IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. M2016-01869-SC-R11-PD
	)	
OSCAR SMITH	)	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

KELLEY J. HENRY, BPR #21113
Supervisory Asst. Federal Public Defender

AMY D. HARWELL, BPR #18691
Asst. Chief, Capital Habeas Unit

KATHERINE M. DIX, BPR #22778
Asst. Federal Public Defender

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265

TABLE OF CONTENTS

Oscar Smith respectfully requests that this Court deny the Attorney General and Reporter's motion to set an execution date. His trial was plagued by multiple constitutional violations, including (1) a jury comprised of a biased juror, a jury that considered inaccurate, extrajudicial information, and jurors who engaged in misconduct by presenting themselves as experts during jury deliberations; (2) an unreliable conviction, as the prosecution's theory of the case did not account for the physical evidence and the police and prosecutors mishandled evidence; and (3) five errors this Court previously found to be "harmless," which, as is clear now, were not harmless. His death sentence is also the product of a criminal justice system that unconstitutionally metes out death sentences in a racist manner and contrary to evolving standards of decency. The many due process violations shown here demand a procedural remedy such that Mr. Smith may establish his entitlement to a new trial. In the alternative, Mr. Smith 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 should be commuted.

I. This Court should deny the State's motion to set an execution date, because Oscar Smith was convicted and sentenced to death by an unconstitutionally comprised jury that was biased against him and that considered erroneous, extrajudicial information.

Due process requires this Court to establish a procedure for the vindication of Mr. Smith's constitutional rights. As will be shown here, Mr. Smith was convicted and sentenced to death in proceedings things that violated his constitutional rights in three fundamental ways: (1) a

juror who was biased against Mr. Smith and overtly hid that bias by failing to answer the trial court's questions truthfully was allowed to sit in judgment of Mr. Smith; (2) the jury considered inaccurate, extraneous information; (3) some jurors engaged in misconduct, presenting themselves as experts in matters relating to the proof and offering testimony not subject to cross examination. Because due process requires adjudication of Mr. Smith's claims and no current procedural vehicle is available, this Court should create a procedure to fill the procedural void.[1]

A. One of the jurors who sat in judgment of Mr. Smith was biased against Mr. Smith and concealed that bias in order to be seated on the jury.

Mr. Burton's participation in Mr. Smith's capital murder trial violated Mr. Smith's constitutional right to a fair and impartial jury. Mr. Burton "believed that anytime someone killed a person on purpose they should get the death penalty."[2] Despite this belief, Mr. Burton concealed his opinion from the court and from counsel. Mr. Burton was biased against Mr. Smith and any potentially mitigating evidence Mr. Smith would present before he even heard the proof.

The Sixth and Fourteenth Amendments to the federal constitution require that a criminal defendant be tried by an impartial and unbiased jury. *Morgan v. Illinois*, 504 U.S. 719 (1992). "The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial,

---

[1] Ex. 1, *State v. Hall*, E1997-00344-SC-DDT-DD (Tenn. December 3, 2019) (citing *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999)).
[2] Ex. 2, Burton Decl.

'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Similarly, the Tennessee Constitution guarantees each criminal defendant "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *Toombs v. State*, 279 S.W.2d 649, 650 (Tenn. 1954). A sentence of death rendered by a juror unable to "give meaningful effect" to mitigating evidence is "fatally flawed." *Abdul-Kabir v. Quarteman*, 550 U.S. 233, 246, 264 (2007). *See also Smith v. Texas*, 550 U.S. 297 (2007); *Brewer v. Quarterman,* 550 U.S. 286 (2007); *Boyde v. California*, 494 U.S. 370 (1990); *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Morgan and its progeny make clear that a juror must be able to consider and give meaningful effect to all mitigating evidence presented, and that voir dire protects this right by allowing trial counsel to question potential jurors to expose "possible biases, both known and unknown, on the part of potential jurors." *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003). *Morgan* notes that "any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence." *Morgan*, 504 U.S. at 738.

"The right to a jury that is fair and impartial is fundamental, and the denial of that right cannot be treated as harmless error. *Faulker v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460 at *81 (Tenn. Crim. App. Aug. 29, 2014) (citations omitted). "Such errors are structural constitutional errors that compromise the integrity of the judicial

process. *Id.* (citations omitted). Structural errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence . . . and are subject to automatic reversal because they deprive a defendant of a right to a fair trial." *Id.* (citations omitted). "Our system of justice cannot tolerate a trial with a tainted juror, regardless of the strength of the evidence against the defendant." *Id.*

Whether a juror, himself, believes that he was biased is irrelevant to the consideration of structural error. This Court has held that a juror is disqualified from service "where some bias or partiality is either actually shown to exist or is presumed to exist from circumstances." *State v. Hugueley*, 185 S.W.3d 356, 378 (Tenn. 2006). This Court has held that bias is presumed when a juror purposefully conceals or fails to disclose information relevant to that juror's impartiality. *Smith v. State*, 357 S.W.3d 322, 347-48 (Tenn. 2011). Once shown, such a presumption cannot be overcome by a juror's testimony that the bias did not affect the verdict. *Faulkner*, 2014 WL 4267460 at *78.

The record here reflects Mr. Burton was quite clear about his bias. He explained how strongly he believes in capital punishment, describing himself as a "nine or ten" out of ten on a scale in favor of the death penalty.[3] When Mr. Smith's counsel asked Mr. Burton how that belief would apply in a case, he initially was forthright, but later changed his response in the face of the Court's questioning:

[3] Ex. 3, Trial Tr. at 742.

Mr. Newman: Okay. And would the fact that there are three people killed, would that in any way inhibit you from considering life imprisonment as opposed to the death penalty? Or do you consider that any person who is convicted of three crimes or murder should receive the death penalty automatically?

Juror [Burton]: If he's proven guilty, he should, yes, sir.

Mr. Newman: Okay. So even though the Judge would instruct you that you are to weigh the factors, is it your position and are you telling the Court that if it is three murders, that you would automatically vote for the death penalty?

Juror [Burton]: Yes, sir.

Mr. Newman: And that would be despite whatever instructions the Judge may give you because of your personal feelings concerning this type of crime?

Juror [Burton]: Yes, sir.

Mr. Newman: Your Honor, at this point we'd ask that he be excused.

Gen. Blackburn: Well, Your Honor, I'd object at this point. He's already answered the question a different way.

The Court: He answered the question already that if he thought the aggravating factors did not outweigh the mitigating factors that he would impose a life sentence. He has answered that two or three different ways. I think you need to answer the question now, Mr. Burton, and I understand what his question is, is whether or not, if you did not find that the mitigating – that the aggravating factors outweighed the mitigating factors,

in any of the three cases involving the victim of homicide, whether or not you would follow the law and impose a life sentence in each case, or whether he would decide because there were three cases that you would automatically impose the death sentence or something. That's the question.

In other words, if in any one of the three cases where there are victims alleged, you thought the aggravating factors outweighed the mitigating factors you would impose the death penalty in that particular case of that particular victim. But if in none of the cases you thought the aggravating factors outweighed the mitigating factors, then you would impose a life sentence in each of those?

Juror [Burton]: Yes, sir. Yes, sir.

The Court: And not add them up and have a cumulative –

Juror [Burton]: Right.

The Court: --sort of a –

Juror: Yes sir.

The Court – finding? Do you understand the point I'm making?

Juror [Burton]: Yes, sir.

The Court: All right. Now, Understanding that, I'm not trying to interject my question into Mr. Newman's, but I thought based on your earlier answers you may have misunderstood them. If you had, say, Victim A, and you found that the aggravating circumstances did not, beyond a reasonable doubt, outweigh the mitigating

circumstances in that case, what would your sentence be?

Juror [Burton]: Life.

The Court: If you had Victim B, and you thought the aggravating factors did not outweigh beyond a reasonable doubt the mitigating factors as to that victim, what would –

Juror [Burton]: that would be life.

The Court: -- your verdict be? And as to Victim C, if you found that the aggravating factors did not beyond a reasonable doubt outweigh the mitigating factors, what would your verdict be –

Juror [Burton]: Life

The Court: – in that case? All right. So are you saying if factors did not outweigh – the aggravating factors did not outweigh the mitigating factors, in any of the three victim's case that you would return a verdict of life in this case, assuming –

Juror [Burton]: Yes, sir.

The Court: -- that guilt is proven beyond a reasonable doubt; is that what you're saying.

Juror [Burton]: Yes, sir.

The Court: Okay. I thought that that was what he was saying, but I'll be glad to let you ask him a follow-up question, but I don't want to have Mr. Burton getting maybe a little confused by your question based on what I heard

him say two or three different ways in his responses to earlier questions.

Okay. Go ahead.

Mr. Newman: Mr. Burton, I'm not trying to confuse you. And if I have, I apologize. What my question concerned was, was the – was the possibility that you may be sitting as a juror trying to decide either death by electrocution or life in prison, would the fact that there would be three victims, would that cause you to have a preconceived notion or an idea that you should vote for death by electrocution?

Juror [Burton]: No, sir; not just because there was three.[4]

Mr. Burton has explained why he changed his initial forthright response:

> Before I was selected, the Judge talked to me in the court room about my views on the death penalty. When I was being questioned personally by the Judge, I felt like he did not like my answers. I was confused by what the Judge was saying to me, so I just went along with him. In fact, I have never believed a person should get a life sentence if they meant to kill someone. There was not anything Mr. Smith's lawyer could have said that would have made me change my opinion.[5]

Mr. Burton's concealment of his bias and prejudgment of the appropriate sentence deprived Mr. Smith of an impartial jury.

---

[4] Ex. 4, Trial Tr. at 748 – 52.

[5] Ex. 2, Burton Decl.

Mr. Burton's deception further demonstrates his bias. That is to say, not only had Mr. Burton impermissibly pre-judged the case, but his "going along with the judge" so to be seated on the jury, thereby purposefully concealing information relevant to his impartiality, creates a presumption of bias (even if he had not admitted that he had prejudged the case). *Smith v. State*, 357 S.W.3d 322, 347-48 (Tenn. 2011) (citing *Carruthers v. State*, 145 S.W.3d 85, 97) ("[A] presumption of juror bias arises '[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality.'").

B. Mr. Burton's deception deprived Mr. Smith of a jury able to provide individualized sentencing as required by the Constitution.

Mr. Smith's death sentence violates the Eighth Amendment, because he was denied an individualized sentencing. Mr. Burton's view was absolute, across-the-board, and could not be changed.[6] As Mr. Burton admits, "I have never believed a person should get a life sentence if they meant to kill someone. There was not anything Mr. Smith's lawyers could have said that would have made me change my opinion."[7]

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) (holding that in capital cases the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of

[6] Ex. 2, Burton Decl.

[7] *Id.*

the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process."); *accord*, *Kansas v. Marsh,* 548 U.S. 163, 173-74 (2006) (same); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (same); *Zant v. Stephens*, 462 U.S. 862 (1983) (same). Under the Eighth Amendment, "[w]hat is important at the 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).

Mr. Burton's deception (and his underlying bias) prevented Mr. Smith from receiving the individualized determination the Eighth Amendment requires. Instead of weighing Mr. Smith's individual characteristics – or even the individual characteristics of this crime – Mr. Burton decided his vote for death based on his across-the-board belief that any murder committed "on purpose" deserves the death penalty.[8] As he explains, Mr. Burton has "never believed a person should get a life sentence if they meant to kill someone. There was not anything Mr. Smith's lawyers could have said that would have made me change my opinion."[9] Mr. Burton, accordingly, did not weigh aggravating versus mitigating circumstances as required by the constitution and the law of the State of Tennessee. Instead, he merely found Mr. Smith guilty of first degree murder and that was, in his mind, good enough to merit the death penalty.

---

[8] Ex. 2, Burton Decl., ¶2.

[9] *Id.* at ¶5.

Mr. Burton's admission proves that Mr. Smith did not receive a fair trial by an impartial jury. Mr. Burton admits that he not only did not follow the law regarding individualized sentence but that he also "went along" with answers that obscured his determination to automatically give the death penalty if Mr. Smith were convicted.

C. Inaccurate, extrajudicial information that improperly influenced the jurors to vote for death infected the jury's determination of Mr. Smith's sentence.

Mr. Smith is in danger of execution based on a juror impermissibly and erroneously instructing another juror that a life sentence is only thirteen years. "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" *Simmons v. South Carolina,* 512 U.S. 154, 161–62 (1994) (quoting *Gardner v. Florida,* 430 U.S. 349, 362 (1977)). Just as in *Simmons*, "[t]o the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161. Such a result is just as impermissible here as the United States Supreme Court found it to be in *Simmons*.

The jury that sentenced Mr. Smith to death impermissibly considered erroneous, extrajudicial information about the length of a life sentence. As Juror Frank Buford reports, "I believed that life in prison was just 13 years. I did not think 13 years was enough time for the crime, so I voted for death. We went through the voting quite a few times. We wrote down our vote, but everyone knew who was voting against the death penalty. There was a young girl who was really upset with the idea

of the death penalty and electrocution. I talked to her in the jury room privately, and assured her that life in prison was only 13 years. We had this conversation off to the side during deliberations. After our discussion, she later changed her vote and the jury became unanimous as to the death verdict."[10]

The United States Supreme Court has "insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public

); *State v. Payne*, 791 S.W.2d 10, 21 (Tenn. 1990)). This Court approved the trial court's refusal to answer jury questions about the length of a life sen tribunal free of prejudice, passion, excitement, and tyrannical power.'" *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quoting *Chambers v. State of Florida*, 309 U.S. 227, 236-37 (1940)). Included in that right "is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources." *Id.* "[A juror's] verdict must be based on the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilty of the offender or the state in life which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). While "impartiality and indifference do not require ignorance," jurors "'cannot act in any case upon *particular facts material to its disposition resting in their private knowledge*.'" *Thompson v. Parker*, 867 F.3d 641, 647 (6th Cir. 2017) (quoting *Head v. Hargrave*, 105 U.S. 45, 49 (1881) (emphasis in original)).

[10] Ex. 5, Buford Decl.

This Court has repeatedly held that the "after-effect of a jury's verdict, such as parole availability, is not a proper instruction or consideration for the jury during deliberations." *State v. Bush*, 942 S.W.2d 489 (Tenn. 1997) (citing *State v. Caughron*, 855 S.W.2d 526, 543 (Tenn. 1993tence, finding that to do so would

> create the possibility of jury speculation on the length of time a defendant would have to serve and could "breed irresponsibility on the part of jurors premised upon the proposition that corrective action can be taken by others at a later date." This Court held that instructing the jury on such specific sentencing information could result in sentences of death based on sheer speculation and on factors not enumerated by statute and not sanctioned under the United States Constitution or the Tennessee Constitution.

State v. Dellinger, 79 S.W.3d 458, 474–75 (Tenn. 2002) (quoting *State v. Smith*, 857 S.W.2d 1, 11 (Tenn. 1993) and citing *State v. Burns*, 979 S.W.2d 276, 295-96 (Tenn. 1998)). That which this Court has sought to prevent is exactly what happened here.

The jury that sentenced Mr. Smith to death did so based on "sheer speculation and on factors not enumerated by statute and not sanctioned under the United States Constitution or the Tennessee Constitution," as at least two members of the jury voted for death based on Mr. Buford's erroneous belief that Mr. Smith would only serve 13 years on a life sentence. This is particularly problematic because the trial court instructed the jury not to consider any information other than that presented in open court -- *four* times:

- "All you need to consider anything about this case on is what you hear in this courtroom under oath and absolutely nothing else."[11]
- "[C]onsider only the evidence that you hear in this courtroom."[12]
- "This case must be decided solely upon the evidence that you hear in the courtroom."[13]
- "I again instruct you that you can consider no information in reaching your verdict other than the evidence you hear in the courtroom."[14]

Unfortunately, the jurors did not heed the court's instructions.

Rule 606 of the Tennessee Rules of Evidence does not prohibit consideration of Mr. Buford's declaration as proof of the jury's misconduct. A juror is permitted to testify about extraneous prejudicial information improperly brought to the jury's attention, including consideration of facts not in evidence. *Carruthers v. State*, 145 S.W.3d 85, 92 (Tenn. Crim. App., Jan 26, 2004) (citing *Caldararo v. Vanderbilt University*, 794 S.W.2d 738, 742 (Tenn. App. 1990) (listing external influences that could warrant a new trial including "consideration of facts not admitted in evidence")). Where Juror Buford's unsworn and unconfronted testimony related to the case the jurors were discussing, it

[11] Ex. 6, Trial Tr. at 540-41.
[12] Ex. 7, Trial Tr. 543.
[13] Ex. 8, Trial Tr. 2971.
[14] Ex. 9, Trial Tr. at 3272.

is properly considered extraneous to the jury's considerations and is, accordingly, not blocked by Rule 606. "[T]o be considered extraneous evidence, the evidence must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury." *Thompson v. Parker*, 867 F.3d 641, 648-49 (6th Cir. 2017) (citing *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding, in a civil case, that "'[e]xternal' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room")). If Rule 606 were to block the courts' consideration of Juror Buford's misconduct, the rule would be unconstitutional. An evidentiary rule cannot trump either Mr. Smith's right to confront the witnesses and evidence against him under the Sixth Amendment or his right to due process under the Fifth.

In *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001), the Sixth Circuit examined a juror's jury room expert testimony and found it clearly "extraneous." *Id.* at 734, *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510 (2003). The juror performed an experiment at home to test the veracity of the defendant's testimony and reported her findings to her fellow jurors "in the manner of an expert witness." *Id.* at 733. The Sixth Circuit reviewed the misconduct, because it "stands in stark contrast to an examination of internal factors affecting the jury . . . . [F]or a juror to perform and report to other jurors the results of an out-of-court experiment . . . conflicts with Doan's constitutional right to a fair and impartial jury that considers only the evidence presented at trial. *Id.* The Sixth Amendment requires, "'at the very least,' that the evidence brought

against a defendant and considered by the jury be presented at trial where the defendant can confront that evidence to the fullest extent possible." *Id.* (quoting *Turner*, 379 U.S. at 472-73).

D. Improper outside influences tainted the conviction in this case.

The jury that convicted Mr. Smith discussed the case—with the alternates—prior to submission, which constituted a "direct, unauthorized private communication . . . during a trial about the matter pending before the jury" in violation of *Remmer v. United States*, 347 U.S. 227, 229 (1955). Such a communication is presumptively prejudicial. *Id.*; *Walsh v. State*, 166 S.W.3d 641, 647 (Tenn. 2005) (citing *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984)); *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997)). As juror Kevin Stephens has admitted, the alternate jurors were part of those discussions, including expressing their opinions: "The alternates let us know they also thought Mr. Smith was guilty."[15]

This Court has held that, "[A] discharged alternate [juror] is no longer a member of the jury since the function of an alternate juror ceases when the case has been finally submitted." *State v. Adams*, 405 S.W.3d 641, 651 (Tenn. 2013) (quoting *State v. Bobo,* 814 S.W.2d 353, 355 (Tenn. 1991)). In *Adams*, a discharged alternate left behind a note indicating his opinion as to the defendant's guilt. The note was discovered and read by the foreperson of the jury prior to his vote in the deliberations. The foreperson did not share the contents of the note with any other juror and

[15] Ex. 10, Stephens Decl.

made no mention of the note during deliberations. This Court determined that the proper framework for determining the probable, objective effect upon a verdict of a jury's exposure of an improper outside influence includes examination of the following factors: 1) the nature and content of the information and influence; 2) the number of jurors exposed to the information or influence; 3) the manner and timing of the exposure to the juror(s); and 4) the weight of the evidence adduced at trial. These should be considered in determining whether there exists a reasonable possibility that the extraneous improper outside influence altered the verdict. *Id.*

The *Adams* factors show that there is a reasonable possibility that the improper influence altered the verdict against Mr. Smith. Here, the alternate jurors discussed their opinion as to the ultimate issue—Mr. Smith's guilt.[16] They did so in the presence of the entire jury. *Id.* This was done prior to the dismissal of the alternates, but after the judge repeatedly instructed the jury not to discuss the case until deliberation.[17] Because the discussions were held in flagrant violation of the court's instructions, it appears that they were not inadvertent slips of the tongue, but rather an attempt by the alternates to make sure the other

---

[16] Ex. 10, Stephens Decl.

[17] Ex. 11, Trial Tr. at 1779; Ex. 12, *id.* at 2098; Ex. 13, *id.* at 2215; Ex. 14, *id.* at 2798 (reminding the jury "I still want you to remember not to in any way make any remarks or have any conversations about what you've heard. You'll have plenty of time to do that. And I just wanted to remind you to not have anything to say about what you have heart so far. I hope you enjoy your lunch.").

jurors registered their opinions. In this circumstantial evidence case where the jury was asked to rely on an inscrutable 911 call and a bloody smudge on a sheet, Mr. Smith's conviction was far from a foregone conclusion. All of these factors create the "reasonable possibility" that the improper outside influence altered the verdict.

Mr. Smith is entitled to a hearing on this matter. As no procedure currently exists in Tennessee for the adjudication of his claim, this Court must establish a procedure.[18]

E. Mr. Smith was denied a fair trial and the right to confront the witnesses against him when a juror testified during jury deliberations as to his purported expert opinion that Mr. Smith's alibi was not possible because of weather conditions the night of the crime.

Juror Stephens testified as an unsworn, putative expert in the jury room, violating Mr. Smith's rights under the Fifth and Sixth Amendments. Just as Juror Buford shared his purported knowledge about a life sentence lasting only 13 years, Juror Stephens held himself out to his fellow jurors as an expert on weather:

> When I was in Antioch High School, I took an aerospace science class taught by the head of local civil aviation. Later, when I was in the Navy at Millington, I took a similar course. From those classes, I learned about weather patterns. As I explained to the jury, I knew from my training that the wind,

[18] *See* Ex. 1 *State v. Hall*, E1997-00344-SC-DDT-DD at # (Tenn. December 3, 2019) (holding that this Court will create procedures to fill the procedural void where due process requires adjudication of claims) (citing *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999)).

as reported that night, would have cleared the fog enough that a person would not have had to drive as slowly that evening.[19]

Juror Stephens' actions were very similar to those of the juror found to have violated the defendant's constitutional right to confrontation in *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001). In *Doan*, the Sixth Circuit reviewed the juror misconduct, holding that a juror reporting to other jurors "the results of an out-of-court experiment . . . conflicts with Doan's constitutional right to a fair and impartial jury that *considers only the evidence presented at trial*." *Id.* (emphasis supplied). The Sixth Amendment requires, "'at the very least,' that the evidence brought against a defendant and considered by the jury be presented at trial where the defendant can confront that evidence to the fullest extent possible." *Id.* (quoting *Turner*, 379 U.S. at 472-73). Mr. Smith had no opportunity to confront Juror Stephens' information and opinions; Mr. Smith's right of confrontation was violated and the resulting conviction is unconstitutional.

F. The jury that sentenced Mr. Smith to death otherwise engaged in misconduct, failing to follow the court's instructions, deliberating prior to the close of proof, and failing to engage in meaningful discussion of the issues prior to rendering a verdict.

In addition to the constitutional violations outlined above, Mr. Smith's trial was infected by juror misconduct where jurors deliberated

[19] Ex. 10, Stephens Decl.

prior to the submission of all the evidence and where other jurors refused to deliberate at all. In this case, the Court instructed the jury:

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.[20]

Despite that instruction, several jurors refused to deliberate with the rest of the jury:

> There were some hot heads on the jury. Those men just wanted to make a quick decision and go home. I remember one or two of them had their minds made up before we even deliberated. It was clear that nothing would change their minds about giving Mr. Smith the death penalty. Those guys just wanted out of there, and didn't participate in the discussion except to hurry us along.[21]

These jurors violated Mr. Smith's right to a fair and impartial jury. *See State v. Wakefield*, No. M2007-2813-CCA-R3-CD, 2009 WL 137225, at *3-4 (Tenn. Crim. App. Jan. 21, 2009) (finding "manifest necessity" for a mistrial when a juror refuses to deliberate with the other jurors).

Other jurors, by contrast, deliberated before the submission of the case to the jury: "We ate in the courthouse and therefore could speak about things we heard at lunch. When we were eating, the alternates could throw in their opinions. The alternates let us know they also

[20] Ex. 15, Trial Tr., pp.3286-87.

[21] Ex. 5, Buford Decl.

thought Mr. Smith was guilty."[22] Each of these failures to comply with the court's instructions were juror misconduct. *But see State v. Frazier*, 683 S.W.2d 346, 353 (Tenn. Crim. App. Oct. 25, 1984) (finding inquiring into premature deliberations barred by Rule 606); *State v. Leath*, 461 S.W.3d 73, 110 (Tenn. Crim. App. June 3, 2013) (same).

To be sure when jury misconduct in a noncapital case is discovered proximate to the verdict, other jurisdictions require a defendant to establish prejudice from jury misconduct in order to be entitled to a new trial. *See United States v. Bertoli,* 40 F.3d 1384 (3d Cir.1994) (trial judge should, through *voir dire,* decide impact of premature jury deliberations and effectiveness of curative instructions); *United States v. Resko,* 3 F.3d 684 (3d Cir. 1993) (prejudice is touchstone of entitlement to a new trial when improper intra-jury influences are at issue); *United States v. Carmona,* 858 F.2d 66, 69 (2d Cir. 1988); *Unites States v. Klee,* 494 F.2d 394 (9th Cir. 1974) (not every instance of misconduct warrants a new trial); *United States v. Piccarreto,* 718 F. Supp. 1088 (W.D.N.Y. 1989) (requiring a showing that discussions shaped final deliberations, improperly influenced jurors, or prejudiced defendants.); *State v. Hays,* 883 P.2d 1093 (Kan.1994); *People v. Renaud,* 942 P.2d 1253 (Colo. Ct. App. 1996) (requiring proof of prejudice); *Commonwealth v. Maltais,* 438 N.E.2d 847 (Mass.1982). However Mr. Smith has no way to carry such a burden, given Tennessee Rule of Evidence 606. *Walsh v. State,* 166 S.W.3d 641, 647 (Tenn. 2005) (citing State v. *Blackwell,* 664 S.W.2d 686, 689 (Tenn. 1984)); *State v. Parchman,* 973 S.W.2d 607, 612 (Tenn. Crim.

[22] Ex. 10, Stephens Decl.

App. 1997)).Where it is impossible to conduct an adequate post-trial inquiry due to the passage of time, other courts have found that new trial may be ordered. *See United States v. Resko,* 3 F.3d 684 (3d Cir. 1993*); State v. Aldret*, 509 S.E.2d 811, 814–15 (S.C. 1999).

The jury misconduct here "reaches past the statutory and procedural framework of our criminal justice system and encroaches upon certain basic constitutional guaranties." *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn., 1991). "Under Article I, § 6 of our constitution, the right of trial by jury must be preserved inviolate." *Id.* (citing *Grooms v. State,* 426 S.W.2d 176 (1968); *Woods v. State,* 169 S.W. 558 (1914)). Among the essentials of the right to trial by jury is the constitutional right to have all issues of fact submitted to the same jury at the same time. *Winters v. Floyd,* 367 S.W.2d 288 (Tenn. 1962); *Harbison v. Briggs Bros. Paint Mfg. Co.*, 354 S.W.2d 464 (Tenn. 1961). Because of the misconduct of the jury, that did not happen for Mr. Smith.

G. Due process requires that this Court create a procedure for the resolution of Mr. Smith's claims.

Mr. Smith has shown that the jury in his case violated his constitutional rights in myriad ways including in violation of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment. Due process therefore requires that Mr. Smith be provided a procedure by which he may establish his entitlement to relief. This Court must establish a procedure for the vindication of his claims.[23]

[23] *See,* Ex. 1 *State v. Hall*, E1997-00344-SC-DDT-DD (Tenn. December 3, 2019) (holding that where due process requires adjudication of

Accordingly, this Court should deny the motion to set an execution date and, instead, set forth a procedure by which Mr. Smith's claims that his due process right to a fair trial may be adjudicated and remand this matter to the trial court for a hearing.

II. This Court should deny the State's motion, because the conviction is unreliable.

Mr. Smith's conviction and death sentence violate the Constitution because they are unreliable. The Supreme Court has repeatedly recognized that any capital prosecution offends the Eighth Amendment if the judicial system cannot sufficiently insure reliability in the determination. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976)) Here, Mr. Smith was convicted based on a prosecution theory that is inconsistent with the physical evidence and on the basis of misleading testimony that was the product of the mishandling of evidence.

A. The prosecution's theory of the case does not account for the physical evidence.

Mr. Smith was convicted and is sentenced to death based on an impossible prosecution theory that conflicts with the physical evidence. The State's entire case turned on the victims having been killed shortly after the 911 call at 11:23 p.m. Though Mr. Smith had an alibi for that

---

claims, this Court will create procedures to fill the procedural void) (citing *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999)).

time as well as later in the evening, the proof that he was in Kentucky became stronger the later the deaths occurred. The undisputed facts of the police investigation of the 911 call and the evidence at the scene completely undermine the prosecution's theory, making it impossible that Mr. Smith committed the murders as the prosecution claimed.

The prosecution theory at trial is demonstrably false, for at least four separate reasons: 1) if the victims were killed when the prosecution said, the police would have seen Chad Burnett's body while circling the house in response to the 911 call; 2) the police would have seen the open back door; 3) the police saw lights on in the house that were turned off before the discovery of the bodies; 4) the police would have heard the victims' hairdryer inside the house, and 5) the prosecution's theory of the crime in no way accounts for the alarm clock.

A 911 call from 324 Lutie was received by the emergency dispatcher at 11:23. The prosecution's theory at trial was that the victims were killed shortly after the 911 call.[24] The medical examiner based the time of death partially on the 911 call.[25] Undisputed testimony is that within four minutes, at 11:27, three metro police officers arrived at 324 Lutie and approached the house. Metro Police Officers Michael Robinson and Daniel Crockett arrived first at the house.[26] Officer Terry Miller

---

[24] Ex. 16, Trial Tr. at 56.

[25] Ex. 17, PCR Tr. at 979.

[26] *See* Ex. 18 THE TENNESSEAN, *Slaying Site Call Handled Correctly, Police Officials Say*, Oct. 11, 1989, p. 1B) (hereinafter "Tennessean Article").

arrived last.[27] Through an internal review of the incident, Deputy Assistant Police Chief John Ross learned the details of the officers' actions at the house that was reported by both The Tennessean and the Nashville Banner.[28]

The Tennessean reported Ross' findings on October 11, 1989, explaining that "Crockett and Robinson arrived at 11:27 p.m., four minutes after the call was dispatched by police, and began knocking at doors to the house."[29] Ross confirmed that Officer Miller then arrived and not only walked around the house but also looked into the house through the windows:

> Miller, who was patrolling the area and arrived in a backup car shortly after the first two officers, walked around the side of the home and *looked in through the windows*, Ross said.[30]

Miller walked around the right side of the house where windows were accessible – not the left side, where windows were too high off the ground to enable anyone to look inside the house.

The Nashville Banner also reported Ross' findings that Miller not only went around the house but also knocked on a door while doing so, which necessarily was the back door – the only other door to the house besides the front door that officers initially approached:

---

[27] *Id.*; *see also* Ex. 19, Miller Deposition, excerpt at 17-18.

[28] *See* Ex. 18, Tennessean article; Ex. 20, Nashville Banner, *911 Response Probe Clears 3 Metro Officers of Wrongdoing*, Oct. 11, 1989, p. 1B (hereinafter "Nashville Banner Article").

[29] Ex. 18, Tennessean Article.

[30] *Id.* (emphasis supplied).

> Officers Daniel Crockett and Michael Robinson were assigned to investigate the 911 report. Officer Terry Miller was in the area and assisted.
>
> Ross said the officers arrived at the house four minutes after the call was made. The three officers stayed at the house nine minutes. Two officers went to the front door and knocked repeatedly. The other officer stood in the front yard to see if anyone came to the front windows while the officers were knocking on the door. That officer also checked the sides of the house, *including knocking on a door to see if anyone was inside*.[31]

Ross further stated: "There were no signs of physical violence, no broken windows *or kicked in doors*."[32]

Deputy Police Chief Ross' statements right after the incident provide key evidence that the murders did not occur at or around 11:30 p.m. (as the prosecution claimed) and that Oscar Smith is therefore innocent. The murders did not occur around the time of the 911 call because: (a) an officer walked around the house and saw no broken windows or kicked in "doors" (plural); (b) the officer "looked in through the windows;" (c) Chad Burnett was found the next day in the room at the back right of house; yet (d) no officer saw Chad's body through the window when looking through the windows at 11:30 p.m., though Chad's body would have been visible if he actually had been dead at that time.

A visual examination of the scene proves that no one was killed at 324 Lutie Street at or around 11:30 p.m. Ex. 21 is a picture of the front

---

[31] Ex. 20, NASHVILLE BANNER ARTICLE (emphasis added).

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

of the residence at 324 Lutie Street. Ex. 22 shows the right side of the house, looking down the side. The right side of the house has four windows. *Id.* Chad was found on the floor of the room with the fourth window which, at the time, had sheer curtains that were open when Chad was found and allowed an unimpeded view into the room.

The fourth window on the side of the house was at or below the officer's eye level and an officer certainly would have looked into that window upon walking around the house. *See* Ex. 23 (entire right side of house showing four windows); Ex. 24 (right side focusing on two far right windows). Critically, an officer looking into that last side window would have had an unobstructed view of anyone lying on the floor of that room – if anyone had actually been there. *See* Ex. 25 (showing side window to room where Chad was found the next day, with sheer open curtain making any body easily visible through that side window).

Moreover, there was a second window to that very room on the back of the house, as seen on the far left side of a picture of the back of the house. *See* Ex. 26 (photo of back of house). The officer also had a clear, unobstructed view of the floor of the room from that rear window, because the sheer curtains were completely open to that window when Chad was found. *See* Ex. 27 (picture from inside the room where Chad was found with view of the window on the back of the house, showing clear visibility through that window of anything on the floor).

All of this proves that at 11:30 p.m., while an officer walked around the house and looked through the windows and into the room where Chad was found the next day, the officers did not see Chad on the floor. The reason: When the officer looked through those unobstructed windows,

Chad had not been killed and was not lying on the floor. Chad was still alive – and not killed until later in the morning of the next day, when the hair dryer was running, and when Oscar Smith was out of town.

This evidence also has to be considered in light of additional evidence about the time of death and Oscar Smith's whereabouts in the morning. Not only did Dr. Hofman testify that the victims may have died as late as 8:00 or 9:00 a.m. the following day (October 2, 1990 – when Oscar Smith was unquestionably at work in Morehead, Kentucky),[33] but even Dr. Charles Harlan said the deaths occurred as late as the morning of the day they were found.[34] Considering the officers did not see Chad's body in the back room at 11:30 p.m. when that evidence would have been clearly visible to the officers, there is a reasonable probability that Oscar Smith would have been acquitted of first-degree murder given this gaping hole in the prosecution's assertion that Oscar Smith was guilty because he killed the victims around 11:30 p.m.

To be sure, in 2017, there was some uncertainty with Officers Miller and Crockett about who went around the house and looked into the windows. Almost thirty years after the event, Miller believed that it was Crockett who went around the house.[35] Crockett testified that he did not

---

[33] Ex. 28, Evid. Hr'g Tr. at 18.

[34] *See* Ex. 29, Banner Article (Harlan said the victims may have died as late as 10:00 a.m. on the day they were found).

[35] Ex. 19, Jan. 27, 2017 Deposition of Officer Terry Miller at 18 ("I thought that Crockett had gone around to the back;" "I thought Crockett had gone around on the back.").

go to the back of the house.[36] Nevertheless, Deputy Chief Ross' contemporaneous statements show that Miller went around the house, looked into the windows, and checked the back door (which is proven by the fact that Deputy Chief Ross was able to state that there were "no kicked in doors" at the house). Yet while looking in the windows and checking the doors at 11:30 pm. Officer Miller did not see Chad's body in the back room. *Compare* Ex. 24, Photos of Outside of 324 Lutie *with* Ex. 30, Photo of Body in Relation to Side Window and Ex. 27, Photo of Body in Relation to Back Window.

This same proof further supports Mr. Smith's innocence, because Officer Miller did not see the back door open when he was inspecting the house at 11:30 that night, yet the back door was open at the time of the discovery of the victims' bodies. Michael Price, the seven-year-old cousin and nephew of the victims, was the first person to report discovery of the bodies. He testified that he went in the back door of the house which was standing open:

Q: Okay. Did you go in the front door or the back door?

A: The back door.

Q: Okay. Was it open or closed?

A: It was open.

Q: Was it standing open?

A: Yeah.

---

[36] Ex. 31, February 28, 2017 Deposition of Officer Crockett, excerpt at 20-21.

Q: And where did you go when you went in the house?

A: To where the noise was coming from.

Q: What kind of noise was it?

A: A hair dryer.

Q: Okay. Was it on?

The Court: Speak up in a good, strong voice now, real loud.

Q (By Gen. Thurman): The hair dryer was on?

A: Yeah.[37]

The uncontroverted proof at trial shows that someone was alive in the victims' home after the police left the home at 11:30. The proof at trial clearly showed that the lights at 324 Lutie were on when the police responded to the call.[38] However, Billy Fields testified at trial that the lights were all off when he arrived at the victims' home on October 2.[39] Further, the uncontroverted proof is that the victims' hairdryer was found under Jason's body – still running at the time the victims' bodies were found in the afternoon of October 2, 1989.[40] The hairdryer further demonstrates that the victims were not dead at the time the officers circled the house. The officers testified that at the time they knocked on the front door and at the time Officer Miller went around the house,

---

[37] Ex. 32, Trial Tr.: Testimony of Michael Price, p. 1821-22.
[38] Ex. 33, Robinson Report, p. 2.
[39] Ex. 34, Trial Tr. at 2178, 2183.
[40] *Id.*; Ex. 35, Trial Tr. at 1851; Ex. 36, Supplemental Report by Det. Bernard.

nothing appeared amiss. Had they heard the hair dryer, the officers would not have given up and left so quickly.

The victims' alarm clock is physical evidence that the prosecution's theory is not what occurred. It is uncontroverted that the victims' alarm clock was set for 5:00 a.m. and was not ringing at the time the bodies were discovered.[41] This fact demonstrates that the killing occurred after 5:00 a.m. – when Mr. Smith was demonstrably out-of-town. Had the victims been killed at the time of the 911 call as the State maintained, one of two things would be true: either 1) the alarm clock would not yet be set to alarm in the morning, because the victims had not yet gone to bed or 2) the alarm clock would have been ringing when the victims' bodies were discovered, because they had set the clock before being attacked. What cannot be true is that the victims were attacked after setting the alarm, that the attack happened before 5:00 a.m., and that the alarm was not sounding when the bodies were discovered. Instead, the version of events that could account for both the fact that the alarm was set (as clearly documented by the police in Ex. 37) and for the fact that the alarm was not sounding when the bodies were found (*id.*) is that the victims rose in the morning after 5:00 a.m., turned off the sounding alarm, reset the alarm to ring the next day, and then were subsequently attacked.

Finally, the presence of an identifiable print of an unknown person on the bloody awl undermines the prosecution's theory. It is uncontested that the awl found at the scene created the puncture wounds found on

[41] Ex. 37, Oct. 2, 1989, MNPD Supplemental Report.

Chad and Judy.[42] Sargent Hunter testified, consistent with the prosecution's theory, that there were no identifiable fingerprints on the awl.[43] However, subsequent analysis of the awl has shown the presence of an identifiable print that does not belong to Oscar Smith or any of the victims.[44] Given that the awl was covered in blood when found and matched the victims' wounds, the presence of a print from an unknown person on the awl refutes the prosecution's theory.

B. The conviction is unreliable because the police and prosecution mishandled evidence.

A review of the latent print evidence proves that numerous latent prints found at the crime scene are identifiable and traceable to persons other than Oscar Smith and that Johnny Hunter misidentified numerous latent prints in this case. Hunter was an unreliable witness, inexpert in the identification of prints, and his analysis and testimony in this case were unscientific and wholly unreliable.[45]

The expert examination of the dozens of latent prints recovered from the house reveals not only that numerous latent prints recovered

---

[42] Ex. 38, Trial Tr. at 2566-75 (Chad); Ex. 39, *id.* at 2620-21 (Judy).

[43] Ex. 40, *id.* at 1973.

[44] Ex. 41, Bright-Birnbaum Report. The latent lifts from the awl revealed two latent prints, however one of the prints was Sargent Hunter's own ring finger. Clearly Sargent Hunter did not commit the crime, but the trial court should have been informed of his incompetence prior to making the decision to deem him an expert, and the jury should have been told of metro police's lack of care with the scene evidence.

[45] *See* Ex. 41, Bright-Birnbaum Report.

from the crime scene are identifiable and not Oscar Smith's (thus showing someone else's guilt), but also that Hunter's analysis in this case was littered with misidentifications of prints and scientifically erroneous conclusions. Hunter misidentified and misclassified numerous latent prints in this case. As we know from the Bright-Birnbaum Report, Hunter made significant errors and reached scientifically erroneous conclusions in his analyses of at least 16 of the latent prints recovered from the crime scene. Hunter's 16 errors spanned the "thirty four (34) latent lift cards" obtained from the house.[46] Thus, Hunter reached erroneous conclusions with regard to nearly 50% of the prints lifted. Had counsel investigated this latent print evidence, counsel easily could have excluded Hunter from testifying at all as an "expert."

Johnny Hunter's testimony was wholly unreliable because he made glaring errors in his analysis and conclusions in this case. Had the jury heard evidence of Hunter's errors and unreliability, there is a reasonable probability that the jury would not have credited Hunter's identification of the print on the bedsheet and never would have convicted Oscar Smith.

As certified latent print examiner Kathleen Birnbaum explains, with regard to the latent prints recovered in the house, Johnny Hunter: (a) made two erroneous identifications; (b) erroneously failed to make four identifications; and (c) made ten other errors when he erroneously concluded that ten other prints were of "no value." Ms. Birnbaum summarizes this litany of 16 clear errors made by Officer Hunter with regard to the prints from the latent print cards:

---

[46] *Id.* at 1.

> During my review of the latent prints and identifications made by Officer Hunter, I concluded that two (2) of the identifications were erroneous. One latent print (#001-25) identified as belonging to Chad Barnette was actually made by Judith Smith and a second latent print (#001-34) identified as belonging to Judith Smith was actually made by Jason Barnette.
>
> Of the thirty-three (33) latent prints marked of N/V [No Value] (Officer Hunter's report states there were thirty (30) latent prints to be of No Identifiable value), I found sufficient detail to identify one (1) of the latent prints, #001-14, to Chad Barnette and two (2) of the latent prints, #001-20 and 001-33, to Jason Barnette. One (1) additional latent, #001-001(A), also marked N/V, was identified as belonging to Officer Hunter. An additional ten (10) latent prints marked N/V (#001-05, 001-10, 001-18, 001-19, 001-21, 001-23, 001-24 (x2), 001-32, 001-33) and another with no markings (#001-01), were determined to be of value for comparison purposes, but no identifications were made to the inked/known prints that had been submitted to me.[47]

Among Johnny Hunter's many mistakes was his contamination of the crime scene – including contaminating the evidence collection from the murder weapon with *his own prints*.

Johnny Hunter's prints were among those collected by MNPD demonstrating that he did not follow evidence gathering protocol. As set forth, above, Hunter collected his own print and marked it #001-001(A).[48] He then failed to identify the print as his own, instead completing reports

---

[47] *Id.* at 1.

[48] *Id.*

that showed the print as "N/V" ("no value"). *Id.* Hunter's failure to follow protocol is particularly relevant because his own fingerprints were found on the murder weapon.

Johnny Hunter contaminated the evidence collection – lifting his own prints from the awl used to stab Chad and Judy. As the Bright-Birnbaum Report documents, a latent print from Hunter's left ring finger was included in the latent print lifts from the awl. Though Birnbaum believes that the print was left by Hunter on the lifting tape (as opposed to actually on the awl) such contamination is unacceptable. Further, Hunter failed to identify this readily identifiable print – instead marking the print "N/V" for "no value."[49] Whether Hunter failed to identify his own print to cover his own incompetence or failed to recognize that the identifiable print on his lifting tape from the awl was his own matters not: Hunter's incompetence is manifest.

Simply stated, Hunter never should have even testified in this case as a purported "expert." His entire testimony would have been categorically excluded as unreliable and inadmissible had trial counsel impeached his work with his error rate. His errors were unquestionably beyond the pale, on a magnitude far beyond any known or recognized failure of any other fingerprint examiner petitioner has been able to identify.[50]

---

[49] *Compare* Ex. 42, 1/30/90 Supplemental Report: Final Analysis of the Latent Fingerprints (dismissing all prints not enumerated as "of no identifiable value") *with* Ex. 41, Bright-Birnbaum Report.

[50] Ex. 43, Ulery, et al., *Accuracy And Reliability Of Forensic Latent Fingerprint Decisions*, Proceedings of the National Academy of Sciences

Even if Hunter had been allowed to testify despite his clear lack of expertise, if the jury had learned that Hunter's classification and identification of prints was so shockingly wrong, and if counsel had cross-examined Hunter to show his unreliability, there is little question that the jury would have had no faith in Hunter's testimony against Oscar Smith. Jurors would have rejected his testimony and conclusions as scientifically unreliable, and jurors would have voted to acquit Oscar Smith.

In addition to the mishandling of the fingerprint evidence, the State allowed a key piece of evidence, a bloody knife found at 324 Lutie, to be wiped clean – thereby allowing its evidentiary value to be destroyed. Though the police inventory did not initially discover it, a bloody knife was found at the murder scene – hidden under the house. The homeowner turned the knife over to the Detective McElroy.[51] The knife was later determined to have Chad Burnett's blood on it and to be consistent with the slashing defensive wounds to Chad and Jason's hands.[52]

Despite the obvious import of a bloody knife under the house where a crime occurred, no evidence about the knife was presented at trial. Indeed, at trial, the medical examiner testified that a serrated knife (such as the knife found under the house) could not have made the victim's

---

May 2011, 108 (19) 7733-7738; DOI: 10.1073/pnas.1018707108 (2011) (compared to error rate in latent print study, Johnny Hunter's errors in this case are exponentially higher).

[51] Ex. 44, PCR Tr. at 452.

[52] Ex. 45, Lab Corp Report (DNA match to Chad's hair sample); Ex. 46, PCR Tr. at 1061.

wounds.[53] In post-conviction, the medical examiner had to retract that statement and admit that the knife could have made many of the injuries to both Chad and Jason.[54] Despite this admission, the evidentiary value of the knife was discounted – in part because Decretive McElroy testified at post-conviction that the knife was clearly not related to the homicide because there was no blood on the knife.[55]

Scientific testing has shown that Detective McElroy's testimony that there was no blood on the knife was untrue.[56] Chad Burnett's blood was on the knife.[57] Mr. Smith could not present this evidence to rebut McElroy's untrue statement at post-conviction, because the knife was disclosed just prior to a post-conviction hearing (which had been set months in advance), and the late disclosure left counsel with no reasonable opportunity to further investigate the knife.[58] In addition, the July 2, 1996 Metro Property Receipt reveals that, before coming to testify in post-conviction, Detective McElroy was given both the knife and a piece of paper contained in the same bag.[59] When he arrived at court, McElroy claimed that the bag was open and that the paper was missing when he received it.[60] The Property Receipt raises serious questions about whether McElroy or others destroyed evidence and clearly calls

---

[53] Ex. 47, Trial Tr. at 2622-23.
[54] Ex. 46, PCR Tr. at 1060-61.
[55] Ex. 48, PCR Tr. at 452-91.
[56] Compare Ex. 48, PCR Tr. at 452- 91 *with* Ex. 45, Lab Corp Report.
[57] *Id.*
[58] Ex. 49, McGee Affidavit.
[59] Ex. 48, PCR Tr. at 452-91.
[60] *Id.* at 454.

into question McElroy's story in post-conviction that he never had the knife tested.

III. The harm to the integrity of the judicial system of the errors this Court previously deemed "harmless" is now apparent.

This Court previously found five errors in the adjudication of Mr. Smith's guilt and sentence. The effect and prejudice of those errors is now apparent, when considered in light of the information Mr. Smith has presented in this application. Though those errors were previously held to be harmless, the prejudice to Mr. Smith is clear when the errors are considered cumulatively. *State v. H.R. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (recognizing the cumulative error doctrine) (citing *Alvarez v. Boyd,* 225 F.3d 820, 824 (7th Cir. 2000); *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir. 1990); *United States v. Wallace,* 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. Duffy,* 967 P.2d 807, 816 (1998)).

Mr. Smith was prejudice by the cumulative effect of the following five errors found by this Court:

1) This Court found the trial court erred in repeatedly admitting hearsay statements from several witnesses regarding Mrs. Smith's fear of Mr. Smith. The trial court admitted the hearsay pursuant to the state of mind hearsay exception. As this Court recognized, Mrs. Smith's fear of Mr. Smith was not probative of whether he was the person who killed her and so was not relevant. However without the evidence presented in this Response, this Court found there was no prejudice to the jury hearing that Mrs. Smith was afraid of Mr. Smith. *State v. Smith*, 868 S.W.2d 561, 573 (1993).

2) This Court previously found proof from Mrs. Smith's romantic interest Billy Fields that Mrs. Smith told him not to come over that night because his doing so "might cause a conflict" to be harmless. *Smith*, 868 S.W. 2d at 574. The Court analyzed the proof as admissible to show Mrs. Smith's plan and why Fields did not accompany her. The Court found that to the extent this evidence might have been used improperly to establish Mr. Smith's conduct, the comment was harmless because the record is full of info about what Mr. and Mrs. Smith did that night. This Court failed to consider the prejudicial impact of the inference from that which Mrs. Smith's hearsay termed the potential for "conflict" – i.e., that Mrs. Smith was saying Mr. Smith was potentially violent.
3) This Court found harmless the erroneous admission of Mrs. Smith's statements to Sheila Gunther that if given a divorce she would take the children and Mr. Smith would never find her again. *Id.* at 575.
4) This Court found the admission of alleged comment by Mr. Smith to Clinton Curtis that "you never know when one of us could snap and do something [like shooting up a McDonalds]" to be only slightly probative, but found it was also only slightly prejudicial and thus clearly harmless. *Id.* at 578.
5) This Court found the prosecution's use of phrase "killing room" to describe where Mr. Smith worked at a meat processing plant to be harmless. *Id.* at 579.[61]

[61] Ms. Smith's prosecutorial misconduct claim based on this and other improper arguments was deemed to be procedurally defaulted and was

In light of all the evidence presented in this Response demonstrating that the prosecution's theory of the case is disproved by police evidence and undermining the reliability of Johnny Hunter's putative "match" of the handprint, the evidence against Mr. Smith is no longer compelling. The trial court's error in admitting prejudicial, irrelevant evidence likely affected the verdict. *State v. Dotson*, 254 S.W.3d 378, 389 (Tenn. 2008) (holding the key question determining whether an error is harmless is whether it "likely had an injurious effect on the jury's decision-making process").[62]

IV. The Death Penalty Is Racist.

A. 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,

---

not reviewed by the federal courts. Ex. 50, *Smith v. Mays, sub. nom., Smith v. Bell*, 99-cv-00731, D.E. 201, p. 28 (M.D. Tenn. 2005).

[62] Due to procedural technicalities, this Court's failure to review the cumulative effect of all these errors was not reviewed by the federal courts. Ex. 51, *Smith v. Mays, sub. nom., Smith v. Bell*, 99-cv-00731, D.E. 201, p. 44 (M.D. Tenn., 2005).

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.

B. 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.[63] "Until 1913, all individuals convicted of a capital offense were hanged. There are no official records of the number or names of those executed."[64] 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.[65] After decades of legal battles

---

[63] Ex. 52, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS,https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

[64] Ex. 53, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[65] 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. 54, *Race, Rape, and the Death Penalty,* DEATH PENALTY INFORMATION

on the constitutionality of the death penalty and method of execution, Tennessee made lethal injection the method of execution starting January 1, 1999.[66]

Parallel to the official, state-sanctioned death penalty, there has been a darker history of capital punishment in Tennessee. There have been 237 reported extra-judicial lynchings in Tennessee—the birthplace of the Ku Klux Klan.[67] 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.[68] After opening the People's Grocery store in Memphis, TN, a thriving business, Misters McDowell, Stewart, and Moss were

---

CENTER, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty

[66] Ex. 52, *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. 53, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[67] Ex. 55, *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/tennessee.

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

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.*

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

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

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

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

In his separate concurring opinion, Justice Stewart indicted the capital punishment system saying, "if any basis can be discerned for the

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

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

> [E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet

> the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field . . . providing no indication that the problem of race in the administration of death will ever be addressed.

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

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

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

> treatment under the law that is so central to a functioning democracy.

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

While blacks make up approximately 12% of the population, they account for 42% of the national death row.[69] *Id.* These disparities are well known and well documented. The death penalty is intended for the worst of the worst, (*see Harmelin v. Michigan*, 501 U.S. 957, 966 (1991)), yet research continues to show that race, not crime, is the more likely indicator for who receives the death penalty.

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

D. 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

---

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

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.[70] Whites are associated with purity and seen as victims.[71] Research shows that merely seeing a black face can trigger negative associations.[72] 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. [73] Racial priming affects charging decisions, how prosecutors

---

[70] Ex. 57, 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.

[71] *Id.*

[72] *Id.* at 799; Ex. 110, Lisa Trei, *'Black' features can sway in favor of death penalty, according to study*, Standford Report (2006); Ex 111, Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes.* CORNELL LAW FACULTY PUBLICATION (2006).

[73] *Id,* Ex 112, 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 113, Mike Dorning, *Plea*

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.

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

The history of the exclusion of blacks from jury service is long – and telling. In 1880, the Supreme Court held that statutes limiting jury service to whites are unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303 (1879). In the wake of *Strauder*, states removed the racial discrimination from their statutes, while initiating a series of facially constitutional practices aimed at achieving the same goal—preventing blacks from serving on juries. While some states began using seemingly neutral requirements such as intelligence, experience, or good moral character to keep black citizens out of the jury box, other states printed the names of black jurors on separate color paper so those names could be avoided during a putatively "random" drawing or, alternatively, utilized the jury commissioner as a proxy for the state's racism.[74]

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

---

Bargains Favor Whites in Death Penalty Cases, Study Says, WASHINGTON POST, July 26, 2000.

[74] Ex. 58, Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004).

> 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 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).[75] 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

[75] Much of this section is drawn from Ex. 59, 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.

without a judicial rebuke.[76] 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 historically black college, a son in an interracial marriage, living in a black-majority neighborhood or that a juror "shucked and jived."[77]

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.[78]
- 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.[79]
- Between 1994 and 2002, prosecutors in Jefferson Parish, Louisiana struck 55% of blacks, but just 16% of whites.[80]

---

[76] Ex. 60, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?* THE NEW YORKER, June 5, 2015.
[77] Ex. 61, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*.
[78] Ex. 62, ACLU, *Race and the Death Penalty.*
[79] Ex. 63, Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, Reprieve, August 2015.
[80] Ex. 60, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015.

- Although blacks make up 23% of the population in Louisiana, *80%* of criminal trials had no more than two black jurors, and it notably takes only 10 of 12 juror votes to convict in that state.[81]
- 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.[82] The study's authors concluded that the chance of this occurring in a race-neutral process was less than 1 in 10 trillion.[83] Even after adjusting for excuses given by prosecutors that tend to correlate with race, the 2-to-1 discrepancy remained.[84] 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.[85] The legislature later repealed that law.[86]
- 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'

---

[81]Ex. 61, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*.

[82]Ex. 64, Barbara O'Brian & Catherine M. Grosso, *Report on Jury Selection Study*, MICH. ST. UNIV. C. OF L. FAC. PUB., Dec. 15, 2011).

[83] *Id.*

[84] *Id.*

[85] Ex. 65, North Carolina Senate Bill 461, The Racial Justice Act.

[86] Ex. 66, Matt Smith, *"Racial Justice Act" repealed in North Carolina*, CNN, June 21, 2013.

office struck 50% of prospective black jurors, compared with just 11% of whites.[87]

- 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.[88]
- 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.[89] Six of the seven death penalty trials featured all-white juries.[90]
- 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.[91] Jurors were more likely to evaluate ambiguous, race-neutral

---

[87] Ex. 67, Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APMReports, June 12, 2018.

[88] Ex. 68, Ian Millhiser, *Something has gone wrong with Jury Selection in Mississippi, and the Fifth Circuit is to Blame.*, Think Progress, Apr. 5, 2018.

[89] Ex. 69, Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death penalty cases*, ATLANTA JOURNAL CONST., Mar. 19, 2018.

[90] *Id.*

[91] Ex. 70, Justin D. Levinson, Danielle Young, *Different Shards of Bias: Skin Ton, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA L. Rev., 307 (2010).

evidence against the dark-skinned suspect as incriminating and more likely to find the dark-skinned suspect guilty.[92]

- Between 2005 and 2009, prosecutors in Houston County, Alabama, struck 80% of black people from juries in death penalty cases.[93] 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.[94]

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

---

[92] *Id.*

[93] Ex. 71, Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NPR Nov. 2, 2015.

[94] *Id.*

justices that the prosecutors' strikes "were motivated in substantial part by race."[95] *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).[96] 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

---

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

[96] 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).

> sufficiently account for the history when considering Flowers' *Batson* claim.
>
> The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

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

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

F. 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.

G. 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.[97] Nearly 80% of executions are for the murder of white victims, despite blacks

---

[97] Ex. 72, 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.[98] Killers of black people rarely get death sentences.[99] White killers of black people get death sentences even less frequently.[100] And far and away, the person *most* likely to receive a death sentence is a black man who kills a white woman.[101] 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.[102]

The correlation between the race of the victim and the severity of punishment exists in jurisdictions across the country:[103]

- 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.[104]

---

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

[99] Ex. 73, 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).

[100] *Id.*

[101] *Id.*

[102] Ex. 74, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases*, Amnesty International, Apr. 23, 2003.

[103] Much of this section is drawn from Ex. 59, 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.

[104] Ex. 75, 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."[105]
- 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.[106]
- 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.[107]
- 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.[108]

---

[105] Ex. 76, Sheri Lynn Johnson, John H. Blume, et al., *The Delaware Death Penalty: An Empirical Study (2012*), CORNELL LAW FACULTY PUBLICATIONS, Paper 431.

[106] Ex. 77, John H. Blume, Theodore Eisenberg, et. al., *Explaining Death Row's Population and Racial Composition*, (2004), CORNELL LAW FACULTY PUBLICATIONS, Paper 231.

[107] Ex. 78, Michael L. Radelet & Glenn L. *Pierce, Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).

[108] Ex. 79, 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."[109]
- 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.[110]

[109] Ex. 80, 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).
[110]Ex. 81, 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, [111] New Jersey, [112] Virginia, [113] Utah, [114] Ohio, [115] Florida [116] and the federal criminal justice system produced similar results.[117]
- 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.[118]

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

---

[111]Ex. 82, 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).

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

[113]Ex. 83, *Broken Justice: The Death Penalty in Virginia*, ACLU (2003).

[114]Ex. 84, Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, NTY, Feb. 24, 1995 at. B1.

[115] Ex 115, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (2016).

[116] Ex 109, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (2016).

[117]Ex. 85, 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.

[118]Ex. 86, 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."[119] 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.[120] However, African American capital defendants suffer an extreme attribution error that whites commit when whites interpret and judge the behavior of minority group members.[121] 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.[122]

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

---

[119]Ex. 87, Erik Ausion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 2018.

[120] *Id.*

[121] Ex 116, 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).

[122] *Id.*; *see also* Ex. 88, 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.

H. 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.

V. The Death Penalty Violates Evolving Standards of Decency

A. 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.[123] 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.[124] Moreover, just last month, Gallup released its

---

[123] Ex. 89, *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).

[124] Ex. 90, *States with no death penalty or with no execution in 10 years*, DEATH PENALTY INFORMATION CENTER, December 11, 2019,

latest poll reflecting that now, for the first time, 60% of the country favor life in prison over a death sentence.[125] 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."[126]

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

---

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

[125] Ex. 91, *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).

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

principles and values."[127] Tennessee has since formed its own chapter.[128] 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.[129]
- 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?"[130]
- Lack of deterrence –The death penalty does not prevent violent crime.[131]

Indeed, these same concerns are recognized in the recent year-end report by the Death Penalty Information Center, which noted that,

---

[127] Ex. 92, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[128] Ex. 93, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

[129] Ex. 94, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019; Ex. 114, Samuel Gross, et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017).

[130] *Id.*

[131] *Id.*

"innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[132] 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." [133] 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 impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[134]

The United States Supreme Court has previously found such a rapid in the shift of attitudes regarding the imposition of the death

---

[132] Ex. 95, *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).

[133] *Id.*

[134] *Id.*

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 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.[135] Post-*Furman* and *Gregg*, Tennessee was one of the last states[136] to resume executions when it executed Robert Coe on April 19, 2000 – the state's first execution in forty years.[137] The State executed another five men between 2006 and 2009.[138] And, it should be

---

[135] Ex. 96, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTION, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[136] 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. 97 – *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. 98, *States with no Recent Executions*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[137] Ex. 96, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTION, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[138] 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.*

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.[139] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[140] – 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 death penalty in the United States is not reserved for the worst of the worst but is, rather, completely and unconstitutionally arbitrary.

B. 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

---

[139] Ex. 99, *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).

[140] Ex. 100, *Tennessee*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

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.[141]

---

[141] 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. 101, *States with and*

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*.

C. 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%.[142] In Tennessee, while African-Americans comprise only 17% of the state's population, 50% of the individuals on Tennessee's death row are African-American.[143] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

---

without the death penalty, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[142] Ex. 102, *Death and Texas: Race Looms Ever Larger as Death Sentences Decline*, THE INTERCEPT, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-race-texas/ (last visited Dec. 24, 2019).

[143] Ex. 103, *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).

D. 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.[144] As the graph below shows, among the counties that have had an individual sentenced to death in that county executed, Harris County, Texas—Houston—outpaces the rest by an astonishing margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [145]

---

[144] Ex. 89, *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).

[145]Ex. 104, *Executions by County*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).

When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[146]

In Tennessee, the geographic disparity is no less stark. Since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed

[146] Ex. 105, *The Abolitionists*, THE INTERCEPT, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

sustained death sentences.[147] 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.[148] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[149]

E. 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 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.

---

[147] Ex. 106, *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).

[148] Ex. 103, *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).

[149] *Id.*

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).

F. **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.[150] As to *practice within the states*, there are now 21 states without the death penalty and, as noted at the outset of this section, a total of 38 states (very nearly 80% of the country) have not had an execution in the last five years.[151] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing

---

[150] Ex. 107, *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)).

[151] Ex. 98, *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).

numbers of states sought to further limit the use of the death penalty.[152] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[153] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[154] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[155]

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.[156] Moreover, this Gallup poll showed a wide demographic preference for life imprisonment over the death penalty, with majorities of men and women, whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[157] Equally

---

[152] Ex. 107, 2019 DPIC Report, at 2.
[153] *Id.* at 3.
[154] *Id.* at 4.
[155] *Id.*
[156] *Id.* at 14; *see also* Ex. ##, Gallup Poll, https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment (last visited Dec. 27, 2019).
[157] Ex. 91, Gallup Poll at 1-2.

consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[158]

Tennessee was one of only seven states to perform an execution in 2019,[159] and joins only Texas in having any executions scheduled for 2020. [160] 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.[161] 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.[162]

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. [163]

---

[158] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 101, *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).

[159] Ex. 107, 2019 DPIC Report, at 6.

[160]Ex. 108, *Upcoming Executions*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[161] Ex. 107, DPIC Report, at 2.

[162] Ex. 107, 2019 DPIC Report, at 2.

[163] *Id.*

Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[164] 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.[165]

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.

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

---

[164] *Id.* at 3.

[165] *Id.* at 6.

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

VI. Application for Certificate of Commutation

Mr. Smith requests this Court to issue a certificate of commutation, given the extenuating circumstances presented here. 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 at 808; *see also Bass v. State*, 231 S.W.2d 707, 715 (Tenn. 1950) (recommending commutation from death sentence to life imprisonment based on questions of "whether defendant's mind was sufficiently clear to be capable of that deliberation of thought which is necessary to become a basis of murder in the first degree"); *Anderson v. State*, 383 S.W.2d 763, 763-64 (Tenn. 1964) (prisoner's "chronic illness" and condition of "medical[] Insan[ity]"); *Green v. State*, 14 S.W. 489, 489 (Tenn. 1890) (prisoner's "chronic dementia"). 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 addressed the 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 (Birch, J., dissenting).

Here, Mr. Smith has shown compelling proof that the jury impaneled in his case was biased against him and deliberately withheld information as to that bias. Mr. Smith has further shown that extraneous proof was presented in the jury room in violation of his right to confront all witnesses against him. Finally, it is apparent from the uncontested proof that the crime could not have occurred in the manner posited by the state and that the entirety of his conviction rests on a shaky and unreliable theory. Where the Court cannot be assured that these serious violations of Mr. Smith's constitutional rights did not have a substantial and injurious effect on the jury's deliberation, this Court should issue a certificate of commutation to Governor Lee.

VII. Conclusion

For all the reasons discussed in this Response, Mr. Smith asks this Court to deny the State's motion to set an execution date, and to remand his case to the trial court for further proceedings in light of the Constitutional violations shown.

Respectfully submitted this 30th day of December, 2019.

KELLEY J. HENRY, BPR #21113
Supervisory Asst. Federal Public Defender

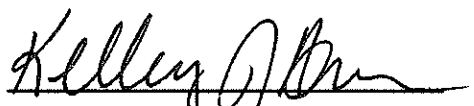
AMY D. HARWELL, BPR #18691
Asst. Chief, Capital Habeas Unit

KATHERINE M. DIX, BPR #22778
Asst. Federal Public Defender

FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265

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
Counsel for Oscar Smith