IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. W1998-00679-SC-DDT-DD
	)	
FARRIS GENNER MORRIS	)	**Capital Case**

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

FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DISTRICT OF
TENNESSEE

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I. INTRODUCTION.

Farris Morris requests that this Court deny the Attorney General's motion to set an execution date. First and foremost, this Court should deny the motion, because the surviving victims do not want Mr. Morris to be executed. Further, Mr. Morris is only subject to execution due to procedural technicalities that constrained the federal appellate courts' review of his case: The federal district court found that Mr. Morris merited relief because his trial counsel were constitutionally ineffective. *Morris v. Bell*, 2011 WL 7758570 (W.D. Tenn., September 29, 2011). Finally, Mr. Morris's conviction and sentence are rife with structural error: he, an African-American, was tried by an unconstitutionally comprised, all white jury – in shackles.

The most significant reason for this Court to deny the State's request for an execution date is that the parents of Erica Hurd, the victim for whom Mr. Morris received his death sentence, never wanted Mr. Morris sentenced to death.[1] Neither the prosecution nor Mr. Morris' counsel informed the jury of the Hurds' desire for a life sentence. And, as outlined below, this was a jury that was particularly likely to give strong consideration to the victim's parents' desires, given that they sentenced Morris to life without parole for the murder of Charles Ragland. Had the jury known of the Hurds' desire that Mr. Morris receive life without parole, there is strong reason to believe the jury would not have sentenced him to death.

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[1] Ex. 1, Affidavit of Virginia Hurd.

At this point, Mr. Morris' death sentence hangs on a procedural technicality. The federal district court determined Mr. Morris should not be subject to execution, because trial counsel were constitutionally deficient. *Morris v. Bell*, 2011 WL 7758570 (W.D. Tenn., September 29, 2011). As outlined by the district court, there was copious mitigating evidence available that Mr. Morris had a family history of mental illness; that he is, himself, seriously mentally ill; that he suffered brain injury; that he had a substance abuse problem; and that he was extremely intoxicated on the night of the murders in this case. *Morris*, 2011 WL 7758570 at *28. Despite his attorneys being on notice this evidence was available, they neglected to develop it and present it to the jury that would determine Mr. Morris' fate. *Id.* The district court determined this evidence would clearly have made a difference to at least one juror and vacated Morris' death sentence. *Id.* Mr. Morris is only subject to execution because procedural technicalities of deferential review required the 6th Circuit to reverse this decision.[2] This is critical: The Court of Appeals did *not* consider –as did the district court – whether the mitigation that should have been presented would have made a difference to the jury. They also did not find that Morris' lawyers did a good job. Rather, the court, constrained by the procedural bars placed on reviewing courts,

[2] *Morris v Carpenter*, 802 F.3d 825 (6th Cir. 2015). The 6th Circuit simply held that, that there was "a reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id* at 843.

simply said that there is a way to look at counsel's representation as constitutionally . . . okay.[3]

The point, however, is that the mitigation exists. And that it is substantial enough that this Court should deny the State's request for an execution date. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (citing *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989)), ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse"); *see also Eddings v. Oklahoma,* 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a " 'part of the process of inflicting the penalty of death' "). Indeed, the last court to actually consider it determined it was so substantial as to require Mr. Morris' death sentence to be vacated. *Morris*, 2011 WL 7758570 at *28.

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[3] In order to make this very deferential assessment of Morris' counsel's performance, the 6th Circuit had to go so far as to create a hypothetical strategy for counsel's complete failure to present mitigation evidence: "By not presenting additional mental-health testimony in the mitigation phase, counsel avoided opening the door to rebuttal evidence of Morris's history of drug dealing, drug use, and other illegal acts. . . .This court may entertain *possible* reasons for counsel's decisions *even if not expressed by counsel.* Accordingly, the risk of rebuttal evidence is a valid consideration *whether or not Morris's counsel considered it.*" Id. at 844-45. (emphasis added).

The State's request for an execution date should also be denied where Mr. Morris, an African-American was tried before an all-white jury – despite the trial being held in a community whose population is one-third African-American.[4] Moreover, subsequent review of the prosecutor's trial notes raised serious constitutional concerns about the State's use of a peremptory strike to remove an African-American juror and ensure an all-white jury.[5] However, due to both another instance of ineffective counsel – his trial counsel did not object to the composition of the jury – and additional procedural technicalities, no court has ever reviewed the merits of this issue.[6]

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[4] Ex. 2, 2000 Census reflecting African-American population of Madison County, Tennessee as 32.46%.

[5] Ex. 3, prosecutor's jury selection notes.

[6] Ex. 4, 6th Circuit Order (November 13, 2018) (denying Morris's application for a second or successive petition for writ of habeas corpus). Mr. Morris has attempted several times to raise this critical issue only to have the court determine that it was procedurally barred from even receiving any of the evidence – evidence which supports a *prima facie* showing that the prosecutor's strike of an African-American juror was motivated by racial considerations. The following section of the 6th Circuit order outlines the different times Mr. Morris has raised the issue of his all-white jury and that reflect that, every time, the court to which it was raised refused to consider it – on purely procedural grounds:

> Morris's proposed petition is barred and would be an abuse of the writ *because it raises a claim that was presented in a prior petition*. In claim 24 of his amended petition, Morris alleged that the state violated *Batson* by using a peremptory challenge to remove Ingram. The district court held that Morris procedurally defaulted the claim by failing to present

All of these concerns in Mr. Morris' case are emblematic of the concerns, nationwide, with how and for whom capital punishment is imposed. And these are precisely the kind of issues that have led most of the United States to now reject the death penalty in favor of life in prison.[7] Yet, the State of Tennessee seeks to execute Mr. Morris who should, by any reasonable account, be serving a sentence of life without parole.

As explored in greater detail below, there is now a clear national consensus in favor of abolishing the death penalty altogether. Sixty per cent (60%) of the country now favors a life sentence over the death penalty.[8] And between states that have now totally abolished capital punishment (21) and those in which there is a moratorium (4), there is

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it in state court and had not presented cause or prejudice to excuse the default. In claim 9N, Morris alleged that his trial counsel failed to object when the prosecutor removed Ingram. The district court found that Morris had not presented the claim in state court and had failed to demonstrate cause and prejudice for the procedural default. As explained below, *Foster* is an application of *Batson* and not the basis for a new claim. Since Morris presented his *Batson* claim in his previous petition, his current petition is subject to dismissal under § 2244(b)(1).

This chronology by the 6th Circuit demonstrates that Mr. Morris' original trial counsel failed to raise an objection to this issue and, thereafter, each court from which Morris has sought relief has found the issue procedurally barred.

[7] Ex. 5, Gallup poll.

[8] Ex. 5, Id.

now no death penalty in exactly one-half of the United States.[9] Even in Tennessee, there is clear evidence of our society's move towards abolition. Despite the fact that Tennessee was one of only seven states to perform an execution in 2019, there were no trials resulting in a new death sentence in Tennessee this year.[10] Moreover, since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed sustained death sentences.[11] And, of the nine trials resulting in a death sentence since 2010, five were from just one country – Shelby County.[12]

As noted in the "Evolving Standards of Decency" section herein, the few executions occurring nationwide in 2019 – to which Tennessee contributed three (or nearly fifteen percent (15%)) – demonstrated the very issues which are leading the country as a whole to stop executing its citizens:

> The 22 executions this year belied the myth that the death penalty is reserved for the "worst of the worst." At least 19 of the 22 prisoners who were executed this year had one or more of the following impairments: significant evidence of mental illness (9); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (8); or chronic serious childhood trauma, neglect, and/or abuse (13).

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[9] Ex. 6, DPIC Report.

[10] Ex. 6, Id.

[11] Ex. 7, "Tennessee's Death Penalty Lottery", Tennessee Journal of Law and Policy, Vol. 13, Summer, 2018, at 139-140, https://tennesseelawandpolicy.files.wordpress.com/2018/07/maclean-and-miller-tennessees-death-penalty-lottery1.pdf, last-visited December 23, 2019.

[12] Id.

> Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the impairments listed above, an innocence claim, and/or demonstrably faulty legal process.[13]

Executing Farris Morris would only further belie the myth that the death penalty is reserved for the worst of the worst. Instead, it would add to the list of those executed because of: 1) ineffective assistance of counsel; 2) racism; and 3) the completely and unconstitutionally arbitrary manner in which the death penalty is and has always been imposed in the United States. Mr. Morris' death sentence should not be carried out. This Court should deny the State's request for an execution date, issue a certificate of commutation, and/or exercise its supreme authority to remand Mr. Morris' case to the trial court for proceedings under *Batson* and *Foster*.

II. REASONS WHY NO EXECUSTION DATE SHOULD BE SET.

A. Farris Morris' capital sentence is unconstitutionally unreliable: He received constitutionally ineffective assistance of counsel to such a degree that the federal district court vacated his death sentence. But for the reversal by the 6th Circuit Court of Appeals on procedural grounds, Mr. Morris would be serving a sentence of life without parole today.

An unconstitutionally comprised jury sentenced Mr. Morris to death for the murder of Erica Hurd. In a community whose population is

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[13] Ex. 6, DPIC Report.

one-third African-American, Morris' jury was all white.[14] Moreover, Morris' trial counsel was complicit in the striking of African-Americans from the jury. Morris' trial counsel also shares the blame for failing to inform the jury that neither of Ms. Hurd's parents wanted Morris sentenced to death.[15] In spite of these failings on the part of his trial counsel, this unconstitutionally composed jury was open to a sentence other than death: They voted for a sentence of life without parole for the murder of Charles Ragland.[16] Trial counsel's failings prevented the jury from receiving significant mitigation evidence that bore at least a reasonable probability that one or more of them would vote for a sentence other than death.

1. **The federal district court has already determined that Mr. Morris' death sentence should be vacated and he should be granted a new sentencing hearing.**

As the federal district court found, the evidence that should have been presented to the jury at Mr. Morris' capital sentencing included proof that Morris had a substance abuse problem; was extremely intoxicated on the night of the murders; suffered brain injury which

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[14] Ex. 2, 2000 Census reflecting African-American population of Madison County, Tennessee as 32.46%

[15] Ex. 1, Affidavit of Virginia Hurd.

[16] This Court endorsed the probability that the jury would have taken seriously any additional mitigation in its opinion on Morris' direct appeal: "[I]ndeed, in imposing a sentence of life without parole for the murder of Charles Ragland, it is obvious that the jury gave careful consideration to the mitigating evidence." *State v. Morris*, 24 S.W. 3d 788, 799 (Tenn. 2000).

impaired his brain function; suffered serious mental illness exhibited by his paranoia and difficulty dealing with people, and diagnosed as bi-polar disorder; had a family history of mental illness and alcohol abuse; that his mother was verbally abusive and likely bipolar; and that his parents were adulterous, even bringing lovers into the family home. *Morris v. Bell*, 2011 WL 7758570 (W.D., September 29, 2011), citing proof presented to state post-conviction court, *Morris v. State*, 2006 WL 2872870, at *47-50.

Instead, there was no mitigation proof – either about the effects of crack cocaine generally or about Morris' mental condition and crack's effect on him in particular. The only mitigation evidence was from a friend, two teachers and a librarian from the prison, and a former employer. *Morris v. Bell*, 2011 WL 7758570 at *24. The scant evidence presented by his trial counsel at sentencing was able to be summarized by this Court in two terse paragraphs:

> Several witnesses testified on behalf of the defendant. Mickey Granger, the defendant's employer, testified that Morris was a good, dependable employee who suffered a "downhill slide" in performance when accused of rape shortly before these offenses. Granger became aware of Morris's drug problem when he found a crude crack pipe fashioned from a soft drink can.
>
> Jack Thomas, a friend of the defendant's, testified that when he visited Morris in prison, Morris admitted his responsibility for the killings but denied that he raped Angela Ragland. According to Thomas, Morris said that he had used a large amount of cocaine on the night of the offenses in an effort to overdose. Several other witnesses, including teachers and

> prison employees, testified that Morris is a good student, participates in class, and is punctual. Several of the witnesses testified that Morris helps others inmates, studies frequently, and uses reference material from the library. The defendant did not testify.

State v Morris, 24 S.W.3d 788, 794 (Tenn. 2000).

This weak attempt at mitigation was subsequently characterized by the district court as only scratching the surface. *Morris*, 2011 WL 7758570 at *28. Indeed. As Mr. Morris clearly demonstrated in his state and federal post-conviction proceedings, his trial counsel failed to prepare an effective mitigation strategy for sentencing that addressed his mental illness, neurological deficits, organic brain injury, cocaine-induced psychosis, and that Morris suffers from bipolar disorder and is in a persistent state of hypomania. Counsel failed in all these regards because counsel neglected to adequately investigate and develop Mr. Morris' social history and provide that information to psychiatric experts. The evidence developed in support of Morris' ineffective assistance of counsel claim revealed a wealth of mitigation that would have caused one or more of the jurors in his capital sentencing to vote for a sentence other than death:

- Social History and Psychiatric Evaluations: The post-conviction expert testimony demonstrated a more expansive view of Morris' social history, and multiple psychiatric evaluations. Dr. Woods diagnosed Morris with bipolar disorder generally and with a manic episode and cocaine-induced psychosis with paranoid delusions at the time of the murders. *Morris*, 2011 WL 7758570 at *24.[17]

[17] Ex. 8, Report of Dr. Woods.

- Head Trauma leading to Paranoia: Dr. Auble determined that Morris has brain impairments consistent with head trauma or substance use and a tendency to be paranoid. *Morris*, 2011 WL 7758570 at *18.

- Cocaine-induced psychosis: Dr. Smith concluded that Morris met the criteria for cocaine-induced psychosis, that he had a psychotic delusion that killing Ragland made sense, and that Morris suffered the mental impairments of bipolar disorder and brain damage. *Morris*, 2011 WL 7758570 at *24.

- Bipolar Disorder: Dr. Silva found that Morris, at the time of the murders, suffered from cocaine intoxication delirium associated with psychosis, bipolar disorder with manic features, cocaine dependence associated with cocaine withdrawal, an unspecified cognitive disorder, paranoid personality disorder, and alcohol and cannabis abuse. He determined that the most important psychiatric disorder to explain the murders is cocaine intoxication delirium with psychotic symptoms. *Morris*, 2011 WL 7758570 at *25.[18]

- Debilitating Intoxication: Paula Lundberg-Love concluded that, at the time of the homicides, Mr. Morris had consumed alcohol and cocaine and was intoxicated with cocaine and cocaethylene, causing further intoxication than initially suspected by mere cocaine use. She opined that, if he were bipolar, his brain circuitry would be raging, especially if he were in a manic phase. She stated that "hyperactivation" of the brain's circuits impairs intention and deliberation and that people who ingest the massive amounts of cocaine Morris did are "*at the mercy of* their instant impulses." It was her opinion that Morris was still under the influence when the killings occurred and that he "was intoxicated to the extent that he could not have possessed, and did not possess, the culpable mental

[18] Ex. 9, Report of Dr. Silva.

state required for intention, deliberation and premeditation. . . ." *Morris*, 2011 WL 7758570 at *25.[19]

- Brain Damage: Dr. Gur's analysis concluded that Morris had brain damage and dysfunction that resulting in hyperexcitability, impaired ability to conform to social norms, and impaired decision-making, long-range planning, impulse inhibition, emotional regulation. He stated that Morris' abnormally low metabolism in the temporo-limbic system led to severe emotional deregulation and the combined effect of his brain dysfunction compounded the situation. Further, Mr. Morris had other brain abnormalities that produced deficits in processing information and integrating verbal reasoning, which resulted in behavior that was "disorganized, erratic and failing to adjust to situational demands." Gur noted that a person with this type of brain dysfunction may perform well in a structured environment. *Morris*, 2011 WL 7758570 at *25.[20]

- Even the State's expert, Dr. Walker, agreed it was doubtful Morris would have committed these crimes without the use of cocaine. *Morris v. State*, 2006 WL 2872870 at *30.

2. Had Mr. Morris' capital jury heard the mitigation that was available to counsel but not developed or presented, at least one juror would have voted for a life sentence.

As this Court is aware, a defense attorney's failure to reasonably investigate a defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance. *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003). Defense counsel must perform a reasonable investigation in order to be able to make a strategic decision about whether further investigation is unnecessary. *Id.* at 521 (citing

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[19] Ex. 10, Report of Dr. Lundberg-Love.

[20] Ex. 11, Report of Dr. Gur.

Strickland, 466 U.S. at 690-91). The Court must consider both the quantum of evidence known to counsel and whether that evidence should have led a reasonable attorney to investigate further. *Goodwin v. Johnson*, 632 F.3d 301, 318 (6th Cir. 2011) (citing *Wiggins*, 539 U.S. at 527). To establish prejudice, "the new evidence that a habeas petitioner presents must differ in a substantial way —- in strength and subject matter —- from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir.), *cert. denied*, 546 U.S. 1039 (2005).

As the district court determined, "[a] review of the record indicates that there was substantial information that should have caused counsel to further investigate whether Morris had a mental illness, separate from the effects of cocaine intoxication, and how his alcohol and cocaine use would have affected his cognitive abilities on the night of the murders." *Morris*, 2011 WL 7758570 at *28. Yet, there was no testimony in the penalty phase about Mr. Morris' level of intoxication, his mental condition, or his social history. Moreover, the court recognized that, "Counsel's argument, and apparently his strategy, was that Petitioner was suffering an extreme emotional disturbance, was intoxicated, and that he would adapt in a correctional setting." *Morris*, 2011 WL 7758570 at *28. Continuing its rebuke of Morris' trial counsel's performance, the district court stressed:

> Counsel did not present any evidence of Morris' background or family history, not even to make a plea for mercy; nor did he present any evidence of the brain damage and mental illness Morris suffered. Morris was not simply a good student in prison and a dependable grave digger who suffered a "downhill slide" by using crack. Further, regardless of which

> expert's diagnosis is considered, the post-trial evidence presents information that creates a reasonable probability that at least one juror would not have voted for death.

Morris, 2011 WL 7758570 at *28.

Regarding this last point, it cannot be stressed enough that the jury in this case found two aggravating circumstances for each of Morris' victims. *Morris*, 24 S.W.3d at 794. And, as this Court recognized, the jury gave careful consideration to the paltry mitigation presented to them – returning a sentence of life without parole for the murder of Charles Ragland. *Morris*, 24 S.W. 3d 788, 799. There is no question the district court was correct in its conclusion that Mr. Morris "was not simply a good student in prison and a dependable grave digger who suffered a 'downhill slide' by using crack." *Morris*, 2011 WL 7758570 at *28. Given the careful consideration this jury gave to mitigation in returning one life sentence, had they heard the actual extent of mitigation that was available to competent counsel, there is a reasonable probability that at least one of them would have voted for life. Because the ineffective assistance of his counsel prevented Mr. Morris from presenting this crucial mitigation evidence, his death sentence is unconstitutional.

The district court already determined this evidence would clearly have made a difference to at least one juror and vacated Morris' death sentence. *Id.* Mr. Morris is only subject to execution because procedural technicalities required the 6th Circuit to reverse the district court's

decision.[21] Yet, the mitigation is real. Looking past the procedural roadblocks allows this Court to see that Mr. Morris' death sentence is actually unconstitutional. Based on this reality the Court should deny the State's request for an execution date and, instead, exercise its supreme authority to vacate Morris' sentence of death and remand his case to the trial court.

B. Farris Morris should not be executed: His sentence is unconstitutional, because he was shackled before the jury during his capital sentencing trial.

In *Deck v. Missouri*, 544 U.S. 622 (2005), the United States Supreme Court considered whether the general rule against shackling during the guilt phase should be extended to the sentencing phase of a capital proceeding held before a jury. The Court held that "[t]he considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases" because the decision between life and death is "no less important than the decision about guilt." *Id.* at 632. The Court emphasized, "[t]he appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to the jury, as a matter of common sense, that court authorities consider the offender a danger to the community" and that shackling "almost inevitably affects the jury's perception of the character of the defendant." *Id.* at 633.

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[21] *Morris v Carpenter*, 802 F.3d 825 (6th Cir. 2015). The 6th Circuit simply held that, that there was "a reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id* at 843.

The Supreme Court found the visible shackling of Deck unconstitutional because the record contained no indication that the trial judge had required shackling in response to security or decorum concerns. *Id.* at 634. The Court also noted there was no evidence that this was "an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling." *Id.* at 635. In the absence of such a record, the Court held that "the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* Rather, it is the State's burden to prove beyond a reasonable doubt that the shackling error did not contribute to the sentence. *Id.*

At the time Mr. Morris raised this issue in his state post-conviction proceedings, the only evidence presented that he was shackled during the penalty phase of his capital trial was the testimony of his two trial lawyers and their mitigation investigator. *Morris v. State*, 2006 WL 2872870 at *41. Nothing in the entire trial record indicates any need to shackle Mr. Morris. To the contrary, the trial judge, at the beginning of the post-conviction proceedings noted that, "[the Petitioner had] never misbehaved in Court since we've had him." *Id.* at 42. Yet, as to the fact of whether Mr. Morris was shackled, the post-conviction court found:

> [T]he post-conviction testimony must yield to the trial record. There is nothing in the trial record to support the charge that the defendant was visibly (to jurors) shackled and that his pencil and pad were taken from him during guilt/innocence or sentencing phase. It is undisputed that during the guilt/innocence phase defendant was not shackled in view of the jury and there is nothing in the record to show any change between the two phases relative to restraints. Moreover, it is

> highly improbable if not inconceivable that the court and counsel (three defense lawyers plus the D.A. and staff) would have let such a thing (shackling) happen without making a record of it; *and there is no record.* As Mr. Googe said at the post-conviction hearing, "We didn't want him in shackles if we could avoid that." The trial record outweighs the post-conviction testimony.
>
> Accordingly, this court finds as a matter of fact that, at the guilt/innocence *and* the sentencing phase, the defendant was not visibly (to jurors) shackled or restrained, that his writing needs were not taken from him and that he was not prejudiced in this regard.

Id. at *43.

The Tennessee Court of Criminal Appeals likewise credited the silence of the trial record over the affirmative proof that Mr. Morris was shackled. *Id.* at *43.

Ultimately, however, Mr. Morris was able to demonstrate that jurors had actually seen him shackled during the proceedings. Two jurors, Pat Freshour and Johnnye Langford, have each provided sworn declarations that they saw Mr. Morris' legs shackled during the trial. In relevant part, Ms. Freshour stated:

> When I was on Farris Morris' jury he came into [the] court room very calm. He was shackled on feet, but not his hands.[22]

Similarly, Ms. Langford provided that:

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[22] Ex. 12, Declaration of Pat Freshour.

> I was comforted by the fact that Farris Morris was shackled on his legs during the entire trial so I felt security was appropriate for this type of case.[23]

The Supreme Court makes clear that visible shackling is unconstitutional where there is no indication that it was required in response to security concerns. *Id.* at 634. And, as noted, the trial judge in this case actually complimented that Mr. Morris had "never misbehaved in Court since we've had him." *Morris v. State*, 2006 WL 2872870 at *42.

It must also be stressed that Mr. Morris has attempted to present the evidence that jurors saw shackles on his legs in his federal habeas proceedings. As with the mitigation evidence that was not presented, this effort was barred by procedural technicalities. While the federal district court acknowledged the existence of the juror affidavits establishing they saw Mr. Morris shackled, the AEDPA limited federal review to that which was in the state court record. *Morris*, 2011 WL 7758570 at 32, fn 35.

However, procedural technicalities notwithstanding, the evidence clearly demonstrates that Mr. Morris' death sentence is structurally flawed and unconstitutional, because the jury that sentenced him to death saw that his legs were shackled during his capital trial. This Court should therefore deny the State's request for an execution date for Mr. Morris and, instead, exercise its supreme authority to vacate Morris' sentence of death pursuant to *Deck* and remand his case to the trial court for resentencing.

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[23] Ex. 13, Declaration of Johnnye Langford.

C. This Court should deny the State's request for an execution date for Mr. Morris, because there is evidence of racial discrimination in the prosecution's exclusion of an African-American juror that no court has ever considered.

The injustice that Farris Morris' jury -- who saw him shackled in chains -- never heard any of the critical mitigation evidence *or* that Erica Hurd's parents did not want Mr. Morris to receive the death penalty was surely exacerbated by the fact that not one member of Mr. Morris' own race served on the jury.

Mr. Morris' 1997 capital trial for two counts of first-degree murder was held in Madison County, Tennessee. According to the 2000 Census, Madison County was 32.8% African American.[24] Farris Morris is African-American, yet the jury that heard his case was all-white. *Morris v. State*, 2006 WL 2872870 at 56-58. The racial composition of the jury did not occur accidentally. After challenges for cause had been exercised, only one African-American juror, Savanah Ingram, remained among the jurors.[25] The prosecution, however, exercised its peremptory challenge to remove Mr. Ingram to ensure that an all-white jury would determine Mr. Morris' guilt and death.[26] Mr. Morris' trial counsel did not object to the State's strike of the last African-American prospective juror.

After substantial litigation in post-conviction proceedings, Mr. Morris was able to obtain the prosecutor's contemporaneously prepared

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[24] Ex. 2, Census.

[25] Ex. 14, Affidavit of Gaye Nease.

[26] Ex. 3, prosecutor's jury selection notes.

notes of his jury selection decisions.[27] Based on these notes, there is evidence that the prosecution's peremptory strike of Savanah Ingram was motivated by discriminatory intent.[28] The notes demonstrate that the prosecutor allegedly struck Mr. Ingram because he had a relative with drug problems.[29] The prosecution did not strike at least two similarly situated white jurors[30] who had relatives with drug or alcohol problems - specifically, juror Tommy Bowman who had a daughter with a drug problem[31] and juror Teresa Crouse, who had a niece with an alcohol problem.[32] There is clearly evidence of a constitutional violation in the composition of Mr. Morris' jury. Yet no court has granted him a hearing on this critical issue.

1. **The State violated Mr. Morris' right to a fair trial by striking an African-American juror on the basis of race.**

The State struck Savanah Ingram from the jury in violation of Mr. Morris' constitutional rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). (holding that challenging potential jurors solely on the basis of race violates Equal Protection). The prosecutor struck Savanah Ingram, ostensibly, because Ingram had a relative with a drug problem. Yet the prosecutor did not strike two white jurors, with the same issue. The prosecutor's actions prove discriminatory intent under Supreme Court precedent.

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[27] Ex. 3, Id.

[28] Ex. 3, Id.

[29] Ex. 3, Id.

[30] Ex. 14, Affidavit of Gaye Nease.

[31] Ex. 15, voir dire of juror, Bowman.

[32] Ex. 16, voir dire of juror, Crouse.

In *Foster v. Chatman,* 136 S.Ct. 1737 (2016), the Supreme Court reiterated the steps a reviewing court must take in order to determine whether the prosecution had discriminatory intent in striking a juror. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. And third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Id.* at 1747. Because trial counsel did not object to the strike of Ingram, none of these steps happened in the trial court. However once Mr. Morris obtained the prosecutor's voir dire notes during his collateral proceedings, the *Batson* violation become evident.

Reviewing the prosecutor's justifications for striking African-American jurors in *Foster*, the Supreme Court stressed, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 136 S.Ct. at 1754, (quoting *Miller-El v. Dretke,* 545 U.S. 231, 241 (2005)). As outlined above, review of the prosecutor's voir dire notes demonstrates that is exactly what happened in Mr. Morris' case. The prosecutor's putative reason for striking Ms. Ingram would have applied equally to two white jurors: Bowman (whose daughter had a drug problem) and Crouse (who reported having a cousin with an alcohol problem).

Pursuant to *Batson* and *Foster*, Mr. Morris establishes a prima facie showing of discriminatory intent on the part of the prosecutor in his strike of Savanah Ingram. Yet, no court has granted Mr. Morris a hearing, thereby denying him the constitutional right to establish the remaining steps of a *Batson* violation. It was not Mr. Morris' fault that his trial counsel did not make a contemporaneous *Batson* objection. Moreover, since gaining the necessary information, Mr. Morris has diligently pursued his rights under *Batson* only to have procedural bars block his path. *Morris v. Bell* 2011 WL 7758570 at *59 (district court ruling that Morris' Batson claim in his original petition for writ of habeas corpus was procedurally defaulted).[33] Where clear evidence exists demonstrating discriminatory intent in the prosecution's strike of Savanah Ingram. The State's motion for an execution date should not be granted where racial considerations on the part of the prosecutor resulted in Mr. Morris being tried before an all-white jury.

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[33] Ex. 4, 6th Cir Order, November 13, 2018: Pursuant to the United States Supreme Court's ruling in *Foster*, Mr. Morris also filed a motion in the 6th Circuit Court of Appeals asking for an order authorizing the district court to consider a second or successive petition for writ of habeas corpus. Again, on purely procedural grounds, the 6th Circuit, without considering the merits of Morris' claim, denied the motion finding that it could not be considered because *Foster* wasn't to be applied retroactively.

2. The racial composition of juries has a proven impact on trial outcomes.

In "The Impact of Jury Race in Criminal Trials", the authors examined the impact of racial composition of jury pools.[34] The study, based on "a data set of felony trials in Florida between 2000 and 2010,"[35] revealed that "[w]hen there are no potential black jurors in the jury pool, black defendants are significantly more likely than whites to be convicted of at least one crime (81% for blacks versus 66% for whites).[36] However, as the number of blacks in the pool increases, this differential goes away: in fact, with at least one black member of the jury pool, conviction rates are almost identical (71% for blacks and 73% for whites)."[37] Particularly relevant to Mr. Morris' case was the discussion of the ways in which the presence of a single seated black juror may affect the trial outcome:

> In the deliberation and decision process, a black member of the seated jury could have an effect on the outcome either if she was generally more (or less) likely to vote to convict than the white juror that she replaced or if her presence changed the nature of the deliberations, thereby affecting the votes of the other white members of the jury. The latter could arise if the black member of the jury was able to contribute a different perspective during the deliberations or if white jurors were

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[34] Ex. 17, "The Impact of Jury Race in Criminal Trials", Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, April 17, 2012, The Quarterly Journal of Economics, last-visited December 28, 2019.

[35] *Id.*

[36] *Id.*

[37] *Id.*

> more concerned about appearing racially biased in the presence of a black colleague.[38]

Significantly, the study found that:

> [R]acially mixed mock juries, compared to all-white juries, tended to deliberate longer, discuss more case facts, raise more questions about what was missing from the trials, and be more likely to discuss race issues, such as profiling, during deliberations.[39]

There can be little doubt the racial composition of the jury in Mr. Morris' case had an impact on the jury's deliberations. In fact, a study of the Rule 12 reports from Madison County demonstrate the disparity between having an all-white jury versus a racially diverse one.

The difference between a life sentence and a death sentence in Madison County, hangs on the racial composition of the jury. Four African-American men have faced death penalty trials in Madison County.[40] Three (or all but Farris Morris) got life sentences.[41] All three of the men who received life sentences had black citizens on their juries.[42] Only Farris Morris had an all-white jury.[43] And only Farris Morris was sentenced to death.[44] Even more specifically as to these four trials, the trial judge in Mr. Morris' case is the only Madison County, Tennessee

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[38] *Id.*
[39] *Id.*
[40] Collective Ex. 18, Madison County Rule 12 Reports.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

judge who has ever presided over a first-degree murder trial for a black defendant with no black jurors – and he has done so twice, out of only six (6) total first-degree murder trials.[45] Of the eighteen (18) other first-degree murder trials by the five (5) other judges, there were never fewer than two (2) black jurors.[46] As a radical contrast, one of the trial judges has presided over five (5) first degree murder trials of black defendants, and never had fewer than *five* (5) black jurors.[47]

The odds of having an all-white jury in Madison County, Tennessee are 2/3 to the 12th power (that is there is a 2/3 chance that one juror is not black, times a 2/3 chance that the second is not black, times 2/3 that the third.....). Which is to say about a .77% probability, or a 1 in 130 chance. It might could happen. But, with Mr. Morris' trial judge, this statistical improbability has happened twice in only six trials.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

Batson v. Kentucky, 476 U.S. 79, 87-88 (quoting *Strauder v. West Virginia,* 100 U.S., 303, 308).

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[45] *Id.*

[46] *Id.*

[47] Id.

The State's actions prevented any person of color from having a say as to Mr. Morris' fate. It is important to recall, here, the affidavit of Virginia Hurd, the mother of victim, Erica Hurd.[48] Not only does Ms. Hurd stress that neither she nor her husband wanted the death penalty for Farris Morris but, she notes, that she was never contacted by the District Attorney or Mr. Morris' appointed counsel regarding her wishes.[49] Ms. Hurd and her late husband are African-American. The failure of the State to consult with them – when considered along with the State's removal of African-Americans from the jury – ensured that any others of Morris' own race that might have had something to say about his fate — or who *at the very least* should have been given the opportunity to do so – were systematically eliminated from the equation.

Racial injustice played a significant role in the process leading to Mr. Morris' death sentence – including but not limited to the unconstitutional use of a peremptory strike to ensure an all-white jury. The State should not be granted an execution date for Farris Morris under these circumstances. Rather, this Court should exercise its authority to deny the State's request for an execution date for Mr. Morris and, instead, issue a certificate of commutation and remand the case to the trial court for proceedings consistent with *Batson* and *Foster*.

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[48] Ex. 1, Affidavit of Virginia Hurd.

[49] Id.

D. This Court should declare the death penalty unconstitutional because it is racist.

Rooted in a racist past and currently racist in application, Tennessee's use of the death penalty violates the Eighth Amendment to the United States Constitution and Article I, §16 of the Tennessee Constitution. Nothing could be more arbitrary under the Eighth Amendment than a reliance upon race in determining who should live and die, but despite decades of judicial oversight, the application of the Tennessee death penalty statutes remain racially disparate. Racism infects the process through implicit bias in prosecutorial discretion, through the bias (both sometimes overt and sometimes unknowing) in jury selection, through the ineffective assistance of defense counsel, and through bias in the jurors' perceptions and determinations. Because there is no way to root out this impermissible consideration of race, the death penalty is unconstitutional.

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

Since its inception in 1796, the law in Tennessee has allowed for capital punishment.[50] "Until 1913, all individuals convicted of a capital offense were hanged. There are no official records of the number or names

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[50] Ex. 19, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS,https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

of those executed."[51] In 1916, Tennessee progressed to electrocution as a means to end human life. Electrocution remained the sole method of execution from 1916 until 1960. During this time, Tennessee executed 125 people. Of the 125, 85 were African-American including the 31 African-American men executed for rape.[52] After decades of legal battles on the constitutionality of the death penalty and method of execution, Tennessee made lethal injection the method of execution starting January 1, 1999.[53]

Parallel to the official, state-sanctioned death penalty, there has been a darker history of capital punishment in Tennessee. There have been 237 reported extra-judicial lynchings in Tennessee—the birthplace

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[51] Ex. 20, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[52] In 1977, too late to save the 36 men Tennessee had already executed for the crime of rape, the United States Supreme Court found it unconstitutional to impose a sentence of death for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977). 455 people were executed for rape between 1930 and 1972. 89.1% of those men were black. Ex. 21, *Race, Rape, and the Death Penalty,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty

[53] Ex. 19, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.
From 1960 to 2000 there was not a single execution in the state of Tennessee. Ex. 20, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

of the Ku Klux Klan.[54] Of the 95 counties in Tennessee, 59 counties have reported lynchings. *Id.* The numbers of lynching per county range from one to twenty, with Shelby County holding the record for most lynchings. *Id.* In keeping with that history, Shelby County is also responsible for nearly 50% of the current number of people on death row. The individuals lynched in Memphis include Calvin McDowell, William Stewart, and Thomas Moss.[55] After opening the People's Grocery store in Memphis, TN, a thriving business, Misters McDowell, Stewart, and Moss were confronted and jailed by law enforcement officers along with over 100 other black men. *Id.* On March 9, 1892, masked men entered the jail and removed Mr. Moss, Mr. McDowell, and Mr. Stewart and hung them in an open field. *Id.* When the executioners asked Mr. Moss for his last words he stated, "Tell my people to go west. There is no justice for them here." *Id.*

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

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

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[54] Ex. 22, *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/tennessee.

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

ban against 'cruel and unusual punishments' contained in the Eighth Amendment," *id.* at 255. Justice Douglas reasoned:

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

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

In his separate concurring opinion, Justice Stewart indicted the capital punishment system saying, "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310. The Court later found that the death penalty does not comport with the Eighth Amendment if "imposed under sentencing procedures that create a substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Racial disparity in the application of the death penalty is unconscionable. The Supreme Court has repeatedly held that consideration of race is completely inconsistent with the dictates of justice. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *Rose v. Mitchell,* 443 U.S. 545, 555 (1979); *Castaneda v. Partida,* 430 U.S. 482 (1977);

McLaughlin v. Florida, 379 U.S. 184 (1964) (declaring the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states"). Contrary to the mandates of the Supreme Court, the overt racism that led to the lynching of black citizens became ingrained in the justice system. This happened, in part, because for many years the courts viewed their duty as limited to minimizing racist enforcement of the law. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman*, 408 U.S. at 257 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As Justice Black observed in *Callins v. Collins*, 510 U.S. 1141 (1994),

> [E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field . . . providing no indication that the problem of race in the administration of death will ever be addressed.

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

Managing the risk of racism inherent in the administration of the death penalty has proven untenable and unconstitutional. Just last year,

the Supreme Court noted how "familiar and recurring" the evil of racism is:

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

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

While blacks make up approximately 12% of the population, they account for 42% of the national death row.[56] *Id.* These disparities are well known and well documented. The death penalty is intended for the worst of the worst, (*see Harmelin v. Michigan*, 501 U.S. 957, 966 (1991)), yet research continues to show that race, not crime, is the more likely indicator for who receives the death penalty.

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[56] Ex. 23, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

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

3. Implicit biases influence prosecutorial discretion in seeking death.

A defendant's journey through the legal system has but one conductor: the prosecutor. From the pretrial decisions to the final closing statement, prosecutors bring their own perspectives, strategies, and biases into each decision. The most critical of these decisions, however, is whether to seek the death penalty. Prosecutors make such decisions against the backdrop of their own worldview – including their implicit, unconscious biases. Studies have shown that racialized implicit biases cause associations between black citizens and violence, criminality, and aggression.[57] Whites are associated with purity and seen as victims.[58] Research shows that merely seeing a black face can trigger negative

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[57] Ex. 24, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, SEATTLE UNIV. L. REV., V. 35:795.

[58] *Id.*

associations.[59] By the time a prosecutor has made a charging decision, she has been primed with both the race of the defendant and the victim. Similar to an implicit bias test, a prosecutor must then make choices about the charge, the strategy, plea negotiations, and, ultimately whether to seek death. If prosecutors' implicit biases align with the rest of the country's – and there is no reason to believe that they are uniquely immune – these racial associations impact every decision prosecutors make.[60] Racial priming affects charging decisions, how prosecutors perceive jurors, how they assess witnesses, what evidence they perceive as exculpatory, etc. Even when not acting intentionally, a prosecutor's implicit bias becomes the lens through which she dispenses justice.

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

The history of the exclusion of blacks from jury service is long – and telling. In 1880, the Supreme Court held that statutes limiting jury service to whites are unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303 (1879). In the wake of *Strauder*, states removed the racial discrimination from their statutes, while initiating a series of facially

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[59] *Id.* at 799; Ex. 25, Lisa Trei, *'Black' features can sway in favor of death penalty, according to study*, Standford Report (2006); Ex. 26, Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes.* CORNELL LAW FACULTY PUBLICATION (2006).

[60] *Id.*, Ex. 27, Katherine Barnes, et al. *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 Arizona Law Review, 305 (2009). Ex. 28, Mike Dorning, *Plea Bargains Favor Whites in Death Penalty Cases, Study Says*, WASHINGTON POST, July 26, 2000.

constitutional practices aimed at achieving the same goal—preventing blacks from serving on juries. While some states began using seemingly neutral requirements such as intelligence, experience, or good moral character to keep black citizens out of the jury box, other states printed the names of black jurors on separate color paper so those names could be avoided during a putatively "random" drawing or, alternatively, utilized the jury commissioner as a proxy for the state's racism.[61]

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

> If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. The general attitude of the jury commissioner is shown by the following extract from his testimony: 'I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent

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[61] Ex. 29, Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004).

> disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.'

Norris v. State of Alabama, 294 U.S. 587, 598–99 (1935).

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

In 1986, the Supreme Court declared any exclusion prospective jurors based on race unconstitutional. *Batson v. Kentucky,* 476 U.S.79 (1986).[62] However the Court's ruling proved difficult to enforce. In 2015, the New Yorker reported that in the approximately 30 years since *Batson*, courts have accepted the flimsiest excuses for striking black jurors and prosecutors have trained subordinates to strike black jurors without a judicial rebuke.[63] A 2010 report by the Equal Justice Initiative documented cases in which courts upheld prosecutors' dismissal of jurors because of allegedly race-neutral factors such as affiliation with a

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[62] Much of this section is drawn from Ex. 30, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[63] Ex. 31, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?* THE NEW YORKER, June 5, 2015.

historically black college, a son in an interracial marriage, living in a black-majority neighborhood or that a juror "shucked and jived."[64]

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

- A study of criminal cases from 1983 and 1993 found that prosecutors in Philadelphia removed 52% of potential black jurors as compared to only 23% of nonblack jurors.[65]
- Between 2003 and 2012, prosecutors in Caddo Parish, Louisiana — one of the most aggressive death penalty counties in the country — struck 46% of prospective black jurors with preemptory challenges, as compared to 15% of non-blacks.[66]
- Between 1994 and 2002, prosecutors in Jefferson Parish, Louisiana struck 55% of blacks, but just 16% of whites.[67]
- Although blacks make up 23% of the population in Louisiana, *80%* of criminal trials had no more than two black jurors, and it notably takes only 10 of 12 juror votes to convict in that state.[68]

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[64] Ex. 32, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

[65] Ex. 33, ACLU, *Race and the Death Penalty.*

[66] Ex. 34, Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, Reprieve, August 2015.

[67] Ex. 31, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015.

[68] Ex. 32, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

- A 2011 study found that between 1990 and 2010, North Carolina state prosecutors struck about 53% of black people eligible for juries in criminal cases as compared to about 26% of white people.[69] The study's authors concluded that the chance of this occurring in a race-neutral process was less than 1 in 10 trillion.[70] Even after adjusting for excuses given by prosecutors that tend to correlate with race, the 2-to-1 discrepancy remained.[71] The North Carolina legislature had previously passed a law stating that death penalty defendants who could demonstrate racial bias in jury selection could have their sentences changed to life without parole.[72] The legislature later repealed that law.[73]
- Recently, American Public Media's "In the Dark" podcast did painstaking research on the 26-year career of Mississippi District Attorney Doug Evans and found that during his career, Evans' office struck 50% of prospective black jurors, compared with just 11% of whites.[74]

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[69]Ex. 35, Barbara O'Brian & Catherine M. Grosso, *Report on Jury Selection Study*, MICH. ST. UNIV. COLLEGE OF LAW FACULTY PUBLICATIONS, Dec. 15, 2011.

[70] *Id.*

[71] *Id.*

[72] Ex. 36, North Carolina Senate Bill 461, The Racial Justice Act.

[73] Ex. 37, Matt Smith, *"Racial Justice Act" repealed in North Carolina*, CNN, June 21, 2013.

[74] Ex. 38, Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APMReports, June 12, 2018.

- In the 32 years since *Batson*, the U.S Court of Appeals for the 5th Circuit — which includes Mississippi, Texas and Louisiana — has upheld a *Batson* challenge only twice, out of hundreds of challenges.[75]
- A survey of seven death penalty cases in Columbus, Georgia, going back to the 1970s found that prosecutors struck 41 of 44 prospective black jurors.[76] Six of the seven death penalty trials featured all-white juries.[77]
- In a 2010 study, "mock jurors" were given the same evidence from a fictional robbery case but then shown alternate security camera footage depicting either a light-skinned or dark-skinned suspect.[78] Jurors were more likely to evaluate ambiguous, race-neutral evidence against the dark-skinned suspect as incriminating and more likely to find the dark-skinned suspect guilty.[79]

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[75] Ex. 39, Ian Millhiser, *Something has gone wrong with Jury Selection in Mississippi, and the Fifth Circuit is to Blame.*, THINK PROGRESS, Apr. 5, 2018.

[76] Ex. 40, Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death penalty cases*, ATLANTA JOURNAL CONSTITUTION, Mar. 19, 2018.

[77] *Id.*

[78] Ex. 41, Justin D. Levinson, Danielle Young, *Different Shards of Bias: Skin Ton, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV., 307 (2010).

[79] *Id.*

- Between 2005 and 2009, prosecutors in Houston County, Alabama, struck 80% of black people from juries in death penalty cases.[80] The result was that half the juries were all white and the remainder had only a single black juror, even though the county is 27% black.[81]

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

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[80] Ex. 42, Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NPR Nov. 2, 2015.

[81] *Id.*

by race."[82] *Id.* at 1743, 1755. It is noteworthy that it took 20 years for Foster to obtain evidence of the blatant racism of his prosecutors and that he had lost his *Batson* claims in many courts along the way.

In 2019, the Court encountered another egregious case, and seven justices held that a Mississippi prosecutor violated *Batson* when he struck 41 out of 42 potential black jurors throughout six different trials of Curtis Flowers. *Flowers v. Mississippi*, 139 S. Ct. 2229, 2251 (2019).[83] The Mississippi Supreme Court reversed three times (all for prosecutorial misconduct, and one specifically for a *Batson* violation), and twice the jury could not reach a unanimous verdict. *Id.* at 2236-37. The Court described the prosecutor's pattern of racist use of peremptory strikes across his trials as follows:

> Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.

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

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

> The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

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

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

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

Although prosecutors are often blamed for racial disparities in the legal system, defense attorneys are not immune to the effects of racism and implicit bias. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court considered an ineffective assistance of counsel challenge to defense counsel's introduction of a medical expert's report counsel knew presented the view that the defendant's "race disproportionately predisposed him to violent conduct" during the penalty phase, in which

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

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

Id. at 776. Thus, the Court held, "Buck has demonstrated prejudice." *Id.* at 777. The Court held, no matter how egregious the crime, "[o]ur law punishes people for what they do, not who they are." *Id.* at 778. Using this guiding principle the Court found that use of race as a factor to determine the future dangerousness of a defendant, regardless of which party presents that evidence, is intolerable in our justice system. *Id.* at 780. As the Court explicitly found that defense counsel introduced the expert report (and live testimony) while aware of the expert's blatantly

racist conclusions, counsel was clearly infected himself with overt racism or implicit bias.

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

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

The Constitution requires that capital sentencing be individualized to each defendant's "record, personal characteristics, and the circumstances of his crime." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In *Woodson*, the Court held that in capital cases, the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process." *Id.*; *accord Kansas v. Marsh,* 548 U.S. 163, 173-74 (2006); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983). Under the Eighth Amendment, "[w]hat is important at the [punishment] selection stage is an *individualized* determination of the basis of the character of the

individual and the circumstances of the crime." *Zant*, 462 U.S. at 897 (emphasis in the original).

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

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

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

Despite this constitutional requirement, death-qualified juries routinely consider race in making sentencing determinations.[84] Nearly 80% of executions are for the murder of white victims, despite blacks

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[84] Ex. 43, David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, HANDBOOK OF PSYCH AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research indicating that a black defendant who kills a white victim has a significantly greater likelihood of receiving a sentence of death).

being as likely to be victims of murder.[85] Killers of black people rarely get death sentences.[86] White killers of black people get death sentences even less frequently.[87] And far and away, the person *most* likely to receive a death sentence is a black man who kills a white woman.[88] While white people make up less than half of the country's murder victims, a 2003 study by Amnesty International found that about 80 percent of the people on death row in the United States killed a white person.[89]

The correlation between the race of the victim and the severity of punishment exists in jurisdictions across the country:[90]

- A 2012 study of Harris County, Texas, cases found that people who killed white victims were 2.5 times more likely to be sentenced to the death penalty than other killers.[91]

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[85] Ex. 23, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

[86] Ex. 44, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 CRIM. L. & CRIMINOLOGY 733 (2017).

[87] *Id.*

[88] *Id.*

[89] Ex. 45, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases*, Amnesty International, Apr. 23, 2003.

[90] Much of this section is drawn from Ex. 30, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[91] Ex. 46, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUSTON L. REV. (2008).

- In Delaware, according to a 2012 study, "black defendants who kill white victims are seven times as likely to receive the death penalty as are black defendants who kill black victims . . . Moreover, black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims."[92]
- A study of death penalty rates of black perpetrators/white victims versus white perpetrators/black victims through 1999 showed similar discrepancies. Notably, prosecutors are far less likely to seek the death penalty when the victim is black.[93]
- A study of North Carolina murder cases from 1980 through 2007 found that murderers who kill white people are three times more likely to get the death penalty than murderers who kill black people.[94]
- A 2000 study commissioned by then-Florida Governor Jeb Bush found that the state had, as of that time, never executed a white person for killing a black person.[95]

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[92] Ex. 47, Sheri Lynn Johnson, John H. Blume, et al., *The Delaware Death Penalty: An Empirical Study (2012)*, CORNELL LAW FACULTY PUBLICATIONS, Paper 431.

[93] Ex. 48, John H. Blume, Theodore Eisenberg, et. al., *Explaining Death Row's Population and Racial Composition*, (2004), CORNELL LAW FACULTY PUBLICATIONS, Paper 231.

[94] Ex. 49, Michael L. Radelet & Glenn L. *Pierce, Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).

[95] Ex. 50, Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17 (2009).

- A 2004 study of Illinois, Georgia, Maryland and Florida estimated that "one quarter to one third of death sentenced defendants with white victims would have avoided the death penalty if their victims had been black."[96]
- According to a 2002 study commissioned by then-Governor Frank O'Bannon (D), Indiana had executed only one person for killing a nonwhite victim, and although 47% of homicides in the state involved nonwhite victims, just 16% of the state's death sentences did.[97]

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[96] Ex. 51, David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Face and Perception*, 53 DE PAUL L. REV. 1411 (2004).

[97]Ex. 52, Indiana Public Defender Council, *Death Penalty Facts* http://www.in.gov/ipdc/public/pdfs/Death%20Penalty%20Factsheet.pdf (last updated 6/3/2019; last checked 12/26/2019).

- Studies in Maryland,[98] New Jersey,[99] Virginia,[100] Utah,[101] Ohio,[102] Florida[103] and the federal criminal justice system produced similar results.[104]
- A 2014 study looking at 33 years of data found that after adjusting for variables such as the number of victims and brutality of the crimes, jurors in Washington state were 4.5 times more likely to impose the death penalty on black defendants accused of aggravated murder than on white ones.[105]

How a defendant's race affects the jury's assessment of his moral responsibility is more difficult to parse. Psychologist Samuel Sommers

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[98]Ex. 53, Raymond Paternoster, Robert Rame, et. al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2004).

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

[100]Ex. 54, *Broken Justice: The Death Penalty in Virginia*, ACLU (2003).

[101]Ex. 55, Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, NTY, Feb. 24, 1995 at. B1.

[102] Ex 56, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (2016).

[103] Ex 57, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (2016).

[104]Ex. 58, Excerpt from *U.S. DOJ Survey of the Federal Death Penalty System*, 1988-2000, available at https://www.justice.gov/archives/dag/survey-federal-death-penalty-system.

[105]Ex. 59, Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014.*

found that "[r]esearch examining the influence of a defendant's race on individual juror judgments has produced inconsistent results that are difficult to reconcile."[106] Studies have found everything from no effect, to bias for defendants of the same race, to even bias against or harsher judgment of defendants of the same race.[107] However, African American capital defendants suffer an extreme attribution error that whites commit when whites interpret and judge the behavior of minority group members.[108] This is based, in part, on years of media portrayal of criminal defendants (particularly defendants of color) as "others" via predatory language like "roving packs," "thugs," and "terrorists," and the use of mug shots when reporting on suspects of color.[109]

Racist considerations infect jury rooms – often insidiously, but sometime overtly. Despite evidentiary rules that generally prevent discovery of juror considerations, the Supreme Court held that the need to ferret out juror racism trumps even long-standing evidentiary rules. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). For centuries, jury deliberations were a sacred space protected by the "no-impeachment

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[106]Ex. 60, Erik Ausion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 2018.

[107] *Id.*

[108] Ex 61, Rebecca Hetey and Jennifer Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, Assoc. for Psych. Science (2018).

[109] *Id.*; *see also* Ex. 62, Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 105).

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

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

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

Any consideration of race, whether intentional, conscious, unconscious, systematic, individual, or implicit to impose a criminal sanction "poisons public confidence" in the judicial process. *Buck v.*

Davis, 137 S. Ct. 759, 778 (2017) (citing *Davis v. Ayala,* 135 S. Ct. 2187 (2015)). "It thus injures not just the defendant, but 'the law as an institution . . . the community at large, and ... the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose v. Mitchell,* 443 U.S. 545, 556 (1979) (internal quotation marks omitted)).

As Justice Blackmun once wrote,

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

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

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

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

E. Execution of Mr. Morris violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Tennessee Constitution, because he is mentally ill.

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

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

The Diagnostic and Statistical Manual defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[110] "People with [severe mental illness]

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[110] Ex. 63, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.

experience both a mental illness *and* a functional disability . . . and often have a long history of hospitalizations or intensive outpatient treatment due to severe psychological dysfunction."[111]

> According to the American Psychological Association:
>
> [Serious Mental Illness, or SMI] refers to disorders that carry certain diagnoses, such as schizophrenia, ***bipolar disorder***,[112] and major depression; that are relatively persistent (*e.g.*, lasting at least a year); and that result in comparatively severe impairment in major areas of functioning, such as cognitive capabilities; disruption of normal developmental processes, especially in late adolescence; vocational capacity and social relationships. The [Diagnostic and Statistical Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[113]

Similarly, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines "serious mental illness" as "someone over 18 having (within the past year) a diagnosable mental, behavior, or

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[111] Ex. 64, J. Sanchez et. al, *Predicting Quality of Life in Adults With Severe Mental Illness: Extending the International Classification of Functioning, Disability, and Health* (2016) 61 Rehab. Psych. 19, 20 (citations omitted).

[112] As outlined above, Mr. Morris has been diagnosed with bipolar disorder.

[113] Ex. 65, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities."[114] The National Institute of Mental Health (NIMH)[115] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[116]

Mental illnesses that meet the diagnostic criterion for SMI are all generally associated in their acute state with hallucinations, delusions, disorganized thoughts, or significant disturbances in consciousness, perception of the environment, accurate interpretation of the environment, and memory.[117]

2. Mr. Morris' mental illness renders his conviction and death sentence unconstitutionally unreliable.

Reliability is the bedrock of any claim that the death penalty is constitutional. The Supreme Court has repeatedly recognized that any capital prosecution offends the Eighth Amendment if the judicial system

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[114] Ex. 66, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/find-help/disorders (last visited Dec. 22, 2019); *Mental Health and Substance Use Disorders.*

[115] Ex. 67, *Serious Mental Illness (SMI) Among U.S. Adults*, available at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited Dec. 22, 2019).

[116] Ex. 68, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited Dec. 22, 2019).

[117] *See* Ex. 69, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 70, § II.O5 (Anxiety Disorders); Ex. 71, § II.08 (Dissociative Disorders).

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

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

Individualized sentencing is the predicate for any constitutional imposition of the death penalty. In 1976, the Supreme Court held "the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304-05. In *Woodson*, the Court specified that the Eighth Amendment requires consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304; *accord Roberts v. Louisiana*,

428 U.S. 325, 329 (1976). Subsequently, the Court explicitly linked the consideration of mitigating evidence with the heightened need for reliability in capital cases in *Lockett v. Ohio*, 438 U.S. 586 (1978). *Lockett* held that a "risk" that mitigation may not be fully considered offends the constitution: "[P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605.

While insisting that individualized sentencing is the lynchpin of reliability in capital cases, the Supreme Court has recognized that some qualities are inherently difficult for jurors to appropriately weigh and consider. These facts are, by their very nature, "double edged." They should mitigate a defendant's moral culpability, but societal misconceptions about those factors create too significant a risk that they will be misused for a defendant with those qualities to be reliably sentenced to death. The *Atkins* Court determined that where a reliable assessment of constitutionally protected mitigation lies beyond the jury's ability, jurors cannot be asked to consider a death sentence.[118]

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[118] *See*, Ex. 72, Scott E. Sunby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WILLIAM & MARY BILL OF RIGHTS JOURNAL, 21 (2014).

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

The Supreme Court has identified six factors that so undermine the reliability of a jury assessment of individualized characteristics that categorical exemption from the death penalty is required. In exempting the intellectually disabled and juveniles from capital punishment in *Atkins* and *Roper*, and juveniles from mandatory life sentences in *Simmons*, the Court established a framework for the evaluation of when a categorical ban is necessary:

1) When the defendant's individualized characteristics inherently impair his cooperation with his lawyer and impair the lawyer's ability to prepare a defense, *Atkins*, 536 U.S. at 320-21; *Graham*, 560 U.S. at 77;
2) When the individualized characteristics inherently make the defendant a poor witness, *Atkins*, 536 U.S. at 320-21;

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

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

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

> [T]he factor[s] that distinguish the *mentally ill* from [other] adults also put them at a significant disadvantage in criminal proceedings. The *mentally ill* mistrust [other] adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than [other] adults to work effectively with their lawyers to

> aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the [non-impaired] adult world . . . , all can lead to poor decisions by one charged *while mentally ill*. These factors are likely to impair the quality of a *mentally ill* defendant's representation.

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

a. Mental illness impairs a defendant's ability to work with his counsel.

A mentally ill defendant is arguably less able to work with his counsel than a juvenile or intellectually impaired defendant. Cooperation with counsel is particularly at risk when the mental illness includes common symptoms of paranoia, psychosis, delusions, or deep depression. Many mentally ill people resist the stigma of being called "mentally ill" or become paranoid when such a label is used against them. When that occurs, counsel's attempt to mitigate the defendant's culpability through presentation of his mental illness may actually engender additional distrust from the client. Mental illness may prevent even an otherwise cooperative client from providing meaningful assistance because his thought processes may be altered or disjointed; he may be unable to remember events accurately; and he may have difficulty with communicating. As with young and intellectually impaired defendants, the very characteristics that diminish a mentally ill defendant's culpability jeopardize his ability to assist counsel.

b. Mental illness makes a defendant a poor witness.

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

> impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe "significantly fewer bits of information about the context of the story and the events that initiated it." ... [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to "tell their story in the forensic context."[119]

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

If a defendant's mental illness manifests in outburst, inability to control movements, or my making inappropriate gestures or noises, the jurors may interpret such behavior as proof of a lack of remorse or as proof of dangerousness.[120] As Justice Kennedy observed in *Riggins v.*

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[119] Ex. 73, Michele LaVigne & Gregory Van Rybroek, "*He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships*, UNIV. OF WISC. LAW SCHOOL, SERIES PAPER No. 1228 at 4.

[120] Ex. 74, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1563 & n.22

Nevada, 504 U.S. 127 (1992) (Kennedy, J., concurring), medicating a mentally ill defendant may actually make the situation worse: "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.* at 143-44.

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

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

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

> Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital

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(1998) (reporting Capital Jury Project findings describing jurors' reactions to defendants who engaged in outbursts during trial).

murder, and to prevent the presentation of any mitigating evidence on his behalf.

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

d. Mental illness is a double-edged mitigator.

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

The Capital Jury project has determined that, beyond all other aggravating factors, a jury's determination that a defendant might be dangerous in the future trumps all other considerations.[121] As the

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[121] Ex. 74, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998) (37.9% of jurors stated it would make them "much more likely" and 20% "slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 75, Marla Sandys, *Capital jurors, mental illness, and the unreliability principle: Can capital jurors comprehend and account for evidence of mental illness?* BEHAVIORAL SCIENCES & THE LAW (2018), available at

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

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

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

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

Roper, 543 U.S. at 573.

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

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https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2355 (last visited Dec. 23, 2019).

prosecution experts.[122] Further, where juries have already rejected a defendant's mental health evidence in the form of an insanity or diminished capacity defense, there exists a distinct risk that the jury will be confused as to how to weigh mental illness (which it just rejected) as mitigation.

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

Mental illness frequently contributes the brutality of the crime, resulting in acts that appear particularly unnecessary, aberrant, sadistic, and frightening to the jury.[123] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

Just as the Eighth Amendment prohibits the execution of the intellectually disabled and juvenile defendants because of the risk that their conditions will not be properly considered as mitigating their culpability, so too does the execution of the seriously mentally ill violate the Constitution. As this Court has held, "although the Eighth Amendment to the Federal Constitution and Article I, §16, are textually parallel, this does not foreclose an interpretation of the language of

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[122] Ex. 76, Scott E. Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV., 1109, 1126-30 (1997).

[123] Ex. 77, Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013) (summarizing multiple cases where severely mentally ill defendants have been sentenced to death).

Article I, §16, more expansive than that of the similar federal provision." *State v. Black*, 815 S.W.2d 166, 188 (Tenn. 1991) (citing *California v. Greenwood*, 486 U.S. 35, 50 (1988); *California v. Ramos*, 463 U.S. 992, 1013–1014 (1983); *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988); *Miller v. State*, 584 S.W.2d 758, 760 (Tenn.1978)); *State v. Harris*, 844 S.W. 2d 601, 601 (Tenn. 1992) (same). Thus, even if this Court were to find that execution of the seriously mentally ill does not violate the federal constitution, it should find that it violates the state constitution.

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

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

Courts must look to the "evolving standards of decency that mark the progress of a maturing society" when tasked with determining whether a punishment is "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court conducts two separate Eighth-Amendment analyses: (1) whether the death penalty is grossly disproportionate to a certain class of offenders (here, persons with serious mental illness), *see Kennedy v. Louisiana*, 554 U.S. 407 (2008) (rape of a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (non-

triggerman); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); and (2) whether the class of offenders categorically lacks the "capacity to act with the degree of culpability associated with the death penalty," *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles).

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

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

In evaluating whether a national consensus exists in the Eighth-Amendment context, the Supreme Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 331 (1989). The Court also looks to "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual

sentencing practices[, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Also, in looking at whether a national consensus exists, the Court examines the opinions of relevant professional organizations, polling data, and international consensus. *See Atkins*, 536 U.S. at 316 n.21.

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

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

Twenty-one states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and ten additional states have an actual or de facto (ten years since an execution) moratorium on executions.[124] A national consensus is emerging, as more than half of United States jurisdictions prohibit the death penalty in practice and 60% of Americans told Gallup they preferred life

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[124] *See* Ex. 78, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

imprisonment over the death penalty as the better approach to punishing murder. *Id.*

Additionally, the Supreme Court looks to the consistency of the direction of change. *Atkins*, 536 U.S. at 314. Since 2010, nine states have taken affirmative stances against the death penalty; four states have passed legislation ending the death penalty (Connecticut, Illinois, Maryland, and New Hampshire), and six governors have imposed moratoriums on executions. (California, Colorado, Ohio, Oregon, Pennsylvania, and Washington).[125]

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

Since 2016, some of the most active death-penalty states have introduced legislation to exempt persons with serious mental illness from being eligible for the death penalty. These states include Arizona, Arkansas, Idaho, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia. In 2019 alone, nine state legislatures considered measures to ban the execution of individuals with SMI.[126]

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[125] Ex. 79, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

[126] *See* Ex. 78, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

On February 11, 2019, legislators in Tennessee introduced two bills to exclude persons with SMI from the death penalty. HB1455 and SB 1124. House Bill1455 was referred to the House Judiciary Committee on February 11 and assigned to the Criminal Justice Subcommittee on February 13. It was favorably reported out of subcommittee on March 13. SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[127]

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

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

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[127] Ex. 80, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 81, *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 22, 2019).

capacity); La. Code Crim. Proc. Ann. art. 905.5 ("mental disease or defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1)(c)(A) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (mental or emotional disturbance and capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102(j) (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity). Prior to its legislative abolishment of the death penalty in 2012, Connecticut specifically prohibited the execution of persons with serious mentally illness. Conn. Gen. Stat. § 53a-46a(h)(2).

The fact that so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that defendants with serious mentally illness—individuals who are so emotionally disturbed

or mentally incapacitated that they cannot be expected to responsibly conform to lawful conduct—should not receive the death penalty.

Even though these states have statutory mitigating factors that allow the jury to take into count a defendant's serious mental illness, a jury's unreliability in doing so mitigates in favor of an outright exclusion of the death penalty for persons with SMI.[128]

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

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed. *See e.g.*, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316. As discussed below, an analysis of the evolving standards of decency demonstrates that the frequency of new death sentences has decreased considerably over time for *all* defendants, not just the seriously mentally ill. Many jurisdictions that have the death penalty as an option do not impose it.[129] Numerous other jurisdictions have eliminated it altogether.

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[128] *See* Ex. 72, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 2014 Wm. & Mary Bill Rts. J., Vol. 23:487, 492, 497 ("*Roper* thus strongly reinforced *Atkins*'s recognition that if circumstances prevent a juror from being able to give proper consideration to constitutionally protected mitigation, the death penalty *categorically* cannot be imposed." (emphasis in original)).

[129]Ex. 82, Pew Research Center, California is one of 11 states that have the death penalty but haven't used it in more than a decade (Mar. 14, 1999) https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-

In 2018, the Washington Supreme Court held that that the death penalty violates the state constitution, as it is contrary to the evolving standards of decency: "We recognize local, national, and international trends that disfavor capital punishment more broadly." State v. Gregory, 427 P.3d 621, 636 (Wash. 2018). But, even in states where the death penalty continues to be a sentencing option, jurors are increasingly less likely to impose it, particularly against defendants who are seriously mentally ill.[130] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[131]

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

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

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have-the-death-penalty-havent-used-it-in-more-than-a-decade/ (last visited Dec. 23, 2019).

[130] Ex. 74, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 82, Michelle E. Barnett, *When mitigation evidence makes a difference: effects of psychological mitigating evidence on sentencing decisions in capital trials*, 22 Behavioral Sciences and the Law 751 (2004) ("Mitigating evidence such as the defendant was suffering severe delusions and hallucinations . . . yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.").

[131] *Id.*

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

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for defendants with serious mental illness:[132]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[133]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[134]
- National Alliance on Mental Illness, *Death Penalty*.[135]
- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[136]

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[132] Ex. 83, American Psychological Association, *Associations concur on mental disability and death penalty policy*, Vol 38, No. 1, p. 14 (2007), https://www.apa.org/monitor/jan07/associations (noting the APA, the ABA, the American Psychiatric Association, and the National Alliance on Mental Illness' agreement that SMI offenders should not be subject to the death penalty) (last visited Dec. 22, 2019).

[133] Ex. 84.

[134] Ex. 85, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[135] Ex. 86, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

[136] Ex. 87, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Dec. 22, 2019).

The American Bar Association also publically opposes executing or sentencing to death the defendants with serious mental illness.[137] In 2016, the ABA published a white paper that concluded:

> The death penalty is the ultimate punishment that should be reserved for the most blameworthy individuals who commit the worst crimes - and it does not serve any effective or appropriate purpose when it is applied to individuals with severe mental illness. The Supreme Court has already recognized that there are two other categories of individuals who have similar functional impairments to people with severe mental illness that are inherently 'less culpable' to the point that it is unconstitutional to apply the death penalty in their cases. In light of this constitutional landscape, the growing consensus against this practice, and the fact that none of the current legal mechanisms afford adequate protection against the death penalty to those diagnosed with serious mental disorders or disabilities, it is time for the laws in U.S. capital jurisdictions to change.[138]

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[137] Ex. 88, American Bar Association, *ABA Recommendation 122A*, Serious Mental Illness Initiative (adopted Aug. 2006), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/ (last visited 12/19/2019).

[138] Ex.89, https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Dec. 22, 2019).

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness exemption from the death penalty by a 2 to 1 majority."[139] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM.[140] In 2019, the ABA filed an amicus brief in the Nevada Supreme Court arguing that imposition of the death penalty on people with severe mental illness serves no legitimate penological purpose and asking the court to "categorically prohibit the execution of individuals who were suffering from severe mental illness at the time of their crimes."[141]

Turning to Tennessee, in 2018, the ABA published an analysis of the savings an exclusion for the mentally ill would likely generate for the state of Tennessee.[142] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like

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[139] Ex. 90, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness;
see also Ex. 91, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[140] Ex.92, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

[141] Ex. 93, ABA Amicus Brief in Nevada Supreme Court.

[142] Ex. 94, ABA, Potential Cost Savings of Severely Mentally Ill Exclusion from the Death Penalty: An Analysis of Tennessee Data, https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf

schizophrenia, can still be subject to the death penalty in Tennessee."[143] Mr. Cody noted that defendants with SMI differ from other defendants: "In 2007, an ABA study committee, of which I was a member, conducted a comprehensive assessment of Tennessee's death penalty laws and found that 'mental illness can affect every stage of a capital trial' and that 'when the judge, prosecutor and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.'"[144]

Other community organizations oppose the execution of persons with SMI. For example, in 2009, Murder Victims' Families for Human Rights published "Double Tragedies, Victims Speak Out Against the Death Penalty for People with Severe Mental Illness."[145] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[146]

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

- Frank R. Baumgartner and Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*' THE WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the death penalty actually targets those who have mental illnesses."), Ex. 98.

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[143] Ex. 95, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[144] *Id.*

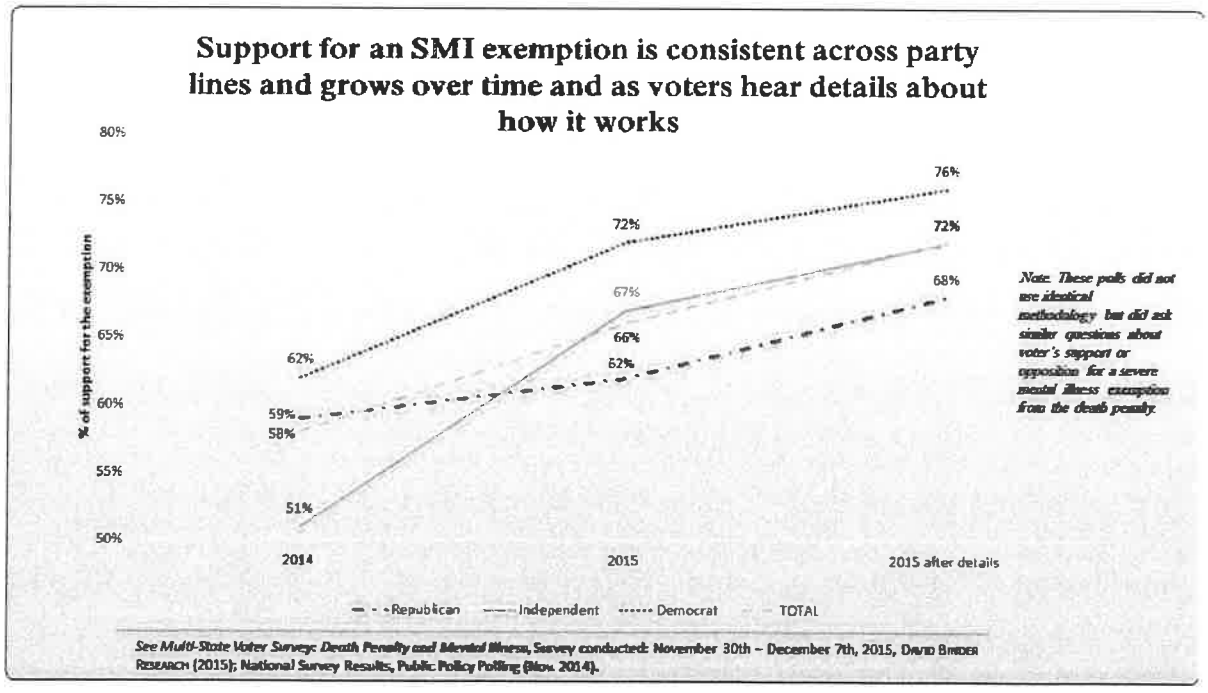
[145] Ex. 96, https://www.amnestyusa.org/double-tragedies/.

[146] Ex. 97.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 99.
- Bob Taft and Joseph E. Kernan, *End the Death Penalty for Mentally Ill Criminals*, THE WASHINGTON POST, March 24, 2017 (written by two former governors (Ohio and Indiana)), Ex. 100.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 101.

Public opinion polls also support this consensus:

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



- The ABA's 2016 polling found that 66% of respondents oppose the death penalty for people with "mental illness." The rate of opposition rose to 72% when respondents learned about the details of how a "severe mental illness" exemption would work. *Id.*
- In 2014, Public Policy Polling found that 58% of respondents opposed the death penalty for "persons with mental illness"; with 28% in favor and 14% unsure.[147]
- A 2009 poll of Californians found 64% opposed the death penalty for the "severely mentally ill."[148]
- A 2007 North Carolina poll found that 52% of respondents were against imposing the death penalty on defendants who had a "severe mental illness or disability" at the time of the crime, with only 30% being in favor of the practice.[149]

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[147] Ex. 102, Public Policy Polling, National Survey Results, https://drive.google.com/file/d/0B1LFfr8Iqz_7R3dCM2VJbTJiTjVYVDVodjVVSTNJbHgxZWlB/view.

[148] Ex. 103, Jennifer McNulty, *New poll by UCSC professor reveals declining support for the death penalty*, University of California Santa Cruz Newscenter, Sept. 1, 2009, http://news.ucsc.edu/2009/09/3168.html (last visited Dec. 22, 2019).

[149] Ex. 104, Rob Schofield, *NC Policy Watch Unveils Inaugural "Carolina Issues Poll:" Results Show that Voters are Supportive of Public, Humane Solutions in Mental Health and Affordable Housing* (Apr. 9, 2007), http://www.ncpolicywatch.com/2007/04/09/nc-policy-watch-unveils-inaugural-"carolina-issues-poll"/ (last visited Dec. 22, 2019).

- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[150] Opposition was similar to the rate of opposition of the death penalty for the "mentally retarded (82%)." *Id.* Notably, a higher percentage of respondents opposed the death penalty for the mentally ill (75%) than for juveniles (69%). *Id.*

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with capital punishment to abolish it for people who suffer to "from any form of mental disorder."[151] A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[152]

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[150] *See* Ex. 105, Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* https://news.gallup.com/poll/1606/death-penalty.aspx, p.12 (last visited Dec. 22, 2019).

[151] Ex. 106, *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999), *see Press Release*, https://www.un.org/press/en/1999/19990428.HRCN938.html ("The Commission urged all States that still maintained the death penalty . . . not to impose it on a person suffering from any form of mental disorder.").

[152] Ex 107, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

The European Union has also declared that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[153] Generally, the EU opposes the death penalty for all crimes.[154]

vi. Evidence of National Consensus: Mental Health Courts

Jurisdictions nationwide are adopting mental health courts that take a holistic approach to rehabilitated persons with mental illness who are in the criminal justice system. Nationwide, there are over 300 mental health courts in all fifty states.[155] At least one hundred of these courts serve felony offenders.[156] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing ... [in which participants] voluntarily

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[153] Ex 108 European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000).

[154] Ex. 109, October 10, 2019, World and European Day Against the Death Penalty, https://www.coe.int/en/web/human-rights-rule-of-law/day-against-death-penalty (last visited Dec. 22, 2019).

[155] Ex. 110, *Adult Mental Health Treatment Court Locator*, Substance Abuse & Mental Health Services Administration, https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults (last visited Dec. 22, 2019).

[156] *Id.*

participate in a judicially supervised treatment plan."[157] These special courts clearly reflect a consistency in the direction of change in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded.

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

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

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

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to

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[157] Ex. 111, *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), https://csgjusticecenter.org/wp-content/uploads/2012/12/mhc-primer.pdf (last visited Dec. 22, 2019).

> stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

536 U.S. at 318.

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

Although severely mentally individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability

to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

5. Conclusion:

This Court should hold that execution of severely mentally ill individuals violates the Eighth Amendment and Article I, §16 of the Tennessee Constitution, set out a procedure by which Mr. Morris may vindicate his claim, and remand his case to the trial court for further proceedings where Mr. Morris may establish the nature and severity of his mental illness and, thus, his exemption from execution.

F. Mr. Morris should not be executed because Tennessee is out of step with the evolving standards of decency that have led most of the country to stop executing its citizens and which render Tennessee's death penalty unconstitutional.

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

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this

> framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

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

Determination of the current standards of decency is not static, but instead courts must continually reassess the current standards of decency as new challenges to punishments are brought under Article I, §16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. The Supreme Court modeled the ongoing nature of this analysis in *Roper*, describing the change in the standards of decency in the 16 years between its holding that executing juveniles over 15 but under 18 was not unconstitutional in *Stanford v. Kentucky*, 492 U.S. 361 (1989), and its holding to the contrary in *Roper* and the similar changes in the 13 years between its holding that executing the intellectually disabled was not unconstitutional in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its holding to the contrary in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Roper*, 543 U.S. at 561. As the Court summed up its task in *Roper*: "Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Id.* at 564.

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

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

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

Here, these factors provide sufficient evidence that there is now a national consensus against the death penalty. Executions are now rare or non-existent in most of the nation. The majority of states—32 out of 50—have either abolished the death penalty or have not carried out an execution in at least ten years.[158] An additional six states have not had an execution in at least five years, for a total of 38 states with no executions in that time.[159] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor

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[158] Ex. 112, *Indiana Marks 10 Years Without an Execution*, Death Penalty Information Center (DPIC), December 11, 2019, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[159] Ex. 113, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

life in prison over a death sentence.[160] Perhaps most revealing about this poll is the sea change in attitudes occurring in just the last five years. Where, in 2014, only 45% of the country favored a life sentence over death, that number has increased by 15% in only five years. Importantly, the poll also demonstrates that the shift toward favoring a life sentence is apparent in every single major subgroup:

> Since 2014, when Gallup last asked Americans to choose between life imprisonment with no parole and the death penalty, *all key subgroups show increased preferences for life imprisonment.* This includes increases of 19 points among Democrats, 16 pointes among independents, and 10 points among Republicans."[161]

Particularly significant to Tennessee, conservative Christians have also coalesced in an effort to abolish the death penalty. Conservatives Concerned About the Death Penalty was formed on a national level in 2013 to "question the alignment of capital punishment with conservative

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[160] Ex. 5, *Americans Now Support Life in Prison Over Death Penalty*, Gallup, November 25, 2019, https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx (last visited Dec. 24, 2019).

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

principles and values."[162] Tennessee has since formed its own chapter.[163] Both the national and Tennessee chapters are opposed to capital punishment for increasingly familiar reasons. Tennessee Conservatives Concerned About the Death Penalty cites the following concerns:

- Innocence – Since 1973, more than 150 people have been freed from death row across the country after evidence of innocence revealed they had been wrongfully convicted.[164]
- Arbitrariness – "Just one percent of murders in the United States have resulted in a death sentence over the last decade. But are those individuals truly the 'worst of the worst' – or simply those with inadequate legal representation?"[165]
- Lack of deterrence –The death penalty does not prevent violent crime.[166]

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[162] Ex. 130, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[163] Ex. 114, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

[164] Ex. 115, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019. Ex. 116, Samuel Gross, et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017).

[165] *Id.*

[166] *Id.*

Indeed, these same concerns are recognized in the recent year-end report by the Death Penalty Information Center, which noted that, "innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[167] Even more poignant, "Two prisoners were executed this year despite substantial doubts as to their guilt and [two more] came close to execution despite compelling evidence of innocence."[168] As to the unconstitutional arbitrariness of capital punishment, the report concluded:

> The 22 executions this year belied the myth that the death penalty is reserved for the "worst of the worst." At least 19 of the 22 prisoners who were executed this year had one or more of the following impairments: significant evidence of mental illness (9); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (8); or chronic serious childhood trauma, neglect, and/or abuse (13). Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the

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[167] Ex. 117, *DPIC 2019 Year End Report: Death Penalty Erodes Further As New Hampshire Abolishes and California Imposes Moratorium*, Death Penalty Information Center, December 17, 2019, https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

[168] *Id.*

impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[169]

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

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

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169 *Id.*

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

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

While the standards of decency of the nation as a whole have evolved towards rejection of the death penalty, Tennessee has fallen out of step with the rest of the country – particularly in the last eighteen months, during which the State has executed six of its citizens at a rate not seen since before 1960.[170] Post-*Furman* and *Gregg*, Tennessee was one of the last states[171] to resume executions when it executed Robert Coe

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[170]Ex. 118, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[171] Of states that have performed executions post-*Furman*, only three states waited longer than Tennessee to resume: New Mexico (2001); Connecticut (2005); and South Dakota (2007). Ex. 119 – *Executions by State and Year*, Death Penalty Information Center https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Dec. 24, 2019). Of those three states, two have since abolished the death penalty all-together, New Mexico doing so in 2009 and Connecticut in 2012. Ex. 120, *States with no Recent Executions*, Death Penalty Information Center,

on April 19, 2000 – the state's first execution in forty years.[172] The State executed another five men between 2006 and 2009.[173] And, it should be stressed that one of those men, Sedley Alley, may well have been innocent of the murder for which he was put to death – an unconscionable reality.[174] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[175] – is but one of the features of capital punishment that have led a clear majority of the country to decide that it doesn't represent our standards of decency and should be eliminated. Another, is the completely arbitrary way the death penalty is imposed. Indeed, whether based on race, poverty, or where the crime happens to take place, the imposition of the

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https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[172] Ex. 118, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

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

[174] Ex. 121, *Did Tennessee Execute and Innocent Man?* Nashville Scene, May 2, 2019, https://www.nashvillescene.com/news/pith-in-the-wind/article/21067050/did-tennessee-execute-an-innocent-man (last visited Dec. 24, 2019).

[175] Ex. 122, *Tennessee*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

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

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

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

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

Furman v. Georgia, 408 U.S. 238, 242 (1972).

Just a few years after *Furman*, the Supreme Court approved supposed legislative corrections designed to eliminate arbitrariness in the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153

(1976). Yet, time and again, these purported fixes, adopted in some form or fashion by numerous states, have failed to actually result in the death penalty being any less arbitrary. In fact, its imposition in many cases is more arbitrary than ever. As a result, more and more states have ceased executions or abolished the practice all-together.[176]

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

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

Racial disparity in the imposition of the death penalty has actually gotten significantly worse in the last ten years, both nationally and here in Tennessee. Whereas nationally, in the ten years post-*Gregg*, 46% of those sentenced to death were people of color, in the last ten years, that number reached a remarkable 60%.[177] In Tennessee, while African-

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[176] Ten states never had the death penalty post-*Gregg*. An additional eleven states have eliminated their death penalty since that time: Massachusetts (1984); Rhode Island (1984); New Jersey (2007); New York (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016) (state supreme court found unconstitutional); Washington (2018) (state supreme court found unconstitutional); and New Hampshire (2019). Ex. 123, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[177] Ex. 124, *Death and Texas: Race Looms Ever Larger as Death Sentences Decline*, THE INTERCEPT, December 3, 2019,

Americans comprise only 17% of the state's population, 50% of the individuals on Tennessee's death row are African-American.[178] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

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

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

Eighty-four percent (84%) of the counties in the United States have not had an execution (of an individual sentenced to death in that county) in the past 50 years.[179] As the graph below shows, among the counties

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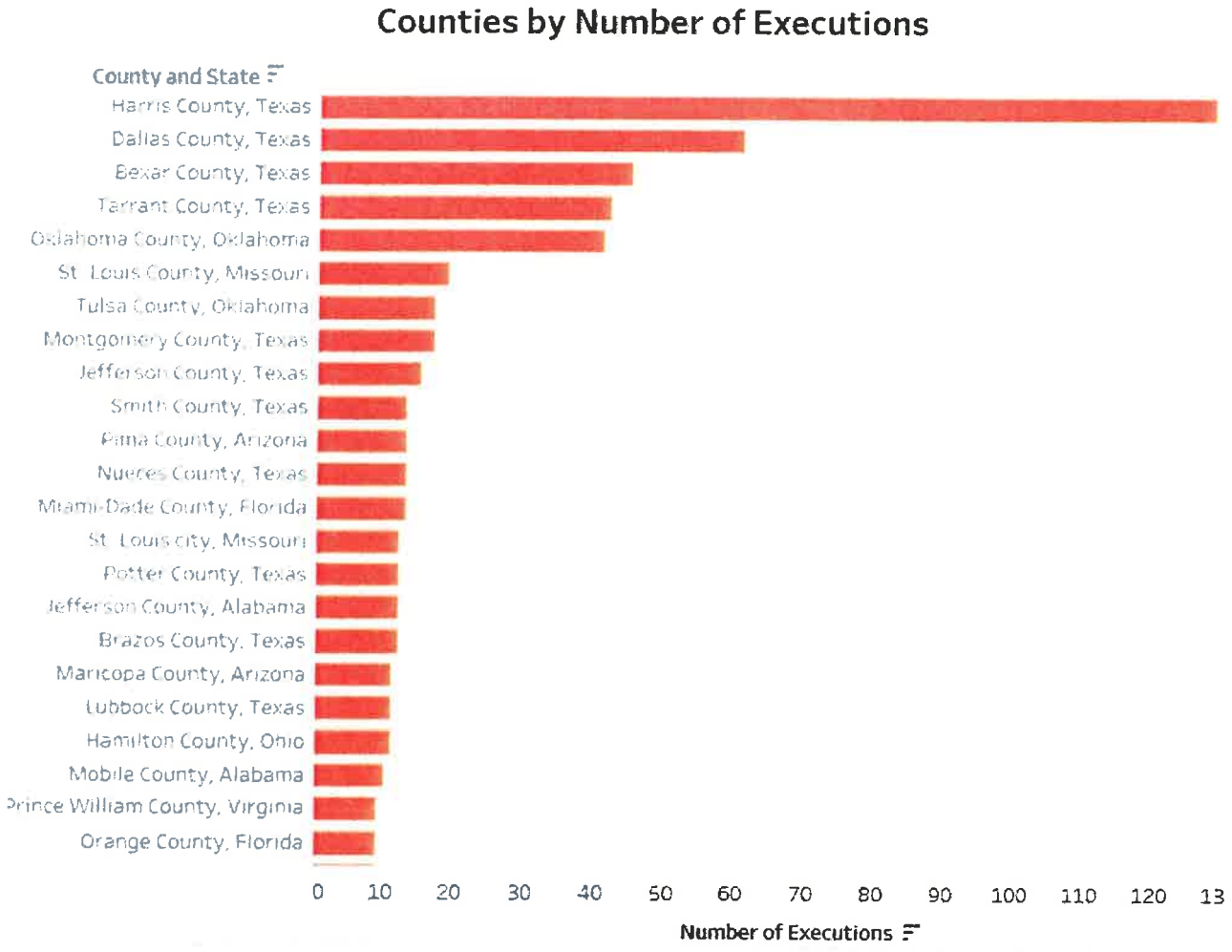
https://theintercept.com/2019/12/03/death-penalty-race-texas/ (last visited Dec. 24, 2019).

[178] Ex. 125, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[179] Ex. 112, *Indiana Marks 10 Years Without An Execution*, Death Penalty Information Center, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

that have had an individual sentenced to death in that county executed, Harris County, Texas—Houston—outpaces the rest by an astonishing margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [180]



When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than

[180]Ex. 126, *Executions by County*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).

Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[181]

In Tennessee, the geographic disparity is no less stark. Since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed sustained death sentences.[182] While Shelby County represents less than fourteen percent (14%) of Tennessee's population, almost half of the men on death row come from Shelby County.[183] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[184]

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

Forty-plus years of attempts to correct the unconstitutional arbitrariness of the death penalty have only resulted in ever-greater arbitrariness in determining who gets sentenced to death and who does not. Evolving standards of decency over that time have led a majority of

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[181] Ex. 127, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

[182] Ex. 7, *Tennessee's Death Penalty Lottery*, TENNESSEE JOURNAL OF LAW AND POLICY, Vol. 13, Summer, 2018, at 139-140, https://tennesseelawandpolicy.files.wordpress.com/2018/07/maclean-and-miller-tennessees-death-penalty-lottery1.pdf (last visited Dec. 24, 2019).

[183] Ex. 125, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[184] *Id.*

the country to recognize that the arbitrariness in the imposition of the death penalty is unconstitutionally cruel and unusual. This recognition has led to the steadily-increasing rejection of the death penalty which is so clearly outlined by the statistics detailed throughout this section.

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

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

It wasn't until 2005 that the Supreme Court determined that our standards of decency had evolved to the point of concluding that it was unconstitutionally cruel and unusual to execute individuals who were juveniles at the time of their crime. *Roper v. Simmons*, 543 U.S. 551 (2005). And it was only three years before that the Court, also looking to our standards of decency, put a stop to executing the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). These realities are now so accepted by society that it is almost impossible to fathom a time when they were not. The discussion in *Roper* is instructive, as it demonstrates a clear parallel between the evolution of the standards of decency that

led to the abolition of executing children and those that put a stop to executing the intellectually disabled. An identical parallel can now be seen between those evolutions and the one now evident supporting the abolition of the death penalty entirely. Indeed, reviewing how standards of decency previously evolved is particularly instructive to the argument presented here – that Tennessee is simply behind the rest of the country in recognizing that current evolving standards of decency are not commensurate with the execution of individuals who were sentenced to death in such an arbitrary way.

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

The *Roper* Court noted that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national

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

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

Regarding *national consensus*, last month's Gallup poll revealed that 60% of the nation now prefer a life sentence over a death sentence.[185] As to *practice within the states*, there are now 21 states without the death penalty and, as noted at the outset of this section, a total of 38 states (very nearly 80% of the country) have not had an execution in the

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[185] Ex. 128, *2019 Year-End Report*, Death Penalty Information Center (hereinafter "2019 DPIC report"), at 2 (report available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited Dec. 24, 2019)).

last five years.[186] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing numbers of states sought to further limit the use of the death penalty.[187] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[188] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[189] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[190]

Perhaps most important is the *consistency in the trend towards abolition* – the type of evidence the *Atkins* Court referred to as "telling." 536 U.S. at 315. According to the Gallup poll conducted in October 2019, in only five years, the percent of individuals who favor of a life sentence over capital punishment rose 15%, from 45% in 2014 to 60% in 2019.[191] Moreover, this Gallup poll showed a wide demographic preference for life

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[186] Ex. 113, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[187] Ex. 128, 2019 DPIC Report, at 2.

[188] *Id.* at 3.

[189] *Id.* at 4.

[190] *Id.*

[191] *Id.* at 14; *see also* Ex. 5, Gallup Poll, https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment (last visited Dec. 27, 2019).

imprisonment over the death penalty, with majorities of men and women, whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[192] Equally consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[193]

Tennessee was one of only seven states to perform an execution in 2019,[194] and joins only Texas in having any executions scheduled for 2020.[195] Although Ohio previously had executions scheduled, the Governor suspended them in the wake of a court decision comparing its execution process to waterboarding, suffocation and being chemically burned alive.[196] Otherwise, across the United States, 2019 saw the use of the death penalty remain near historic lows, as there were but 22 executions and less than 40 new death sentences imposed – the fifth straight year in a row with fewer than 30 executions and fewer than 50 new capital sentences.[197]

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[192] Ex. 5, Gallup Poll at 1-2.

[193] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 123, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[194] Ex. 128, 2019 DPIC Report, at 6.

[195]Ex. 129, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[196] Ex. 128, DPIC Report, at 2.

[197] Ex. 128, 2019 DPIC Report, at 2.

There are now entire regions of the country without the death penalty. With New Hampshire's abolition of the death penalty in May of this year, there is no death penalty in any New England state.[198] Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[199] Indeed, the geographic disparity for determining who is executed and who is not is more striking than ever as 91% of the executions in 2019 happened in the South and 41% in Texas alone.[200]

Four decades after *Furman* and *Gregg*, the cruel and unusual nature of the arbitrary imposition of the death penalty is plainly evident. Moreover, such arbitrary imposition does not satisfy our standards of decency. This much is clear from the ever-dwindling number of states—and counties—performing executions and the ever-increasing number of states abolishing the practice all-together. There is clearly a consistent, national trend towards abolition of the death penalty. As the reality of capital punishment is exposed – whether its racist and otherwise arbitrary imposition or the terrifying fact that scores of innocent people have been sentenced to death and some likely executed – a national consensus has formed declaring that capital punishment does satisfy our standards of decency.

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198 *Id.*

199 *Id.* at 3.

200 *Id.* at 6.

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

It is disturbing that the very aspects that have led most of the country to reject the death penalty as arbitrary and thus, cruel and unusual, are ever-present in Tennessee, even as our Attorney General seeks to schedule executions in unprecedented numbers. This Court, however, has the authority – recognizing the realities of capital punishment that are leading the United States consistently towards total abolition – to deny the State's request for an execution date and, instead, commute a death sentence to one of life in prison. As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI § 1 of the Tennessee Constitution, *In Re Burson*, 909 S.W.2d 768, 772-73 (Tenn. 1995), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§ 16-3-503-04, to deny the Attorney General's motion to set an expedited execution date and instead vacate Mr. Morris' death sentence and modify it to life. *See* *Ray v. State*, 67 S.W. 553, 558 (Tenn. 1902) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673, 685 (1882) (same).

Mr. Morris respectfully request that this Court look to the Washington Supreme Court's recent ruling that the death penalty in that state was unconstitutional. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The Court's holding was based on its conclusion, as urged here, that the "arbitrary and race based imposition of the death penalty cannot

withstand the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 635 (quoting *Trop*, 356 U.S. at 101). The Washington court placed emphasis on the same considerations articulated by the Supreme Court in *Atkins* and *Roper*:

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

Id. at 635-36 (citations omitted).

Decades of evidence have clearly demonstrated that the imposition of the death penalty is not for the worst of the worst but is, rather, unconstitutionally arbitrary. This objective truth has led to a clear national consensus favoring a life sentence over death. In this regard, Tennessee has simply fallen out of step with society's evolving standards of decency. Tennessee's death penalty law is unconstitutional. Mr. Morris therefore, respectfully requests that this Court deny the State's request for an execution date, and, instead, issue a certificate of commutation.

III. REQUEST FOR A CERTIFICATE OF COMMUTATION.

Mr. Morris requests this court certify to the Honorable Bill Lee, Governor of the State of Tennessee, that there are extenuating circumstances attending this case and the punishment of death ought to

be commuted. The power to issue a certificate of commutation is conferred on this Court by statute which provides that a Governor may "commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted." Tenn. Code Ann. § 40-27-106.

This statute, which is unique to Tennessee, does not "restrict, expand, or in any way affect, in the legal sense, the authority of the Governor to exercise his constitutional power of commutation." *Workman v. State*, 22 S.W.3d 807, 817 (Tenn. 2000) (Birch, J. dissenting.) Rather, "[i]t serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Id.*

When considering a request for a certificate of commutation, this Court considers facts in the record and any new, uncontroverted facts. *Workman*, 22 S.W.3d 808; *see also Bass v. State*, 231 S.W.2d 707 (Tenn.1950); *Anderson v. State*, 383 S.W.2d 763 (1964); *Green v. State*, 14 S.W. 489 (1890). If the Court determines that the case presents extenuating circumstances warranting the commutation of a death sentence to life imprisonment, then the Court issues the certificate of commutation for the Governor's consideration. *Workman*, 22 S.W.3d 808.

Although some have observed that the Court as a whole has not exercised its power to issue a certificate of commutation since the passage of the State Post-Conviction Procedures Act, it is important to note that the legislature did not repeal Tenn. Code Ann. §40-27-106. The Court's

authority remains intact and unfettered. Justice Birch entered a certificate of commutation on the record in his dissent in *Workman*.

> [I]n accordance with that duty described above, pursuant to and independent of the enabling statute cited herein, and after a careful consideration of the pertinent parts of the entire record, I do hereby certify to His Excellency, the Honorable Don Sundquist, Governor of the State of Tennessee, that there were extenuating circumstances attending this case and that the punishment of death ought to be commuted.

Workman, 22 S.W.3d at 817.

A certificate of commutation should be issued for Mr. Morris because there is clear evidence of structural error which has so far failed to result in relief for Mr. Morris due only to procedural roadblocks – not because the evidence doesn't exist. Indeed, Mr. Morris' sentence is unconstitutional where, as an African-American in a community that is one-third African American, he was tried before an all-white jury – in chains. In addition, the ineffective assistance of his trial counsel also prevented the jury from hearing substantial mitigation evidence, including that Mr. Morris is mentally ill. The mitigation evidence that was available was substantial enough for the federal district court to vacate Mr. Morris' death sentence. Only procedural technicalities caused the appellate court to reverse this decision.

A certificate of commutation should also issue for Mr. Morris because the surviving victims do not want Mr. Morris to be executed. It is likely Mr. Morris would not even be subject to execution had anyone

asked Mr. and Mrs. Hurd about their feelings prior to Morris' trial. The fact of their input being ignored is emblematic of the systemic racism that pervades the death penalty, in general and led to Mr. Morris' death sentence in this case. Mr. Morris is an African-American put on trial – in chains – before an all-white jury. The prosecutor's notes reveal that his removal of the last African-American from the jury was motivated by race. The fact that neither Mr. nor Mrs. Hurd – who are also African-American – were even contacted by the prosecutor meant that anyone of Mr. Morris' own race who may have had something to say about his sentence was removed from the equation. These are precisely the type of extenuating circumstances contemplated by *Workman* for this Court to issue a certificate of commutation. *Workman*, 22 S.W.3d 808. Therefore, Mr. Morris requests this court certify to the Honorable Bill Lee, Governor of the State of Tennessee, that there are extenuating circumstances attending this case and the punishment of death ought to be commuted.

IV. CONCLUSION

Farris Morris requests that this Court deny the Attorney General's motion to set an execution date. Morris' death sentence is rife with the very concerns that are leading ever-more of the United States to abolish the death penalty all-together. As noted at the outset of this response:

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

> damage, or an IQ in the intellectually disabled range (8); or chronic serious childhood trauma, neglect, and/or abuse (13). Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the impairments listed above, an innocence claim, and/or demonstrably faulty legal process.[201]

Mr. Morris' sentence of death is emblematic of these concerns. Perhaps no more illustrative of the faulty legal process leading to his death sentence is the fact that he, an African-American, was tried by an unconstitutionally comprised, all white jury – in shackles. In addition, the federal district court found that Mr. Morris merited relief because his trial counsel were constitutionally ineffective. But the most significant reason for this Court to deny the State's request for an execution date is that the parents of Erica Hurd, the victim for whom Mr. Morris received his death sentence, never wanted Mr. Morris sentenced to death.[202] Neither the prosecution nor Mr. Morris' counsel informed the jury of the Hurds' desire for a life sentence. And, as outlined above, this was a jury that was particularly likely to give strong consideration to the victim's parents' desires, given that they sentenced Morris to life without parole for the murder of Charles Ragland. Had the jury known of the Hurds' desire that Mr. Morris receive life without parole, there is strong reason to believe the jury would not have sentenced him to death.

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[201] Ex. 6, DPIC Report.

[202] Ex. 1, Affidavit of Virginia Hurd.

For all the reasons outlined in this response, Mr. Morris respectfully requests this Court deny the State's request for an execution date, exercise the Court's authority to issue the Certificate of Commutation, and remand the case to the trial court for further proceedings.

Respectfully submitted this 30th day of December, 2019.

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CERTIFICATE OF SERVICE

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

BY: 

Kelley J. Henry