons for disqualifying the intellectually disabled from capital punishment – their reduced capacity to assist in their defense. In Atkins, the United States Supreme Court explained:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. ... [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[164]

In this respect, intellectual disability and mental illness similarly affect the reliability of capital sentencing, by impairing, through no fault of the defendant, both the defendant's

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[163] *See, e.g.*, Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017) (reflecting years of litigation in a case involving a broad range of I.Q. scores); Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014) (after years of litigation, vacating the state court's judgment and ruling that defendant was intellectually disabled and therefore exempt from execution); Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) (discussing a line of Tennessee intellectual disability cases illustrating the Court's struggle in interpreting the meaning of the statutory elements).

[164] 536 U.S. at 320-21.

capacity to work with defense counsel and the defendant's capacity to present himself to the court and the jury in a favorable way.

With regard to sentencing, this problem may be partially resolved when the defendant is found to fall within the statutory definition of intellectual disability. But there are several other cases in which the defendant's intellectual functioning is compromised but the defendant is not declared intellectually disabled. Too often it is simply a matter of degree and subjective evaluation by the judge in the face of conflicting expert testimony. Even if a defendant is held not to be exempt from capital punishment, his reduced intellectual functioning can nevertheless impair his capacity to assist in his defense and to present himself in the courtroom, which contributes to the arbitrariness of the system.

(8) Race

African Americans represent 17% of Tennessee's population, according to the U.S. Census Bureau, but they represent 44% of Tennessee's current death row population. [165] (Only 51% of the current death row population is non-Hispanic White.) While a number of factors may account for this discrepancy, it cannot be ignored, and it suggests a pernicious form of arbitrariness.

No one can doubt the existence of implicit racial bias in our criminal justice system, and this bias inevitably infects the capital punishment system.[166] The exercise of discretion

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[165] Appendix 1, *Miller Report*, at 10.

[166] For general discussions of implicit racial bias, *see, e.g.*, Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969 (2006); Jennifer L. Eberhardt, *et al.*, Seeing Black: Race, Crime, and Visual Processing, 87 Journal of Personality and Social Psychology 876 (2004). The presence of racial bias in our criminal justice system – whether explicit or implicit – has been well established. *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (The New Press 2010); Samuel R. Gross, *et al.*, Race and Wrongful Convictions (National Registry of Exonerations, Mar 7, 2017). *See also* United States Sentencing Commission, Demographic Differences in Sentencing (Nov

permeates a capital case – from the time of arrest through the charging decision, the district attorney's decision to seek the death penalty, innumerable decisions by all of the parties and the judiciary throughout the proceedings, and the ultimate jury decision of life versus death. Where there is discretion, there is room for implicit racial bias.

In 1997 the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness issued its Final Report at the conclusion of its two-year review of the State's judicial system.[167] Among other things, the Commission concluded that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] ..., institutionalized bias is relentlessly at work."[168] While our society continually attempts to eradicate the effects of implicit bias from our institutions, there is no indication that it has been eliminated from our capital sentencing system.

The American Bar Association commissioned a study of racial bias in Tennessee's capital punishment system that was published in 2007.[169] The study concluded that the race of the

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2017) (based on several studies, concluding that "black male offenders continue[] to receive longer sentences than similarly situated Black offenders" by a substantial margin) (available at https://www.ussc.gov/research/research-reports/demographic-differences-sentencing, last visited 11/18/2017).

[167] Final Report of the Tennessee Commission on Racial and Ethnic Fairness to the Supreme Court of Tennessee (1997) (available at http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial_ethnic_fairness.pdf, last visited 11/17/17).

[168] Id. at 5.

[169] Glenn Pierce, at al., Race and Death Sentencing in Tennessee: 1981-2000, Appendix 1 to The Tennessee Death Penalty Assessment Report, note 181, *infra*.

defendant and the victim influences who receives the death sentence, "even after the level of homicide aggravation is statistically controlled."[170]

The recent trend regarding race is disturbing. Over the past ten years, from July 1, 2007 to June 30, 2017, there were nine trials resulting in new death sentences; in all but one of those cases (*i.e.,* in 89% of the cases), the defendant was African American.[171] It appears that as the death penalty becomes less frequently imposed, in an increasing percentage of cases it is imposed on African Americans.

(9) Judicial disparity

While judges are presumed to be objective and impartial, from our experience in capital cases we know that different judges view these cases differently, and the predisposition of a judge can influence his or her decisions in capital cases. We can begin by looking at the deeply divided death penalty opinions issued by the Supreme Court on a yearly basis, from the nine differing opinions issued in Furman v. Georgia in 1972 through the five conflicting opinions issued in Glossip v. Gross in 2015,[172] and in cases since then. For example, Justices Brennan and Marshall categorically opposed the death penalty and always voted to reverse or vacate death sentences, while Justices Rehnquist and Scalia consistently voted to uphold death sentences, and this split continues with the current members of the Court.

We see similarly opposing views expressed on the United States Court of Appeals for the Sixth Circuit. These judges, persons of integrity and intelligence, acting in good faith, and looking at the same cases involving the same legal principles, often come to opposing

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[170] Id. at Q.

[171] See Appendix 2, *Chart of Tennessee Capital Trials.* These numbers exclude retrials.

[172] 576 U.S. __, 135 S.Ct. 2726 (2015).

conclusions about what the proper outcomes should be. Among the defense bar, and probably within the Attorney General's office, we know that in many federal habeas cases, the judge or panel that we draw will likely determine the outcome of the case.

Our review of the voting records of Sixth Circuit judges in capital habeas cases arising out of Tennessee emphasizes the point. The *Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases,* attached as Appendix 4, breaks down the Sixth Circuit votes according to political party affiliation – *i.e.*, according to whether the judges were appointed by Republican or Democrat administrations. We found 37 Sixth Circuit decisions in which the Court finally disposed of capital habeas cases from Tennessee. In those cases, Republican-appointed judges cast 88% of their votes to deny relief and only 12% of their votes to grant relief. By contrast, Democrat-appointed judges cast only 22% of their votes to deny relief, and 78% of their votes to grant relief. In other words, the voting records for Republican-appointed judges were the opposite from the voting records for Democrat-appointed judges; Republican-appointed judges were significantly more favorable to the prosecution, whereas Democrat-appointed judges were significantly more favorable to the defense.[173]

The political skewing of the voting records is greater in the twenty cases that were decided by split votes, which represent a majority of the Sixth Circuit cases. In those cases, Republican-appointees voted against the defendant 93% of the time, and for defendant only 7% of the time; whereas Democrat-appointees voted exactly the opposite way - against the defendant only 7% of the time, and for the defendant 93% of the time. Similarly, in the six Tennessee capital cases that were decided by the full *en banc* Court, Republican-appointed judges cast 91% of their votes against the defendants, whereas Democrat-appointed judges cast

[173] Appendix 4, *Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases,* at. 1-5.

97% of their votes in favor of the defendants. In five of the six *en banc* cases, the Court's decision was determined strictly along party lines.[174]

Without pointing to individual members of the Tennessee judiciary, it is reasonable to believe that different state court judges also differ in their exercise of judgment in these kinds of cases. All practicing attorneys know that a judge's worldview can shape his or her attitude towards the death penalty, and towards criminal defendants and the criminal justice system in general. These attitudes can affect decisions ranging from the final judgment in a post-conviction case to rulings on evidentiary and procedural issues during the course of pre-trial and trial proceedings.

That is to be expected in the highly controversial and emotionally charged arena of capital punishment. It is human nature. Everyone approaches these kinds of issues with certain cognitive biases shaped by differing worldviews.[175] Trial judges are elected officials, and we know from the experience of Justice Penny White that the politics of the death penalty can even influence the Court's composition.[176] It goes without saying that liberal judges tend to

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[174] Id. at 5-6.

[175] For interesting discussions of how different cognitive styles deal with controversial social issues in different ways, *see, e.g.*, Richard A. Posner, How Judges Think (Harvard University Press) (2008); Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 Emory L. Rev. 312 (2008); and Dan M. Kahan & Donald Bramam, Cultural Cognition and Public Policy, 24 Yale Law & Policy Rev. 147 (2006). For studies of judicial bias based on differing political perspectives, *see, e.g.*, Max M. Schanzenbach and Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Emperical Evidence, and Reform, 75 U. Chi. L. Rev. 715 (2008); Chris Guthrie, *Misjudging*, 7 Nev. L. J. 420 (2007).

[176] In 1996 Justice White became the only Tennessee Supreme Court Justice who was removed from office in a retention election. She was the political victim of a campaign to remove her from the Court because of her concurring vote to reverse the death sentence in a single death penalty case – *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Justice White's experience was discussed in a recent study regarding the effects of political judicial elections on judicial decision-making in capital cases. *See* Reuters Investigates, Uneven Justice: In states with elected high court judges, a harder line on capital

be somewhat more sympathetic to defense arguments, and conservative judges tend to be somewhat more sympathetic to prosecution arguments. This is not necessarily a criticism, for in our society diversity of viewpoint is a good thing. But in highly charged death penalty cases, where divergent points of view are more likely to come to the fore, and where arbitrariness is not to be tolerated, differences in judicial disposition contribute to the capriciousness of the capital punishment system. From our study, this is obviously true to a remarkable degree in the federal court system, and there is good reason to believe it is true at least to some degree in the state court system as well.

C. Comparative Disproportionality: Single vs. Multi-Murder Cases

It is beyond the scope of this article to identify the many extremely egregious cases resulting in Life or LWOP sentences, or to compare them to the many significantly less egregious cases leading to death sentences or executions. But the statistics concerning one simple metric make the point – number of victims. Mr. Miller has identified 339 defendants convicted of multiple counts of first-degree murder since 1977. Of those, only 33 (or 10%) received sustained death sentences, whereas 306 (or 90%) received Life or LWOP.[177] Several in the Life/LWOP category were convicted of three or more murders. These numbers can be broken down as follows:

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punishment (Sept 22, 2015) (found at http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/, last visited on 11/15/2017).

[177] Appendix 1, *Miller Report*, at 12.

Multi-Murder Cases - Breakdown By Number of Victims & Sentences[178]

Number of Victims	Life or LWOP Sentences	Sustained Death Sentences	Totals
2	259 (92% of 2-Victim cases)	24 (8% of 2-Victim cases)	283
3	32 (82% of 3-Victim cases)	7 (18% of 3-Victim cases)	39
4	11 (92% of 4-Victim cases)	1 (8% of 4-Victim cases)	12
5	1 (100% of 5-Victim cases)	0 (0% of 5-Victim cases)	1
6	3 (75% of 6-Victim cases)	1 (25% of 6-Victim cases)	4
TOTALS	306 (90% of Multi-Murder Cases)	33 (10% of Multi-Murder Cases)	339

Virtually all of these defendants were found guilty of premeditated murder (as opposed to felony murder). Thus, from these statistics, if a defendant deliberately killed two or more victims, he was nine times more likely to be sentenced to Life or LWOP than death; and the sentence he received most likely depended on extraneous factors such as the geographic location of the crime, the prosecutor, quality of defense counsel, timing of the case, and the other factors described above.

On the other hand, compared to the 306 multiple murder defendants who were sentenced to life or LWOP instead of death, a majority of the defendants with sustained death

[178] Table 13A, *Miller Report.*

sentences (53 out of a total of 86, or 62%) committed single murders, and several of them were found guilty of felony murder and not premeditated murder.[179]

This comparative disproportionality demonstrates a lack of rationality in Tennessee's system. The evidence of such inconsistent results, of sentencing decisions that cannot be explained solely on the basis of individual culpability, indicates that the system operates arbitrarily, contrary to the requirements of the Eighth Amendment.

VII. CONCLUSION

A. U.S. Supreme Court Dissenting Opinions

We are not alone in claiming that the historical record shows that capital sentencing systems like Tennessee's fail Furman's commandment against arbitrariness and capriciousness. The death penalty has hung by a thin thread since it was reinstated in Gregg. The vote to uphold the guided discretion scheme in Gregg was seven-to-two. Justices Powell, Blackmun and Stevens were among the seven in the majority. However, after years of observing the application of guided discretion sentencing schemes in the real world, each of these Justices changed his mind. These three Justices, combined with the dissenting Justices in Gregg,[180] would have constituted a majority going the other way.

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[179] We have identified ten cases resulting in sustained death sentences in which the defendants were convicted of felony murder and not premeditated murder: State v. Barnes, 703 S.W.2d 611 (Tenn. 1985); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Carter, 988 S.W.2d 145 (Tenn. 1999); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000); State v. Powers, 101S.W.3d 383 (Tenn. 2003); State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013); State v. Bell, 480 S.W.3d 486 (Tenn. 2015).

[180] Justices Brennan and Marshall cast the dissenting votes.

Justice Powell dissented in Furman, voting to uphold discretionary death penalty statutes, and also authored the Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), which upheld Georgia's death penalty against a challenge based upon demonstrated racial bias. Shortly after his retirement, however, his biographer published the following colloquy:

> In a conversation with the author [John C. Jeffries Jr.] in the summer of 1991, Powell was asked if he would change his vote in any case:
>
> > "Yes, *McCleskey v. Kemp*."
> > "Do you mean you would now accept the argument from statistics?"
> > "No, I would vote the other way in any capital case."
> > "In *any* capital case?"
> > "Yes."
> > "Even in *Furman v. Georgia*?"
> > "Yes, I have come to think that capital punishment should be abolished."
>
> Capital punishment, Powell added, "serves no useful purpose." The United States was "unique among the industrialized nations of the West in maintaining the death penalty," and it was enforced so rarely that it could not deter.[181]

Justice Blackmun, who also dissented in Furman and voted to uphold discretionary sentencing statutes, and voted with the majority in Gregg, first expressed his changed view in 1992:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see Furman v. Georgia, 408 U.S. 238 (1972), and, despite the effort of the States and the Court to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[182]

Justice Stevens, who was relatively new to the Court when he joined the Gregg majority, followed suit fourteen years later in 2008:

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

[182] Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

> I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman, 408 U.S. at 312 (White, J., concurring).[183]

With reference to current Justices who were not on the Court when Gregg was decided, in the case of Glossip v. Gross, Justices Breyer and Ginsburg recently looked at the historical record. In a careful analysis, they explained why a system such as Tennessee's can no longer be sustained. They summarized their analysis as follows:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.[184]

The Glossip dissent is significant because it represents a shifting view and eloquently reflects on the failed effort over forty years to apply guided discretion capital sentencing schemes that were supposed to address the problem of arbitrariness. The historical record in Tennessee, as well as in other states that have attempted to maintain capital sentencing systems, speaks to how this kind of system simply has not been able to accomplish that goal.

B. Opinions from the ALI and the ABA Tennessee Assessment Team

The opinions of the dissenting Supreme Court Justices are echoed by other leading authorities.

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[183] Baze v. Rees, 128 S.Ct. 1520, 1549-51 (2008) (Stevens, J., concurring in result).

[184] Glossip v. Gross, 576 U.S. ___, ___, 135 S.Ct. 2726, ___ (2015) (Breyer, J., dissenting).

As mentioned above, Tennessee's capital punishment scheme was patterned after the Georgia scheme approved in Gregg, which in turn was patterned in part after the American Law Institute Model Penal Code §210.6 (1962). In 2009, the American Law Institute (ALI) withdrew §210.6 from the Model Penal Code because of its concerns about whether death penalty systems can be made fair.[185] In recommending withdrawal of this section from the Model Penal Code, the ALI Council issued a Report to its membership stating, "Section 201.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it.... [O]n the whole the section has not withstood the tests of time and experience."[186] The Report went on to describe the ALI Council's reasons for its concerns about fairness in death penalty systems, as follows:

> These [concerns] include (a) the tension between clear statutory identification of which murder should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where – even though nearly all state judges perform their tasks conscientiously – candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.[187]

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[185] *See* American Law Institute, Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty (April 15, 2009) (available at https://www.ali.org/media/filer_pubic/3f/ae/3fae71fl-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf), last visited 11/17/17).

[186] Id. at 4.

[187] Id. at 5. The American Law Institute reported an "overwhelming[]" vote for withdrawal of §210.6. https://www.ali.org/publications/show/model-penal-code.

In a similar vein and focusing on Tennessee, the American Bar Association appointed a Tennessee Death Penalty Assessment Team to assess fairness and accuracy in Tennessee's death penalty system.[188] The Assessment Team conducted an extensive study of Tennessee's system and issued its lengthy report in March 2007.[189] The Team concluded that "Tennessee's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures."[190] The Report identified the following areas "as most in need of reform":

- Inadequate procedures to address innocence claims;
- Excessive caseloads of defense counsel;
- Inadequate access to experts and investigators;
- Inadequate qualification and performance standards for defense counsel;
- Lack of meaningful proportionality review;
- Lack of transparency in the clemency process;
- Significant juror confusion;
- Racial disparities in Tennessee's sentencing;
- Geographical disparities in Tennessee's capital sentencing; and
- Death sentences imposed on people with severe mental disability.[191]

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[188] The members of the Assessment Team were Professor Dwight L. Aarons, Chair; W.J. Michael Cody, former Tennessee Attorney General; Kathryn reed Edge, former President of the Tennessee Bar Association; Jeffrey S. Henry, Executive Director of the Tennessee District Public Defenders Conference, Judge Gilbert S. Merritt, former Chief Judge of the United States Court of Appeals for the Sixth Circuit; attorney Bradley A. MacLean; and attorney William T. Ramsey.

[189] The Tennessee Death Penalty Assessment Report: An Analysis of Tennessee's Death Penalty Laws, Procedures, and Practices (March 2007) (available at https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf, last visited 11/13/2017).

[190] Id, at iii.

[191] Id. at iii – vi.

C. Final Remarks

It is clear from the statistics and our experience over the past 40 years that Tennessee's death penalty system "fails to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences."[192] The system is riddled with arbitrariness.

A person of compassion and empathy cannot deny that the death penalty is cruel. "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."[193] "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity."[194]

When over the past 40 years we have executed fewer than one out of every 400 defendants (less than ¼ of 1%) convicted of first degree murder; when we sentence 90% of multiple murderers to life or life without parole and only 10% to death; when the majority of capital cases are reversed or vacated because of trial error; when the courts have found that in over 23% of capital cases, defense counsel's performance was constitutionally deficient; when the number of death row defendants who die of natural causes is four times greater than the number Tennessee actually executed; when we have not seen a new capital case in Tennessee since mid-2014; when we haven't seen any death sentences in the Grand Middle Division since

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[192] Woodson, 428 U.S. at 302.

[193] Spaziano v. Florida, 468 U.S. at 469 n. 3 (Stevens, J., concurring).

[194] Furman, 408 U.S., at 306 (Stewart, J., concurring).

early 2001 – then, it must also be said that the death penalty is an "unusual" and unfair punishment. The statistics make clear that Tennessee's system is at least as arbitrary and capricious as the systems declared unconstitutional in Furman – and that is without accounting for the exorbitant delays and costs inherent in Tennessee's system, which far exceed the delays and costs inherent in the pre-Furman era.

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

Appendix 2
Tennessee Trials In Which Death Sentences Were Imposed During The Period 7/1/1977 through 6/30/2017

This chart identifies in chronological order, by defendant's name, each "Capital Trial " that resulted in the imposition of one or more death sentences. For purposes of this chart, the term Capital Trial includes a resentencing hearing.

The county listed is where the murder allegedly occurred, not necessarily where the case was tried.

A number in parentheses immediately following the defendant's name in a multi-murder case indicates the number of murder victims for which death sentences were imposed.

Asterisks indicate cases that have had two or more Capital Trials arising from the same charges. A single asterisk indicates the result of the defendant's first Capital Trial, a double asterisk indicates the result of the defendant's second trial for the same murder(s), etc. The other Capital Trials involving the same defendant and charges are cross-referenced in the far right column.

A Capital Trial is "Pending" if it has not been reversed or vacated – *i.e.*, if the defendant is still under a sentence of death from that Capital Trial. Because capital cases typically are challenged until a defendant is executed, a case remains Pending as long as the defendant is alive.

If a case is ultimately resolved by plea agreement or by the prosecution's withdrawal of the death notice (*e.g.*, while the defendant is awaiting retrial or resentencing), that fact is not reflected in the chart.

Capital Trial No.	Defendant	County Where Offense Occurred	Sentence Date (of instant sentencing proceeding)	Defendant's Race and Gender	Type of Relief (AR) = Awaiting Retrial	Other Capital Trial(s) for Same Defendant
1	Richard Hale Austin*	Shelby	10/22/77	White/Male	Sentence Relief	No. 169
2	Ronald Eugene Rickman	Shelby	03/04/78	White/Male	Conviction Relief	
3	William Edward Groseclose	Shelby	03/04/78	White/Male	Conviction Relief	
4	Larry Charles Ransom	Shelby	04/07/78	Black/Male	Sentence Relief	
5	Ralph Robert Cozzolino	Hamilton	04/22/78	White/Male	Sentence Relief	
6	Russell Keith Berry	Greene	08/28/78	White/Male	Conviction Relief	
7	Donald Wayne Strouth	Sullivan	09/04/78	White/Male	DECEASED	
8	Richard Houston	Knox	11/03/78	Black/Male	Conviction Relief	
9	Donald Michael Moore	Shelby	11/10/78	White/Male	Sentence Relief	
10	Jeffrey Stuart Dicks	Sullivan	02/10/79	White/Male	DECEASED	
11	Luther Terry Pritchett	Marion	08/16/79	White/Male	Sentence Relief	
12	Michael Angelo Coleman	Shelby	04/19/80	Black/Male	Sentence Relief	
13	Carl Wayne Adkins*	Washington	01/29/80	White/Male	Sentence Relief	Nos. 52, 62
14	Loshie Pitts Harrington	Dickson	06/01/80	White/Male	Sentence Relief	
15	Stephen Allen Adams	Shelby	06/20/80	Black/Male	Sentence Relief	

16	Richard Weldon Simon	Montgomery	06/26/80	Black/Male	Sentence Relief	
17	Raymond Eugene Teague*	Hamilton	11/22/80	White/Male	Sentence Relief	No. 44
18	Hugh Warren Melson	Madison	12/05/80	White/Male	DECEASED	
19	Cecil C. Johnson, Jr. (3)	Davidson	01/20/81	Black/Male	EXECUTED	
20	Joseph Glenn Buck	Smith	01/24/81	White/Male	Sentence Relief	
21	Robert Glen Coe	Weakley	02/28/81	White/Male	EXECUTED	
22	Walter Keith Johnson*	Hamilton	03/25/81	White/Male	Sentence Relief	No. 47
23	Hubert Loyd Sheffield	Shelby	03/26/81	White/Male	Sentence Relief	
24	Timothy Eugene Morris	Greene	04/09/81	White/Male	Sentence Relief	
25	Thomas Gerald Laney	Sullivan	04/11/81	White/Male	Sentence Relief	
26	Ronald Richard Harries	Sullivan	08/08/81	White/Male	Sentence Relief	
27	Stephen Leon Williams	Hawkins	10/16/81	White/Male	Sentence Relief	
28	Laron Ronald Williams (2)	Shelby	11/06/81	Black/Male	DECEASED	
29	Laron Ronald Williams	Madison	12/14/81	Black/Male	DECEASED	
30	David Earl Miller*	Knox	03/17/82	White/Male	Sentence Relief	No. 76
31	Kenneth Wayne Campbell	Washington	03/26/82	White/Male	Sentence Relief	
32	Phillip Ray Workman	Shelby	03/31/82	White/Male	EXECUTED	
33	Michael David Matson	Hamilton	04/22/82	White/Male	Sentence Relief	
34	Gary Bradford Cone (2)	Shelby	04/23/82	White/Male	DECEASED	
35	Michael Eugene Sample (2)	Shelby	11/02/82	Black/Male	PENDING	
36	Larry McKay (2)	Shelby	11/02/82	Black/Male	PENDING	
37	Tommy Lee King	Maury	11/13/82	Black/Male	Sentence Relief	
38	Richard Caldwell	Henderson	12/04/82	White/Male	Conviction Relief	
39	Walter Lee Caruthers	Knox	02/08/83	Black/Male	Sentence Relief (AR)[1]	
40	David Carl Duncan	Sumner	04/01/83	Black/Male	Sentence Relief (AR)	
41	Richard Carlton Taylor*	Hickman	05/07/83	White/Male	Conviction Relief	No. 198
42	Willie James Martin	Shelby	06/24/83	Black/Male	Conviction Relief	
43	Charles Edward Hartman*	Montgomery	05/23/83	White/Male	Sentence Relief	No. 153
44	Raymond Eugene Teague**	Hamilton	08/25/83	White/Male	Sentence Relief	No. 17
45	Ricky Goldie Smith	Shelby	02/10/84	Black/Male	Sentence Relief	
46	Edmund George Zagorski (2)	Robertson	03/02/84	White/Male	PENDING	

[1] Died while awaiting Retrial.

47	Walter Keith Johnson**	Hamilton	03/08/84	White/Male	Sentence Relief	No. 22
48	William Wesley Goad	Sumner	03/22/84	White/Male	Sentence Relief	
49	Willie Claybrook	Crockett	06/06/84	Black/Male	Conviction Relief	
50	David Lee McNish	Carter	08/15/84	White/Male	Sentence Relief (AR)[2]	
51	James William Barnes	Washington	09/14/84	White/Male	DECEASED	
52	Carl Wayne Adkins**	Washington	10/01/84	White/Male	Sentence Relief	Nos. 13, 62
53	Edward Jerome Harbison	Hamilton	10/05/84	Black/Male	Sentence Relief (Commutation)	
54	James David Carter	Hamblen	11/14/84	White/Male	Sentence Relief	
55	Willie Sparks	Hamilton	11/14/84	Black/Male	Sentence Relief	
56	Kenneth Wayne O'Guinn	Madison	01/22/85	White/Male	DECEASED	
57	Terry Lynn King	Knox	02/06/85	White/Male	PENDING	
58	Vernon Franklin Cooper	Hamilton	02/15/85	White/Male	Sentence Relief	
59	Tony Lorenzo Bobo	Shelby	02/22/85	Black/Male	Sentence Relief	
60	Leonard Edward Smith*	Sullivan	03/20/85	White/Male	Conviction Relief	Nos. 97, 143
61	Charles Walton Wright (2)	Davidson	04/05/85	Black/Male	PENDING	
62	Carl Wayne Adkins***	Washington	06/28/85	White/Male	Sentence Relief	Nos. 13, 52
63	Rocky Lee Coker	Sequatchie	07/11/85	White/Male	Sentence Relief	
64	Thomas Lee Crouch	Williamson	08/08/85	White/Male	DECEASED	
65	Gregory S. Thompson	Coffee	08/22/85	Black/Male	DECEASED	
66	Donnie Edward Johnson	Shelby	10/04/85	White/Male	PENDING	
67	Erskine Leroy Johnson	Shelby	12/07/85	Black/Male	Conviction Relief	
68	Anthony Darrell Hines*	Cheatham	01/10/86	White/Male	Sentence Relief	No. 96
69	Sidney Porterfield	Shelby	01/15/86	Black/Male	DECEASED	
70	Gaile K. Owens	Shelby	01/15/86	White/Female	Sentence Relief (Commutation)	
71	Paul Gregory House	Union	02/08/86	White/Male	Conviction Relief (Exonerated)	
72	Steve Morris Henley* (2)	Jackson	02/28/86	White/Male	Sentence Relief	No. 161
73	Roger Morris Bell	Hamilton	05/23/86	Black/Male	Sentence Relief	
74	Terry Dwight Barber	Lake	08/18/86	White/Male	DECEASED	
75	Billy Ray Irick	Knox	11/3/86	White/Male	PENDING	
76	David Earl Miller**	Knox	02/12/87	White/Male	PENDING	No. 30

[2] Died while awaiting Retrial.

77	Bobby Randall Wilcoxson	Hamilton	02/13/87	White/Male	Sentence Relief	
78	Sedley Alley	Shelby	03/18/87	White/Male	EXECUTED	
79	Stephen Michael West (2)	Union	03/25/87	White/Male	PENDING	
80	David Scott Poe	Montgomery	03/28/87	White/Male	Sentence Relief	
81	Darrell Wayne Taylor	Shelby	04/24/87	Black/Male	Sentence Relief	
82	Nicholas Todd Sutton (2)	Morgan	03/04/86	White/Male	PENDING	
83	Wayne Lee Bates	Coffee	05/21/87	White/Male	Sentence Relief	
84	James Lee Jones, Jr. (*aka Abu-Ali Abdur'Rahman*)	Davidson	07/15/87	Black/Male	PENDING	
85	Homer Bouldin Teel	Marion	08/31/87	White/Male	Sentence Relief	
86	Michael Lee McCormick	Hamilton	01/15/88	White/Male	Conviction Relief (Exonerated)	
87	Pervis Tyrone Payne (2)	Shelby	02/27/88	Black/Male	PENDING	
88	Michael Boyd (*aka Mikaeel Abdullah Abdus-Samud*)	Shelby	03/10/88	Black/Male	Sentence Relief (Commutation)	
89	Ronald Michael Cauthern*(2)	Montgomery	03/18/88	White/Male	Sentence Relief	No. 140
90	J.B. McCord	Warren	05/01/88	White/Male	Conviction Relief	
91	Edward Leroy Harris (2)	Sevier	05/13/88	White/Male	Sentence Relief	
92	John David Terry*	Davidson	09/22/88	White/Male	Sentence Relief	No. 157
93	Byron Lewis Black (3)	Davidson	03/10/89	Black/Male	PENDING	
94	Mack Edward Brown	Knox	05/22/89	White/Male	Conviction Relief	
95	Heck Van Tran (3)	Shelby	06/23/89	Asian/Male	Sentence Relief (AR)	
96	Anthony Darrell Hines**	Cheatham	06/27/89	White/Male	PENDING	No. 68
97	Leonard Edward Smith**	Sullivan	08/25/89	White/Male	Sentence Relief	Nos. 60, 143
98	Donald Ray Middlebrooks*	Davidson	09/22/89	White/Male	Sentence Relief	No. 144
99	Michael Wayne Howell	Shelby	10/26/89	Native Am/ Male	DECEASED	
100	Thomas Daniel Eugene Hale	Washington	11/18/89	Black/Male	Conviction Relief	
101	Jonathan Vaughn Evans	Hamblen	12/16/89	Black/Male	Sentence Relief	
102	Gary June Caughron	Sevier	02/03/90	White/Male	Sentence Relief	
103	John Michael Bane*	Shelby	02/23/90	White/Male	Sentence Relief	No. 156
104	Danny Branam	Knox	05/04/90	White/Male	Sentence Relief	
105	Harold Wayne Nichols	Hamilton	05/12/90	White/Male	PENDING	
106	Tommy Joe Walker	Knox	05/14/90	White/Male	Sentence Relief	
107	Randy Duane Hurley	Cocke	05/23/90	White/Male	Sentence Relief	

108	Oscar Franklin Smith (3)	Davidson	07/26/90	White/Male	PENDING	
109	David M. Keen*	Shelby	8/15/90	White/Male	Sentence Relief	No. 158
110	Victor James Cazes	Shelby	11/01/90	White/Male	DECEASED	
111	Jonathan Wesley Stephenson*	Cocke	10/19/90	White/Male	Sentence Relief	No. 194
112	Olen Edward Hutchison	Campbell	01/18/91	White/Male	DECEASED	
113	Kenneth Patterson Bondurant*	Giles	02/09/91	White/Male	Conviction Relief	No. 201
114	David Allen Brimmer	Anderson	03/02/91	White/Male	Sentence Relief	
115	Roosevelt Bigbee	Sumner	03/15/91	Black/Male	Sentence Relief	
116	Joseph Arlin Shepherd	Monroe	04/04/91	White/Male	Sentence Relief	
117	Ricky Eugene Estes	Shelby	06/26/91	White/Male	Conviction Relief	
118	James Blanton (2)	Stewart	07/27/91	White/Male	DECEASED	
119	Sylvester Smith	Shelby	09/27/91	Black/Male	Sentence Relief	
120	Millard Curnutt	Campbell	11/22/91	White/Male	DECEASED	
121	William Eugene Hall (2)	Stewart	12/04/91	White/Male	PENDING	
122	Derrick Desmond Quintero (2)	Stewart	12/04/91	Latino/Male	PENDING	
123	Henry Eugene Hodges	Davidson	01/28/92	White/Male	PENDING	
124	Craig Thompson	Shelby	02/29/92	Black/Male	Sentence Relief	
125	Timothy Dewayne Harris	Shelby	03/04/92	Black/Male	Sentence Relief	
126	Leroy Hall, Jr.	Hamilton	03/11/92	White/Male	PENDING	
127	Ricky Thompson*	McMinn	04/04/92	White/Male	Conviction Relief	182
128	Derrick Johnson	Shelby	04/22/92	Black/Male	Sentence Relief	
129	Robert Williams	Hamilton	06/19/92	Black/Male	Sentence Relief	
130	Richard Odom*	Shelby	10/15/92	White/Male	Sentence Relief	Nos. 177, 210
131	William Arnold Murphy	Shelby	11/20/92	White/Male	Sentence Relief	
132	Michael Dean Bush	Putnam	02/22/93	White/Male	Sentence Relief	
133	Gary Wayne Sutton	Blount	02/24/93	White/Male	PENDING	
134	James Anderson Dellinger (2)	Blount	02/24/93	White/Male	PENDING	
135	Fredrick Sledge	Shelby	11/04/93	Black/Male	Sentence Relief	
136	Christopher Scott Beckham	Shelby	11/17/93	White/Male	Sentence Relief	
137	Andre S. Bland	Shelby	02/14/94	Black/Male	PENDING	
138	Glen Bernard Mann	Dyer	07/19/94	Black/Male	DECEASED	
139	Gussie Willis Vann	McMinn	08/10/94	White/Male	Conviction Relief (Exonerated)	

140	Perry A. Cribbs	Shelby	11/16/94	Black/Male	Sentence Relief	
141	Preston Carter* (*aka Akil Jahi*) (2)	Shelby	01/25/95	Black/Male	Sentence Relief	No. 179
142	Ronald Michael Cauthern**(2)	Montgomery	01/25/95	White/Male	Sentence Relief	No. 89
143	Clarence C. Nesbit	Shelby	02/24/95	Black/Male	Sentence Relief (AR)	
144	Kevin B. Burns (2)	Shelby	09/23/95	Black/Male	PENDING	
145	Leonard Edward Smith***	Sullivan	09/27/95	White/Male	Sentence Relief	Nos. 60, 97
146	Donald Ray Middlebrooks**	Davidson	10/12/95	White/Male	PENDING	No. 98
147	Christa Gail Pike	Knox	03/30/96	White/Female	PENDING	
148	Tony V. Carruthers (3)	Shelby	04/26/96	Black/Male	PENDING	
149	James Montgomery (3)	Shelby	04/26/96	Black/Male	Conviction Relief	
150	Jon D. Hall	Henderson	02/05/97	White/Male	PENDING	
151	Farris Genner Morris, Jr. (2)	Madison	04/01/97	Black/Male	PENDING	
152	Bobby Gene Godsey, Jr.	Sullivan	04/25/97	White/Male	Sentence Relief	
153	Charles Edward Hartman**	Montgomery	08/01/97	White/Male	Sentence Relief	No. 43
154	Roy E. Keough	Shelby	05/09/97	White/Male	Sentence Relief	
155	Tyrone L. Chalmers	Shelby	06/19/97	Black/Male	PENDING	
156	John Michael Bane**	Shelby	07/18/97	White/Male	PENDING	No. 103
157	John David Terry**	Davidson	08/07/97	White/Male	DECEASED	No. 92
158	David M. Keen**	Shelby	08/15/97	White/Male	PENDING	No. 109
159	Jerry Ray Davidson	Dickson	09/03/97	White/Male	Sentence Relief	
160	Dennis Wade Suttles	Knox	11/04/97	White/Male	PENDING	
161	Steve Morris Henley** (2)	Jackson	12/15/97	White/Male	EXECUTED	No. 72
162	James Patrick Stout	Shelby	03/03/98	Black/Male	Sentence Relief	
163	Vincent C. Sims	Shelby	05/01/98	Black/Male	PENDING	
164	Kennath Artez Henderson	Fayette	07/13/98	Black/Male	PENDING	
165	Michael Dale Rimmer*	Shelby	11/09/98	White/Male	Sentence Relief	Nos. 200, 221
166	Gregory Robinson	Shelby	11/23/98	Black/Male	PENDING	
167	Gerald Lee Powers	Shelby	12/14/98	Asian/Male	PENDING	
168	William Pierre Torres	Knox	02/25/99	Latino/Male	Sentence Relief	
169	Richard Hale Austin**	Shelby	03/05/99	White/Male	DECEASED	No. 1
170	James A. Mellon	Knox	03/05/99	White/Male	Conviction Relief	
171	Paul Dennis Reid (2)	Davidson	04/20/99	White/Male	DECEASED	

172	Daryl Keith Holton (4)	Bedford	06/15/99	White/Male	EXECUTED	
173	Christopher A. Davis (2)	Davidson	06/17/99	Black/Male	Sentence Relief	
174	Timothy Terrell McKinney	Shelby	07/16/99	Black/Male	Conviction Relief	
175	William Richard Stevens (2)	Davidson	07/23/99	White/Male	DECEASED	
176	Paul Dennis Reid (2)	Montgomery	09/22/99	White/Male	DECEASED	
177	Richard Odom**	Shelby	10/01/99	White/Male	Sentence Relief	Nos. 130, 210
178	William Glenn Rogers	Montgomery	01/21/00	White/Male	PENDING	
179	Preston Carter** (*aka Akil Jahi*) (2)	Shelby	02/17/00	Black/Male	PENDING	No. 139
180	G'Dongalay Parlo Berry (2)	Davidson	05/25/00	Black/Male	Sentence Relief	
181	Paul Dennis Reid (3)	Davidson	05/27/00	White/Male	DECEASED	
182	Ricky Thompson**	McMinn	06/13/00	White/Male	Sentence Relief	No. 127
183	Arthur Todd Copeland	Blount	07/24/00	Black/Male	Conviction Relief	
184	David Lee Smith (2)	Bradley	11/06/00	White/Male	DECEASED	
185	Robert Lee Leach, Jr. (2)	Davidson	02/16/01	White/Male	DECEASED	
186	Robert Faulkner	Shelby	03/10/01	Black/Male	Conviction Relief (AR)	
187	Hubert Glenn Sexton (2)	Scott	06/30/01	White/Male	Sentence Relief	
188	Charles Edward Rice	Shelby	01/14/02	Black/Male	PENDING	
189	Steven Ray Thacker	Dyer	02/08/02	White/Male	DECEASED	
190	John Patrick Henretta	Bradley	04/06/02	White/Male	Sentence Relief	
191	Detrick Deangelo Cole	Shelby	04/19/02	Black/Male	Sentence Relief	
192	Leonard Jasper Young	Shelby	08/24/02	White/Male	Sentence Relief (AR)	
193	Andrew Thomas	Shelby	09/26/02	Black/Male	Conviction Relief (AR)	
194	Jonathan Wesley Stephenson**	Cocke	10/05/02	White/Male	PENDING	No. 111
195	David Ivy	Shelby	01/11/03	Black/Male	PENDING	
196	Steven James Rollins	Sullivan	06/21/03	White/Male	Conviction Relief	
197	Stephen L. Hugueley	Hardeman	09/16/03	White/Male	PENDING	
198	Richard Carlton Taylor**	Hickman	10/16/03	White/Male	Sentence Relief	No. 41
199	Marlan Duane Kiser	Hamilton	11/20/03	White/Male	PENDING	
200	Michael Dale Rimmer**	Shelby	01/13/04	White/Male	Conviction Relief	Nos. 165, 221
201	Kenneth Patterson Bondurant**	Giles	01/20/04	White/Male	Sentence Relief	No. 113
202	Robert Hood	Shelby	05/06/04	Black/Male	Sentence Relief	
203	Joel Schmeiderer	Wayne	05/15/04	White/Male	Sentence Relief	

204	James Riels (2)	Shelby	08/13/04	White/Male	Sentence Relief	
205	Franklin Fitch	Shelby	10/29/04	Black/Male	Sentence Relief	
206	Harold Hester	McMinn	03/12/05	White/Male	Sentence Relief	
207	Devin Banks	Shelby	04/11/05	Black/Male	Sentence Relief	
208	David Lynn Jordan (3)	Madison	09/25/06	White/Male	PENDING	
209	Nickolus Johnson	Sullivan	04/27/07	Black/Male	PENDING	
210	Richard Odom***	Shelby	12/08/07	White/Male	PENDING	Nos. 130, 177
211	Corinio Pruitt	Shelby	03/01/08	Black/Male	PENDING	
212	Henry Lee Jones (2)*	Shelby	05/14/09	Black/Male	Conviction Relief	No. 220
213	Lemaricus Davidson (2)	Knox	10/30/09	Black/Male	PENDING	
214	Howard Hawk Willis (2)	Washington	06/21/10	White/Male	PENDING	
215	Jessie Dotson (6)	Shelby	10/12/10	Black/Male	PENDING	
216	John Freeland	Chester	05/23/11	Black/Male	Sentence Relief	
217	James Hawkins	Shelby	06/11/11	Black/Male	PENDING	
218	Rickey Bell	Tipton	03/30/12	Black/Male	PENDING	
219	Sedrick Clayton (3)	Shelby	06/15/14	Black/Male	PENDING	
220	Henry Lee Jones (2)**	Shelby	05/16/15	Black/Male	PENDING	No. 212
221	Michael Dale Rimmer***	Shelby	05/07/16	White/Male	PENDING	Nos. 165, 221

Appendix 3

List of Tennessee Capital Cases Granted Relief on Grounds of Ineffective Assistance of Counsel During the 40-Year Period 7/1/1977 – 6/30/2017

Tennessee capital cases granted relief in state court for IAC:

1. *State v. Ransom,* Shelby County Criminal Court No. B57716 (January 1, 1983) (sentence relief) (settled for life)

2. *Teague v. State*, 772 S.W.2d 915 (Tenn. Crim. App. 1988) (sentence relief) (settled for life)

3. *Cooper v. State*, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (grant of sentence relief from pc court aff'd) (resentenced to less than death)

4. *Johnson v. State*, 1992 WL 210576 (Ct. Crim. App. 1992) (sentence relief) (released in 2012 on *Alford* plea)

5. *Campbell v. State*, 1993 WL 122057 (Tenn. Crim. App. 1993) (sentence relief) (settled for life sentence/subsequently paroled)

6. *Adkins v. State*, 911 S.W.2d 334 (Tenn. Crim. App. 1994) (sentence relief) (resentenced to less than death)

7. *Teel v. State,* Marion County Circuit Court No. 1460 (April 12, 1995) (sentence relief) (settled for life)

8. *Bell v. State*, 1995 WL 113420 (Tenn. Crim. App. 1995) (sentence relief) (resentenced to less than death)

9. *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (sentence relief) (resentenced to life)

10. *Coker v. State,* Sequatchie County Circuit Court No. 4778 (April 22, 1996) (sentence relief) (resentenced to life)

11. *Brimmer v. State*, 29 S.W.3d 497 (Tenn. Crim. App. 1998) (sentence relief) (resentenced to less than death)

12. *Smith v. State*, 1998 WL 899362 (Tenn. Crim. App. 1998) (conviction relief) (settled for life)

13. *Hurley v. State*, Cocke County Circuit Court No. 4802 (December 12, 1998) (sentence relief) (settled for life)

14. *Richard Taylor v. State*, 1999 WL 512149 (Tenn. Crim. App. 1999) (conviction relief) (settled for life)

15. *Darrell Wayne Taylor v. State*, Shelby County Criminal Court, Case No. P – 7864, Trial No. 86—03704 (settled for life; paroled)

16. *McCormick v State*, 1999 WL 394935 (Tenn. Crim. App. 1999) (conviction relief) (acquitted on retrial – exoneration)

17. *Wilcoxson v. State*, 22 S.W.3d 289 (Tenn. Crim. App. 1999) (sentence relief) (resentenced to less than death)

18. *Caughron v. State*, 1999 WL 49906 (Tenn. Crim. App. 1999) (sentence relief) (resentenced to less than death)

19. *State v. Bush*, Cumberland County Circuit Court No. 84–411 (March 7, 2002) (sentence relief) (settled for life)

20. *Vann v. State*, McMinn Co. Post–Conviction No. 99–312 (May 29, 2008) (conviction relief) (charges dismissed – exoneration)

21. *Nesbit v. State*, Shelby Co. P–21818 (July 9, 2009) (sentence relief)

22. *Cribbs v. State*, 2009 WL 1905454 (Tenn. Crim. App. 2009) (sentence relief) (settled for life)

23. *McKinney v State*, 2010 WL 796939 (Tenn. Crim. App. 2010) (conviction relief) (after 2 subsequent mistrials [hung juries], pled to 2d degree murder and released)

24. *Cole v. State*, 2011 WL 1090152 (Tenn. Crim. App. 2011) (sentence relief) (settled for life without parole)

25. *Young v. State*, Shelby County No. 00–04018 (March 28, 2011) (sentence relief)

26. *Banks v. State*, Shelby County No. 03–01956 (September 13, 2011) (sentence relief) (settled for LWOP)

27. *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (sentence relief) (settled for life)

28. *Stout v. State*, Shelby Co., 2012 WL 3612530 (Tenn. Crim. App. 2012) (sentence relief) (sentenced to life)

29. *Rollins v. State*, Sullivan Co., 2012 WL 3776696 (Tenn. Crim. App. 2012) (sentence relief by trial P.C. court; conviction relief on appeal) (settled for life)

30. *Rimmer v. State*, Shelby Co. 98–01034, 97–02817, 98–01033 (October 12, 2012) (conviction relief) (retried, convicted, sentenced to death again after mitigation waiver)

31. *Hester v. State*, McMinn Co. 00–115 (May 20, 2013) (settled for LWOP without PC hearing; at the plea hearing, State acknowledged IAC/mitigation)

32. *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014) (sentence relief) (settled for LWOP)

33. *Schmeiderer v. State*, Maury Co. 14488 (December 22, 2014) (settled for LWOP without PC hearing; agreed disposition order references IAC/mitigation)

Tennessee capital cases granted relief in federal court for IAC:

1. *Richard Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) (sentence relief) (resentenced to death)

2. *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (conviction relief) (resentenced to life)

3. *Groseclose v. Bell*, 131 F.3d 1161 (6th Cir. 1997) (conviction relief) (resentenced to life)

4. *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (sentence relief) (settled for life)

5. *Caruthers v. Carpenter*, 3:91–CV–0031 Docket (Doc) #287 and #288 (June 6, 2001) (order granting sentencing relief) (on appeal)

6. *Timothy Morris v. Bell*, E. D. Tenn. No. 2:99–CD–00424 (May 16, 2002) (sentence relief) (settled for life)

7. *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (sentence relief) (settled for life)

8. *King v. Bell*, M.D. Tenn. No. 1:00–cv–00017 (July 13, 2007) (sentence relief) (resentenced to life)

9. *House v. Bell*, 2007 WL 4568444 (E.D. Tenn. 2007) (conviction relief) (charges dismissed in 2009 - exoneration)

10. *Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013) (sentence relief) (sentenced to life)

11. *Duncan v. Carpenter*, No. 3:88-00992 (M.D. Tenn. Mar. 4, 2015) (sentence relief)

12. *McNish v. Westbrooks*, 2016 WL 755634 (E.D. Tenn. Feb. 25, 2016), No.: 2:00–CV–095–PLR–CLC (sentence relief)

Appendix 4

CHART OF SIXTH CIRCUIT VOTING IN TENNESSEE CAPITAL HABEAS CASES

Republican Appointed Judges

REPUBLICAN APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF (or remand)
Batchelder	1991	8	1
Boggs	1986	12	1
Cook	2003	10	1
Gibbons	2002	4	1
Griffin	2005	3	0
Guy	1985	0	1
Kethledge	2008	1	0
McKeague	2005	2	0
Nelson	1985	2	0
Norris	1986	7	0
Rogers	2002	6	0
Ryan	1985	3	3
Siler	1991	11	0
Suhrheinrich	1990	4	1
Sutton	2003	4	0
White	2008	2	2
TOTALS		**79 (88%)**	**11 (12%)**

Democrat Appointed Judges

DEMOCRAT APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF
Clay	1997	3	8
Cole	1995	4	7
Daughtrey	1993	1	3
Donald	2011	0	1
Gilman	1997	2	4
Keith	1977	0	2
Martin	1979	0	5
Merritt	1979	0	9
Moore	1995	3	6
TOTALS		**13 (22%)**	**45 (78%)**

SIXTH CIRCUIT CAPITAL HABEAS CASES FROM TENNESSEE
FINAL DISPOSITIONS IN THE COURT OF APPEALS[1]

CASE	VOTES TO DENY RELIEF	VOTES TO GRANT RELIEF (or remand)
Houston v. Dutton 50 F.3d 381 (1995)		Guy (R) Merritt (D) Ryan (R)
Austin v. Bell 126 F.3d 843 (1997)		Martin (D) Merritt (D) Suhrheinrich (R)
Rickman v. Bell 131 F.3d 1150 (1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Groseclose v. Bell 130 F.3d 1161 (1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Coe v. Bell 161 F.3d 320 (1998)	Boggs (R) Norris (R)	Moore (D)
Carter v. Bell 218 F.3d 581 (2000)	Clay (D) Gilman (D) Nelson (R)	
Workman v. Bell 227 F.3d 331 (2000) (*en banc*)[2]	Batchelder (R) Boggs (R) Nelson (R) Norris (R) Ryan (R) Siler (R) Suhrheinrich (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore (D)
Abdur'Rahman v. Bell 226 F.2d 696 (2000)	Batchelder (R) Siler (R)	Cole (D)

[1] The cases included in this chart are the final Court of Appeals dispositions of Tennessee capital habeas cases. This chart does not include other decisions that addressed collateral issues or that were superseded by subsequent Court of Appeals decisions.

[2] In *Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), Judges Nelson, Ryan and Siler, all Republican appointees, voted to affirm the district court's denial of habeas relief. In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (*en banc*), the seven Democrat appointees voted to remand the case for further proceedings, while the seven Republican appointees voted to affirm the district court. Because the vote was evenly split, the district court's denial of habeas relief was affirmed. Mr. Workman was executed.

Caldwell v. Bell 288 F.3d 838 (2002)	Norris (R)	Clay (D) Merritt (D)
Hutchison v. Bell 303 F.3d 720 (2002)	Cole (D) Moore (D) Siler (R)	
Alley v. Bell 307 F.3d 380 (2002)	Batchelder (R) Boggs (R) Ryan (R)	
Thompson v. Bell 315 F.3d 566 (2003)	Moore (D) Suhrheinrich (R)	Clay (D)
Donnie Johnson v. Bell 344 F.3d 567 (2003)	Boggs (R) Norris (R)	Clay (D)
House v. Bell 386 F.3d 668 (2004) (*en banc*)[3]	Batchelder (R) Boggs (R) Cook (R) Gibbons (R) Norris (R) Rogers (R) Siler (R) Sutton (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore(D)
Bates v. Bell 402 F.3d 635 (2005)		Batchelder (R) Merritt (D) Moore (D)
Harbison v. Bell 408 F.3d 823 (2005)	Cook (R) Siler (R)	Clay (D)
Harries v. Bell 407 F.3d 631 (2005)		Boggs (R) Cook (R) Gibbons (R)
Payne v. Bell 418 F.3d 644 (2005)	Cook (R) Rogers (R) Sutton (R)	
Henley v. Bell 487 F.3d 379 (2007)	Cook (R) Siler (R)	Cole (D)

[3] The Supreme Court overturned the Sixth Circuit's *en banc* decision. *House v. Bell*, 547 U.S. 518 (2006). On remand from the Supreme Court, the district court granted relief on Mr. House's claims relating to actual innocence, and the state then dismissed the charges – resulting in Mr. House's exoneration.

Cone v. Bell 505 F.3d 610 (2007)[4]	Batchelder (R) Boggs (R) Cook (R) Griffin (R) McKeague (R) Norris (R) Rogers (R) Ryan (R) Sutton (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D) Martin (D) Merritt (D) Moore (D)
Cecil Johnson v. Bell 525 F.3d 466 (2008)	Batchelder (R) Gibbons (R)	Cole (D)
Owens v. Guida 549 F.3d 399 (2008)	Boggs (R) Siler (R)	Merritt (D)
West v. Bell 550 F.3d 542 (2008)	Boggs (R) Norris (R)	Moore (D)
Irick v. Bell 565 F.3d 315 (2009)	Batchelder (R) Siler (R)	Gilman (D)
Smith v. Bell No. 05-6653 (2010)	Cole (D) Cook (R) Griffin (R)	
Wright v. Bell 619 F.3d 586 (2010)	Cole (D) McKeague (R) Rogers (R)	
Nicholus Sutton 645 F.3d 752 (2011)	Boggs (R) Daughtrey (D)	Martin (D)
Stroud v. Colson 680 F.3d 596 (2012)	Cook (R) Kethledge (R) Sutton (R)	
Cauthern v. Colson 726 F.3d 465 (2013)	Rogers (R)	Clay (D) Cole (D)
Hodges v. Colson 727 F.3d 517 (2013)	Batchelder (R) Cook (R)	White (R)

[4] In *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), Judges Norris (R), Merritt (D), and Ryan (R) voted unanimously to grant relief. The Supreme Court overturned that decision in *Cone v. Bell*, 535 U.S. 685 (2002). On remand, Judges Ryan and Merritt voted for relief, while Judge Norris (R) dissented. 359 F.3d 785 (6th Cir. 785). Again, the Supreme Court overturned the decision. 543 U.S. 447 (2005). Then on remand, Judges Norris and Ryan voted to deny habeas relief, while Judge Merritt dissented. 492 F.3d 743 (6th Cir. 2007). On Mr. Cone's petition for rehearing *en banc*, seven Democrat appointees dissented from the denial of rehearing *en banc*. 505 F.3d 610 (6th Cir. 2007). The remaining judges, all Republican appointees, either voted to deny rehearing *en banc* or acquiesced in the denial. (These opposing positions on the *en banc* petition are counted as votes in the chart.) Then again the Supreme Court overturned the Sixth Circuit, 556 U.S. 1769 (2009), and remanded the case to the district court. Mr. Cone died on death row while his case was pending.

Van Tran v. Colson 764 F.3d 594 (2014)	Cook (R) Rogers (R) White (R)	
Middlebrooks v. Bell 619 F.3d 526 (2010) Middlebrooks v. Carpenter 843 F.3d 1127 (2016)	Clay (D) Gilman (D) Moore (D) White (R)	
Miller v. Colson 694 F.3d 691 (2012)	Gibbons (R) Siler (R)	White (R)
Morris v. Carpenter 802 F.3d 825 (2015)	Boggs (R) Clay (D) Siler (R)	
Gary Wayne Sutton v. Carpenter No. 11-6180 (2015)	Boggs (R) Cook (R) Gibbons (R)	
Thomas v. Westbrooks 849 F.3d 659 (2017)	Siler (R)	Merritt (D) Donald (D)
Black v. Carpenter 866 F.3d 734 (6th Cir. 2017)	Boggs (R) Cole (D) Griffin (R)	

Further notes:

Split Decisions: Of the 37 cases charted above, 21 (or 57%) resulted in split decisions. In these split decision cases, 92% of the Republican appointee votes were against relief, while 92% of the Democrat appointee votes were for relief. The votes according to party affiliation of the judges were:

Republican Appointee Votes Against Relief = 50 (93%)
Republican Appointee Votes For Relief = 4 (7%)

Democrat Appointee Votes Against Relief = 3 (7%)
Democrat Appointee Votes For Relief = 37 (93%)

Since 2005, no Republican appointee majority has voted for relief.

***En Banc* Opinions**: We have identified six Sixth Circuit *en banc* opinions in capital cases from Tennessee. Three are included in the chart because those *en banc* decisions resulted in final disposition of the petitioners' habeas claims in the Court of Appeals. The other three are not included in the chart because they decided collateral issues that were not dispositive of the petitioners' habeas claims. The *en banc* opinions are as follows:

O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996) (*en banc*) (*per curiam*) (7 to 6 decision resulting in a remand to state court, in which 4 Democrat appointees and 3 Republican appointees voted favorably for the petitioner; while 5 Republican appointees and 1 Democrat appointee voted unfavorably against the petitioner) (not included in the chart);

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (*en banc*) (a tie 7 to 7 vote strictly along party lines, effectively denying habeas relief) (included in the chart);

Abdur'Rahman v. Bell, 392 F.3d 174 (2004) (*en banc*) (in a 7 to 6 decision on a habeas procedural issue, all 6 Democrat appointees and 1 Republican appointee voted in favor of the petitioner, and 6 Republican appointees and no Democrat appointees voted against the petitioner – *i.e.*, the single swing Republican appointee vote enabled the case to continue) (not included in the chart);

House v. Bell, 386 F.3d 668 (6th Cir. 2004) (*en banc*) (8 to 7 vote, strictly along party lines, denying habeas relief) (included in the chart);

Alley v. Little, 452 F.3d 620 (6th Cir. 2006) (en banc) (8 to 5 vote rejecting method-of-execution claim, in which 7 Republican appointees and 1 Democrat appointee voted against the petitioner, and 5 Democrat appointees voted for the petitioner) (not included in the chart);

Cone v. Bell, 505 F.3d 610 (6th Cir. 2007) (all 7 Democrat appointees dissented from denial of *en banc* review, while all 9 Republican appointees supported denial of *en banc* review – resulting in denial of habeas relief) (included in the chart).

Among these *en banc* opinions, Republican appointees cast 42 of their 46 votes (91%) against the petitioners, while Democrat appointees cast 36 of their 37 votes (97%) in favor of the petitioners.