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TENNESSEE'S DEATH PENALTY LOTTERY

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Abstract

Over the past 40 years, Tennessee has imposed sustained death sentences on 86 of the more than 2,500 defendants found guilty of first degree murder; and the State has executed only six of those defendants. How are those few selected? Is Tennessee consistently and reliably sentencing to death only the "worst of the bad"? To answer these questions, we surveyed all of Tennessee's first degree murder cases since 1977, when Tennessee enacted its current capital punishment system. Tennessee's scheme was designed in response to the U.S. Supreme Court's decision in Furman v. Georgia, which held that a capital punishment system operating in an arbitrary manner violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Tennessee's "guided discretion" scheme was purportedly structured to reduce the risk of arbitrariness by limiting and guiding the exercise of sentencing discretion. Our survey results and analysis show, however, that the state's capital punishment system fails to satisfy Furman's command. Rather, it has entrenched the very problems of arbitrariness that Furman sought to eradicate. This article explains the legal background of Tennessee's death sentencing scheme, presents the most salient results of our survey, and examines the various factors that contribute to the arbitrariness of Tennessee's system—including infrequency of application, geographical disparity, timing and natural deaths, error rates, quality of defense representation, prosecutorial discretion and misconduct, defendants' impairments, race, and judicial disparity.

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I. Introduction

Imagine entering a lottery in which you are given a list of Tennessee's 2,514 adult first degree murder cases since 1977, when our modern death penalty system was installed, along with a description of the facts and circumstances surrounding each case in whatever detail you request. You are not told what the final sentences

were—whether life, life without parole (LWOP), or death. Your job is to make two guesses. First, you must guess which 86 defendants of the 2,514 received sustained death sentences (i.e., death sentences sustained on appeal and in post-conviction and federal habeas review). Second, you must guess which six defendants were actually executed during the 40-year period from 1977 to 2017. What are the odds that your guesses would be correct?

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

And what would you look for to make your guesses? The egregiousness of the crime? Maybe, but the vast majority of the most egregious cases (including rape-murder cases and multiple murder cases involving children) resulted in life or LWOP sentences. Perhaps it would make sense to look for other factors, such as the county where the case occurred (with a strong preference for Shelby County); the race of the defendant (choosing black for the most recent cases would be a very good strategy); the prosecutor (because some prosecutors like the death penalty, and others do not; and some prosecutors cheat, while others do not); the defense lawyers (because some know how to effectively try a capital case, and others do not); the wealth or appearance of the defendant (virtually all capital defendants were indigent at the time of trial, and all defendants on death row are indigent); the publicity surrounding the trial; the trial judge (because some judges are more prosecution oriented, and others are more defense oriented); the judges who reviewed the case on appeal or in post-conviction or federal habeas (because some judges are more inclined to reverse death sentences, and others almost always vote the other way); or the year of the sentencing (because a defendant convicted of first degree murder during the mid-1980's was at least ten times

more likely to be sentenced to death than a defendant convicted over the most recent years).[1] In guessing who may have been executed, perhaps the age of the defendant and his health would be relevant (because at current rates a condemned defendant is four times more likely to die of natural causes than to suffer the fate of execution).

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

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

Before turning to a discussion of Mr. Miller's survey, we need to set the stage with the historical context of Tennessee's system. Accordingly, in Part II we discuss the legal background of Tennessee's scheme beginning with the seminal United States Supreme Court decision in *Furman v. Georgia*[2] through the enactment of Tennessee's scheme in response to *Furman*. In Parts III and IV we discuss two important developments in Tennessee's scheme. In Part III we discuss the expansion of the class of death eligible defendants resulting from two sources: (i) the Tennessee Supreme Court's liberal interpretation of the "aggravating circumstances" that define the class, and

[1] *See infra* Table 1 and accompanying text.
[2] 408 U.S. 238 (1972).

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

II. Background

We tend to forget the reason behind Tennessee's current capital sentencing scheme. It stems from the 1972 case of *Furman v. Georgia*, where the United States Supreme Court expressed three principles that underlie the Court's death penalty jurisprudence under the Eighth Amendment Cruel and Unusual Punishment Clause.[3]

The first principle is that death is different: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[4]

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[3] *Id.*

[4] *Id.* at 306 (Stewart, J., concurring). The Supreme Court has reiterated this principle. The death penalty "is different in kind from any other punishment imposed under our system of criminal justice." Gregg v. Georgia, 428 U.S. 153, 188 (1976). "From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society,

The second principle is that the constitutionality of a punishment is to be judged by contemporary, "evolving standards of decency that mark the progress of a maturing society."[5]

And third, viewing how the sentencing *system* operates as a whole, the death penalty must not be imposed in an arbitrary and capricious manner.[6] Justices Stewart and White issued the decisive opinions in *Furman* that represent the Court's holding—the common denominator among the concurring opinions constituting the majority.[7] Justice Stewart explained it this way:

> [T]he death sentences now before us are the product of a *legal system* that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these

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the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357–58 (1977).

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

[6] *Furman*, 408 U.S. at 274.

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

> sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are "unusual" in the sense that *the penalty of death is infrequently imposed* for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.
>
> *These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual*. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, *the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed*. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death *under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed*.[8]

And Justice White explained:

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[8] *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (emphasis added) (footnotes omitted) (internal citations omitted).

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

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

. . . .

It is also my judgment that *this point has been reached with respect to capital punishment as it is presently administered* under the statutes involved

> in these cases. . . . I cannot avoid the conclusion that as the statutes before us are now administered, *the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice*.[9]

Since *Furman* and *Gregg*, the Court has repeatedly emphasized that the judicial system must guard against arbitrariness in the imposition of the death penalty, and the qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions.[10] Therefore, courts must "carefully scrutinize[] . . . capital sentencing schemes to minimize the risk that

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[9] *Id*. at 311–13 (White, J., concurring) (emphasis added).

[10] *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability."); Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., dissenting in part) ("[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."), *overruled on other grounds by* Hurst v. Florida, 136 S. Ct. 616 (2016); Zant v. Stephens, 462 U.S. 862, 884–85 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976))); California v. Ramos, 463 U.S. 992, 998–99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Gardner v. Florida, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."[11]

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

(i) Courts must view how the entire sentencing *system* operates—i.e., how the few are selected to be executed from the many murderers who are not—and not just focus on the particular case under review.[12] As the Supreme Court explained, we must "look[] to the *sentencing system as a whole* (as the Court did in *Furman* . . .)";[13] a constitutional violation is established if a defendant demonstrates a "pattern of arbitrary and capricious sentencing."[14] It is worth noting that in *Furman*, Justice White's opinion makes no reference to the facts or circumstances of the individual cases under review, and Justice Stewart's opinion only refers to the dates of the trials in the cases in a footnote.[15] Their opinions, along with the other three concurring opinions, dealt with the operation of the death penalty system under a discretionary sentencing scheme, and not with the merits of the individual cases.

(ii) How the capital sentencing system, operating as a whole, as well as evolving standards of decency, will change over time and eventually can reach a point where

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[11] *Spaziano*, 468 U.S. at 460 n.7.
[12] Gregg v. Georgia, 428 U.S. 153, 200 (1976).
[13] *Id.* (emphasis added).
[14] *Id*. at 195 n.46.
[15] *See* Furman v. Georgia, 408 U.S. 238, 309 n.11 (1972) (Stewart, J., concurring). *See generally id.* at 310–14 (White, J., concurring). Indeed, there is virtually no reference to the facts of the cases under review in any of the nine *Furman* opinions.

the system is operating in an unconstitutional manner—as was the case in *Furman*.[16]

(iii) An essential factor to consider in the Eighth Amendment analysis is the *infrequency* with which the death penalty is carried out.[17]

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

And, indeed, that is exactly what the majority did in *Furman*. Each of the concurring opinions in *Furman* relied upon various forms of statistical evidence that purported to demonstrate patterns of inconsistent or otherwise arbitrary sentencing.[18] Evidence of such inconsistent results and of sentencing decisions that could not be explained on the basis of individual culpability indicated that the system operated arbitrarily and therefore violated the Eighth Amendment.[19]

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

[17] *See Furman*, 408 U.S. at 290.

[18] *See Furman*, 408 U.S. at 249–52 (Douglas, J., concurring); *id.* at 291–94 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

[19] *Furman*, 408 U.S. 238.

The death penalty statutes under review in *Furman*, and virtually all then-existing death penalty statutes, were "discretionary."[20] Under those sentencing schemes, if the jury decided that the defendant was guilty of a capital offense, then either the jury or judge would decide whether the defendant would be sentenced to life or death. The sentencing decision was completely discretionary, with no narrowing of discretion or guidance in the exercise of discretion if the defendant was found guilty. *Furman* determined that under those kinds of discretionary sentencing schemes, the death penalty was being imposed capriciously, in the absence of consistently applied standards, and accordingly, any particular death sentence under such a system would be deemed unconstitutionally arbitrary.[21] This problem arose in large measure from the *infrequency* of the death penalty's application and the irrational manner by which so few defendants were selected for death.

In response to *Furman*, various states enacted two different kinds of capital sentencing schemes, which the Court reviewed in 1976. The two leading decisions were *Woodson v. North Carolina*,[22] and *Gregg v. Georgia*.[23]

In *Woodson*, the Court examined a mandatory sentencing scheme—if the defendant was found guilty of the capital crime, a death sentence followed automatically.[24] Presumably, a mandatory scheme would eliminate the *Furman* problem of unfettered sentencing

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[20] In 1838, Tennessee was the first state to convert from a "mandatory" capital sentencing scheme to a "discretionary" scheme, purportedly to mitigate the strict harshness of a mandatory approach. Eventually all states with the death penalty followed course and converted to discretionary schemes. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 139 (2002).

[21] *Furman*, 408 U.S. 238.

[22] Woodson v. North Carolina, 428 U.S. 280 (1976).

[23] Gregg v. Georgia, 428 U.S. 153 (1976).

[24] *Woodson*, 428 U.S. at 286.

discretion. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that North Carolina's mandatory death penalty statute

> fail[ed] to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences. . . . [W]hen one considers the long and consistent American experience with the death penalty in first[ ]degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.[25]

The Court again looked at the historical record. The mandatory statute merely shifted discretion away from the sentencing decision to the guilty/not-guilty decision, which historically had involved an excessive degree of discretion—and therefore arbitrariness—in capital cases. The Court emphasized that mandatory sentencing schemes "do[] not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, *regularize*, and make rationally reviewable the process for imposing a sentence of death."[26]

In *Gregg*, the Court upheld a "guided discretion" sentencing scheme.[27] This type of scheme, patterned in part after section 210.6 of the Model Penal Code,[28] was designed to address *Furman*'s concern with arbitrariness

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[25] *Id*. at 302.
[26] *Id*. at 303 (emphasis added).
[27] *Gregg*, 428 U.S. 153.
[28] MODEL PENAL CODE § 210.6 (AM. LAW INST., Proposed Official Draft 1962).

by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision;[29] (ii) narrowing the class of death-eligible defendants by requiring the prosecution to prove aggravating circumstances, thereby narrowing the range of discretion that could be exercised;[30] (iii) allowing the defendant to present mitigating evidence to ensure that the sentencing decision is individualized, which is another constitutional requirement;[31] (iv) guiding the jury's exercise of discretion within that narrowed range by instructing the jury on the proper consideration of aggravating and mitigating circumstances;[32] and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions.[33] The Court explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[34]

When *Gregg* was decided, states had no prior experience with "guided discretion" capital sentencing. Whether such a scheme would "fulfill *Furman*'s basic requirement"[35] of removing arbitrariness and capriciousness from the system, and whether it would comply with our evolving standards of decency, could only be determined over time. Essentially, *Gregg*'s discretionary sentencing statute was an experiment, never previously attempted or tested.

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[29] *Gregg*, 428 U.S. at 191.
[30] *Id.* at 196–97.
[31] *Id.* at 206.
[32] *Id.*
[33] *Id.* at 174–175.
[34] *Id.* at 189.
[35] Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

In 1977, Tennessee responded to *Furman*, *Woodson*, and *Gregg* by enacting its version of a guided discretion capital sentencing scheme.[36] Tennessee's scheme was closely patterned after the Georgia scheme upheld in *Gregg* and included the same elements itemized above. While the Tennessee General Assembly subsequently amended Tennessee's statute a number of times, its basic structure remains.[37] As was the case in Georgia, under Tennessee's scheme, a death sentence can be imposed only in a case of "aggravated" first degree murder upon a "balancing" of statutorily defined aggravating circumstances[38] proven by the prosecution and any mitigating circumstances presented by the defense.[39] The Tennessee Supreme Court is statutorily

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[36] *See* TENN. CODE ANN. §§ 39-13-204, -206 (2014).

[37] In 1993, the General Assembly provided for life without parole as an alternative sentence for first degree murder. TENN. CODE ANN. § 39-13-204(f) (2014). In 1995, as part of the "truth-in-sentencing" movement the General Assembly amended the provisions of Tennessee Code Annotated section 40-35-501 pertaining to release eligibility, which has been interpreted to require a defendant sentenced to life for murder to serve a minimum of 51 years before release eligibility. *Id.* § 40-35-501 (Supp. 2017); *see* Vaughn v. State, 202 S.W.3d 106 (Tenn. 2006). In 1999, the General Assembly adopted lethal injection as the preferred method of execution and subsequently, in 2014, allowed for electrocution as a fallback method if lethal injection drugs are not available. TENN. CODE ANN. § 40-23-114 (Supp. 2017). Additionally, over the years the General Assembly has broadened the class of death-eligible defendants by adding and changing the definition of certain aggravating circumstances. *See* discussion *infra* Part III.

[38] Aggravating circumstances are defined in Tennessee Code Annotated section 39-13-204(i) (2014).

[39] *See* TENN. CODE ANN. § 39-13-204(g) (2014). To impose a death sentence, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstance(s) outweigh any mitigating circumstances; if a single juror votes for life or life without parole, then the death sentence cannot be imposed. *Id.*

required to review each death sentence to "determine whether: (A) [t]he sentence of death was imposed in any arbitrary fashion; (B) [t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) [t]he evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) [t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[40] The Court's consideration of whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases" is referred to as "comparative proportionality review."[41]

III. Aggravators and the Expanded Class of Death-Eligible Defendants

The thesis of this article is that Tennessee's capital punishment system operates as a capricious lottery. To put into proper context the lottery metaphor and recent trends in Tennessee's capital sentencing, it is important to understand how the Tennessee General Assembly and the Tennessee Supreme Court have gradually expanded the class of death-eligible defendants. The expansion of this class has correspondingly broadened the range of discretion for prosecutors in deciding whether to seek death and for juries in making capital sentencing decisions at trial. This in turn has increased the potential for arbitrariness.[42]

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[40] TENN. CODE ANN. § 39-13-206(c)(1) (2014).

[41] *See* State v. Thacker, 164 S.W.3d 208, 232 (Tenn. 2005).

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

A fundamental feature of the capital sentencing scheme approved in *Gregg* and adopted by Tennessee is the narrowing of the class of first degree murder defendants who are eligible for the death penalty by requiring proof of the existence of one or more statutorily defined "aggravating circumstances" that characterize the crime and/or the defendant.[43] As the Court in *Gregg* explained, "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[44] A central part of the majority opinion in *Gregg* specifically addressed whether the statutory aggravating circumstances in that case effectively limited the range of discretion in the capital sentencing decision.[45] The Court has repeatedly stressed that a state's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"[46]

In addition to defining the class of death-eligible defendants, aggravating circumstances also provide the prosecution with a means of persuading the jury to impose a death sentence. At sentencing, the jury is called upon to "weigh" the aggravating circumstances against the mitigating circumstances, and if the jury finds that the aggravators outweigh the mitigators, then the sentence "shall be death."[47] The more aggravators the prosecution can prove, the more likely the jury will give

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[43] *See generally* Gregg v. Georgia, 428 U.S. 153 (1976); TENN. CODE ANN. § 39-13-206(c)(1).
[44] *Gregg*, 428 U.S. at 189.
[45] *Id*. at 200–04.
[46] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).
[47] TENN. CODE ANN. § 39-13-204(g)(1) (2014).

greater weight to the aggravators and return a death verdict. Moreover, along with expanding the number and definitional range of aggravators, the court and the legislature have also expanded the range of evidence that the prosecution can present to the jury at the sentencing hearing which also enhances the prosecution's case for death.[48]

The Tennessee statute enacted in 1977 defined eleven aggravating circumstances that set the boundary around the class of death-eligible defendants.[49] Over the

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

[49] The original version of the sentencing statute, Tennessee Code Annotated section 39-2404(i) (1977), defined the eleven aggravating circumstances:

> (1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.
> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.
> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.
(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.
(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.
(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.
(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.
(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

years, the Tennessee General Assembly has added six aggravators to the original list, bringing the total number to 17, and it has amended other aggravators to further expand the class of death-eligible defendants.[50]

> (11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

TENN. CODE ANN. § 39-2404(i) (enacted 1977) *reprinted in* Houston v. State, 593 S.W.2d 267, 274 n.1 (Tenn. 1980).

[50] Tennessee Code Annotated section 39-13-204(i)(1)–(17) (2014) now defines the aggravators as follows (emphasis added for substantive changes from 1977 statute):

> (1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older;
> (2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, *whose statutory elements* involve the use of violence to the person;
> (3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
> (4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;
> (5) The murder was especially heinous, atrocious, or cruel, in that it involved torture or *serious physical abuse beyond that necessary to produce death*;
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
> (7) The murder was *knowingly* committed, *solicited, directed, or aided by the defendant*, while the defendant *had a substantial role in*

committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, *theft*, kidnapping, *aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child*, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic* or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that the victim was a *law enforcement* officer, corrections official, corrections employee, *probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic* or firefighter engaged in the performance of official duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general, due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;

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

A. (i)(2) Aggravator—Prior Violent Felony Conviction

In a large number of murder cases, the defendant was previously convicted of a violent felony, and prosecutors frequently use the prior violent felony conviction as an aggravator in seeking death sentences.[51]

> *(12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period;*
> *(13) The defendant knowingly mutilated the body of the victim after death;*
> *(14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability;*
> *(15) The murder was committed in the course of an act of terrorism;*
> *(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant; or*
> *(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.*

[51] *See, e.g.*, State v. Hawkins, 519 S.W.3d 1, 51–52 (Tenn. 2017); State v. Bell, 480 S.W.3d 486, 521–22 (Tenn. 2015); State v.

The Tennessee Supreme Court has broadened the application of this aggravator in a number of ways.

First, notwithstanding the plain language of the statute as amended, which requires that the "statutory elements" of the prior conviction involve the use of violence to the person, it is not necessary for the statutory elements of the prior crime to explicitly involve the use of violence.[52] Instead, according to the court, in cases involving a prior crime which statutorily may or may not involve the use of violence, it is only necessary for the prosecution to prove to the judge (not the jury), based upon the record of the prior conviction, that as a factual matter the prior crime actually did involve the defendant's use of violence to another person.[53]

Thus, for example, in *State v. Cole*[54] the defendant had been convicted of robbery and other crimes for which "the statutory elements of each of [the crimes] may or may not involve the use of violence, depending upon the facts underlying the conviction."[55] The Tennessee Supreme Court sustained the use of the prior violent felony aggravator upon the trial judge's determination that the evidence underlying the prior convictions

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Freeland, 451 S.W.3d 791, 817–18 (Tenn. 2014); State v. Odom, 336 SW.3d 541, 570 (Tenn. 2011).

[52] State v. Ivy, 188 S.W.3d 132, 151 (Tenn. 2006).

[53] *Id.* (holding that the prior conviction may be used as an aggravator if the element of "violence to the person" was set forth in "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, [or] any explicit factual finding by the trial judge to which the defendant assented" (quoting Shepard v. United States, 544 U.S. 13, 16 (2005))); *see also* State v. Sims, 45 S.W.3d 1, 11–12 (Tenn. 2001) ("In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person for purposes of § 39-13-204(i)(2), we hold that the trial judge must necessarily examine the facts underlying the prior felony . . . .").

[54] 155 S.W.3d 885 (Tenn. 2005).

[55] *Id.* at 900.

established that in fact the crimes involved the defendant's use of violence.[56]

Second, the court has held that the "prior conviction" need not relate to a crime that occurred before the alleged capital murder; it is only necessary that the defendant be "convicted" of that crime before his capital murder trial.[57] The "prior convicted" crime may have occurred after the murder for which the prosecution seeks the death penalty. It is not unusual for the prosecution to obtain a conviction for a more recent crime in order to create an aggravator for use in the capital trial on a prior murder.[58]

Third, a prior conviction of a violent felony that occurred when the defendant was a juvenile, if he was tried as an adult, can qualify as an aggravator to support a death sentence for a murder that occurred later when the defendant was an adult[59] even though juvenile offenders are not eligible for the death penalty.[60]

Additionally, in 1998 the legislature expanded the range of permissible evidence the prosecution can introduce relating to a prior violent felony conviction.[61] The 1998 amendment permits introduction of evidence "concerning the facts and circumstances of the prior

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[56] *Id.* at 899–905. Arguably the procedure by which the trial judge made the finding of violence to the person was modified by the court in *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006).

[57] *See* State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) ("[S]o long as a defendant is *convicted* of a violent felony *prior* to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable.").

[58] *See, e.g.*, State v. Nichols, 877 S.W.2d 722, 736 (Tenn. 1994) (affirming the use of a prior violent felony aggravator even where the prosecutor admitted that the defendant's multiple trials had been ordered in such a way as to create an additional aggravating circumstance).

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

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

[61] 1998 Tenn. Pub. Acts 915 (codified as amended at TENN. CODE ANN. § 39-13-204(c) (2014)).

conviction" to "be used by the jury in determining the weight to be accorded the aggravating factor."[62] The amendment gives the prosecution extremely broad license to use such evidence because "[s]uch evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party."[63]

B. (i)(5) Aggravator—Heinous, Atrocious, or Cruel

A murder defendant is eligible for the death penalty if "[t]he murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death"[64]—often referred to as the "HAC aggravator." Any murder, by definition, is a heinous crime that can evoke in a normal juror a strong, visceral negative reaction. In most premeditated murder cases the prosecution can allege the HAC aggravator. But under *Furman* and *Gregg*, most murder cases should not be eligible for capital punishment. The challenge is to create a meaningful, rational, and consistently applied distinction between first degree murder cases in general, all of which are "heinous" in some sense of the term, and the supposedly few murders that are "especially heinous, atrocious or cruel" justifying a death sentence, in order for this aggravator to serve the function of meaningfully narrowing the class of death eligible defendants.

What constitutes an "especially heinous, atrocious or cruel" murder is ultimately a subjective determination without clearly delineated criteria. In the early period following *Furman*, the United States Supreme Court

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[62] *Id.*
[63] *Id.*
[64] TENN. CODE ANN. § 39-13-204(c)(i)(5) (2014).

struck down similar kinds of aggravators as unconstitutionally vague.[65] The Tennessee Supreme Court responded to those cases by applying a "narrowing construction" of the statutory language, stipulating that the HAC aggravator is "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[66] In *Cone v. Bell*, a Sixth Circuit panel declared Tennessee's HAC aggravator to be unconstitutionally vague.[67] The Supreme Court, however, reversed the Sixth Circuit and upheld Tennessee's version based upon the narrowing construction.[68] Although the Supreme Court upheld Tennessee's HAC aggravator, it was a close call, and the criteria for its application remains subjective.

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

> The "especially heinous, atrocious[,] or cruel" aggravating

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

[66] State v. Dicks, 615 S.W.2d 126 (Tenn. 1981) (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); *accord* State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982). The Tennessee Supreme Court's narrowing construction included language purportedly defining the term "torturous." The Tennessee legislature followed suit by amending the language of the HAC aggravator to provide that it must involve "torture or serious physical abuse beyond that necessary to produce death." TENN. CODE ANN. § 39-13-204(c)(i)(5) (2014).

[67] Cone v. Bell, 359 F.3d 785, 794–97 (6th Cir. 2004), *rev'd per curiam*, 543 U.S. 447 (2005).

[68] *Bell*, 543 U.S. 447, 459–60.

> circumstance "may be proved under either of two prongs: torture or serious physical abuse." This [c]ourt has defined "torture" as the "infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." The phrase "serious physical abuse beyond that necessary to produce death," on the other hand, is "self-explanatory; the abuse must be physical rather than mental in nature." The "word 'serious' alludes to a matter of degree," and the term "abuse" is defined as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'"
>
> Our case law is clear that "[t]he anticipation of physical harm to oneself is torturous" so as to establish this aggravating circumstance. Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within the meaning of the statute.[69]

The court has also held that although the HAC aggravator now contains two prongs—"torture" or "serious physical abuse"—jurors "do not have to agree on which prong makes the murder 'especially heinous, atrocious, or cruel.'"[70]

The case of *State v. Rollins*[71] illustrates the broad scope of the court's definition of the HAC aggravator. The defendant was found guilty of stabbing the victim

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[69] State v. Keen, 31 S.W.3d 196, 206–07 (Tenn. 2000) (citations omitted).

[70] State v. Davidson, 509 S.W.3d 156, 219–20 (Tenn. 2016) (citing *Keen*, 31 S.W.3d at 208–09).

[71] State v. Rollins, 188 S.W.3d 553, 572 (Tenn. 2006).

multiple times.[72] In the guilt phase, the medical examiner testified to the cause of death, describing in detail the multiple stab wounds.[73] In the sentencing hearing, the medical examiner testified again, largely repeating his evocative guilt-phase testimony and further describing some of the stab wounds as "defensive," meaning that the victim was conscious and experienced physical and mental suffering during the assault.[74] According to the court, this evidence was sufficient to establish the HAC aggravator.[75] It follows that in any murder case in which the victim was aware of what was happening and/or suffered physical pain during the assault, it may be possible to find the existence of the HAC aggravator. Certainly, the prosecution can allege it in a wide range of cases. With the court's nebulous definition, it is difficult to see how the HAC aggravator meaningfully narrows the class of death eligible defendants.

C. (i)(6) Aggravator—Avoiding Arrest or Prosecution

The (i)(6) aggravator applies when "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another."[76] This aggravator can be alleged in any case in which the murder occurred during the commission of another crime, because in any such case the prosecution can argue that a motivating factor in the murder was to eliminate the victim as a witness. As with other aggravators, the Tennessee Supreme Court has broadly defined this aggravator.

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[72] *Id.* at 576.
[73] *Id.* at 572.
[74] *Id.*
[75] *Id.*
[76] TENN. CODE ANN. § 39-13-204(c)(i)(6) (2014).

Although this aggravator addresses the defendant's motivation, not much is required to prove it. While "[t]he defendant's desire to avoid arrest or prosecution must motivate the defendant to kill, [] it does not have to be the only motivation. Nor does it have to be the dominant motivation. The aggravating circumstance is not limited to the killings of eyewitnesses or those witnesses who know or can identify the defendant."[77]

As one scholar has explained, "When applied broadly to any victim who could have possibly identified the defendant, this aggravating circumstance applies to almost all murders, in violation of the narrowing principle."[78]

D. (i)(7) Aggravator—Felony Murder

Many murders are committed during the commission of another crime, and a "felony murder" can be prosecuted as first degree murder even if the defendant was not the assailant and lacked any intent to kill.[79] Also, a defendant who caused the victim's death during the commission of another felony can be guilty of felony murder even if the defendant neither premeditated nor intended the victim's death.[80] If the

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[77] PENNY J. WHITE, TENNESSEE CAPITAL CASE HANDBOOK, 15.40 (2010) (footnotes omitted) (citing State v. Ivy, 188 S.W.3d 132, 144 (Tenn. 2006); Terry v. State, 46 S.W.3d 147, 162 (Tenn. 2001); State v. Hall, 976 S.W.2d 121, 133 (Tenn. 1998); State v. Bush, 942 S.W.2d 489, 529 (Tenn. 1997) (Birch, C. J., dissenting); State v. Evans, 838 S.W.2d 185, 188 (Tenn. 1992)).
[78] *Id*. at 15.41.
[79] *See generally* TENN. CODE ANN. § 39-13-202(a) (2014) (listing the elements of first degree premeditated murder and first degree felony murder).
[80] State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013).

defendant is guilty of felony murder, then the prosecution can allege and potentially prove the (i)(7) aggravator. [81]

In the felony murder case of *State v. Middlebrooks*, the court invalidated the earlier version of this aggravator, because there was no distinction between the elements of the crime of felony murder and the felony murder aggravator.[82] The Court held that in such a case, the felony murder aggravator was unconstitutional because, by merely duplicating the elements of the underlying felony murder, it did not sufficiently narrow the class of death eligible defendants.[83]

The legislature responded by amending the statute in 1995 to add two elements to the felony murder aggravator: that the murder was "knowingly" committed, solicited, directed, or aided by the defendant; and that the defendant had a "substantial role" in the underlying felony while the murder was committed.[84] In *State v. Banks*, the court upheld the amended felony murder aggravator because its elements did not merely duplicate the elements of felony murder, and therefore, according to the court, the aggravator satisfied the constitutional requirement to narrow the class of death eligible defendants.[85]

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[81] The other felonies that support this aggravator are "first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb" TENN. CODE ANN. § 39-13-204(i)(7) (2011).

[82] State v. Middlebrooks, 840 S.W.2d 317, 341 (Tenn. 1992), *superseded by statute*, 1995 Tenn. Pub. Acts 377 (codified as amended at TENN. CODE ANN. § 39-13-204(i)(7) (2011)).

[83] *Id.* at 323.

[84] TENN. CODE ANN. § 39-13-204(i)(7) (2014).

[85] State v. Banks, 271 S.W.3d 90, 152 (Tenn. 2008); *see also* State v. Robinson, 146 S.W.3d 469, 501 (Tenn. 2004) (upholding felony murder aggravator when the defendant did not kill the victim); Carter v. State, 958 S.W.2d 620, 624 (Tenn. 1997) (upholding the aggravator when defendant was charged

Although the legislature amended the (i)(7) felony murder aggravator in response to the *Middlebrooks* problem, it is not clear how this amendment created a practical difference in the statutory definition. The "knowing" and "substantial role" elements in the amended statute are relatively easy to prove and potentially could apply to virtually every felony murder, and these elements do not effectively perform a narrowing function.[86]

* * * *

Because the court and legislature have expanded the number and meaning of aggravating circumstances that could support a death sentence, we submit that a large majority of first degree murder cases are now death-eligible. It is hard to imagine a case in which the prosecution could not allege and potentially prove the existence of an aggravator. With this development, it is especially significant that, as discussed in Part VI below, Tennessee has experienced a sharp decline in sustained death sentences over the past ten to twenty years, notwithstanding the availability of death as a sentencing option in a larger number of first degree murder cases. This not only implicates the problem of arbitrariness, it also strongly indicates that Tennessee's evolving standard of decency is moving away from the death penalty.

IV. Comparative Proportionality Review and Rule 12

with both premeditated and felony murder relating to the same murder).

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

Another important development in Tennessee's death penalty jurisprudence has been the evisceration of any kind of meaningful "comparative proportionality review"[87] of death sentences by the Tennessee Supreme Court.

As noted above, in an effort to protect against the "arbitrary and capricious" imposition of the death penalty, and following Georgia's lead, the Tennessee scheme requires the Tennessee Supreme Court to conduct a "comparative proportionality review" in every capital case.[88] Section 39-13-206(c)(1)(D) of the Tennessee Code Annotated provides that the court shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[89] According to the court, the statute's purpose is to ensure "rationality and consistency in the imposition of the death penalty."[90] Justice Aldolpho A. Birch, Jr., explained:

> The principle underlying comparative proportionality review is that it is unjust to impose a death sentence upon one defendant when other defendants, convicted of similar crimes with similar facts, receive sentences of life imprisonment (with or without parole). . . . Thus, proportionality review serves a crucial role as an "additional safeguard

[87] TENN. CODE ANN. § 39-13-206(c)(1)(D) (2014).
[88] *Id*.
[89] *Id.*
[90] *See*, *e.g.*, State v. Barber, 753 S.W.2d 659, 665–66 (Tenn. 1988).

> against arbitrary or capricious sentencing."[91]

This follows from the principle that a state's "capital sentencing scheme '. . . must reasonably justify the imposition of a more severe sentence on the defendant *compared to others found guilty of murder*.'"[92]

To facilitate comparative proportionality review, the Court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47) in 1978, requiring that "in all cases . . . in which the defendant is convicted of first[ ]degree murder," the trial judge shall complete and file so-called Rule 12 reports to include information about each of the cases.[93] Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review in capital cases. In *State v. Adkins*, the court stated that "our proportionality review of death penalty cases . . . has been predicated largely on those reports *and has never been limited to the cases that have come before us on appeal*."[94] On January 1, 1999, the court issued a press release announcing the use of CD-ROMs to store copies of

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[91] State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001) (Birch, J., concurring in part and dissenting in part) (quoting State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997)).

[92] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)) (emphasis added).

[93] TENN. SUP. CT. R. 12. As of November 27, 2017, the Rule 12 report included 76 detailed questions plus sub-questions divided into six parts, as follows: A. Data Concerning the Trial of the Offense (12 questions); B. Data Concerning the Defendant (18 questions); C. Data Concerning Victim, Co-Defendants, and Accomplices (15 questions); D. Representation of the Defendant (13 questions); E. General Considerations (8 questions); and F. Chronology of Case (10 questions). Additionally, the prosecutor and the defense attorney are given the opportunity to submit comments to be appended to the report. *Id.*

[94] State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987) (emphasis added).

Rule 12 forms, in which then-Chief Justice Riley Anderson was quoted as saying, "The court's primary interest in the database is for comparative proportionality review in [capital] cases, which is required by court rule and state law[.] . . . The [Tennessee] Supreme Court reviews the data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process."[95]

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

Under this concept of arbitrariness, Rule 12 data collection can make sense. By gathering and analyzing this kind of data, we can begin to see statistically whether our judicial system is consistently and reliably applying appropriate criteria or standards for selecting only the "worst of the bad" defendants for capital punishment,[96] or whether there are other inappropriate criteria (such as race, poverty, geographic location, prosecutorial whim, or other factors) that play an untoward influence in capital sentencing decisions.

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[95] Press Release, Tenn. Admin. Office of the Courts, Court Provides High-Tech Tool for Legal Research in Murder Cases (Jan. 1, 1999), http://tncourts.gov/press/1999/01/01/court-provides-high-tech-tool-legal-research-murder-cases [https://perma.cc/WQH4-KY65].

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

Unfortunately, the history of the court's comparative proportionality review, and of Rule 12, has been problematic.[97] Rule 12 data has rarely, if ever, entered into the court's comparative proportionality analysis. There was no effort by the court or any other public agency to organize or quantify Rule 12 data in any comprehensive way. All we have now are CD-ROMs with copies of more than a thousand Rule 12 reports that have been filed, with no indices, summaries, or sorting of information. There exist no reported Tennessee appellate court opinions that cite or use any statistical data compiled from the Rule 12 reports. And perhaps most significantly, in close to one-half of first degree murder cases, trial judges have failed to file Rule 12 reports, leaving a huge gap in the data.[98]

In the 1990s, Tennessee Supreme Court Justices Lyle Reid[99] and Adolpho A. Birch, Jr.[100] began dissenting from the court's decisions affirming death sentences because of what they perceived to be inadequate comparative proportionality review. Justice Reid criticized the majority for conducting comparative

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[97] In only one case has the Tennessee Supreme Court set aside a death sentence based on comparative proportionality review. *See* State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001).

[98] *See* discussion *infra* Part VI; *see also infra* Appendix 1.

[99] Justice Reid retired from the bench in 1998. Press Release, Tenn. Admin. Office of the Courts, Retired Chief Justice Reid's Portrait Unveiled at Jackson Supreme Court Building (Sept. 22, 2014), http://www.tncourts.gov/news/2014/09/22/retired-chief-justice-reids-portrait-unveiled-jackson-supreme-court-building [https://perma.cc/BJV4-UFFL].

[100] Justice Birch retired from the bench in 2006. Press Release, Tenn. Admin. Office of the Courts, Justice Adolpho A. Birch, Jr., to Retire After 43 Years of Judicial Service (Jan. 26, 2006), http://www.tncourts.gov/press/2006/01/26/justice-adolpho-birch-jr-retire-after-43-years-judicial-service [https://perma.cc/45RS-XA7R].

proportionality review "absen[t] a structured review process."[101]

Then in 1997, the court decided *State v. Bland*, which dramatically changed the court's purported methodology for conducting a comparative proportionality review.[102] Among other things, the court narrowed the pool of cases to be compared in the analysis. Under *Bland*, the court now compares the capital case under review only with other capital cases it has previously reviewed, and not with the broader pool of all first degree murder cases, including those that resulted in sentences of life or life without parole.[103] Justices Reid and Birch dissented in *Bland*. Justice Reid repeated his earlier complaints that the court's comparative proportionality review analysis lacks proper standards.[104] Justice Birch agreed with Justice Reid and further dissented from the court's decision to narrow the pool of cases to be considered.[105] Thereafter, Justice Birch repeatedly dissented from the court's decisions affirming death sentences, on the ground that the court's comparative proportionality analysis was essentially

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

[102] State v. Bland, 958 S.W.2d 651, 665 (Tenn. 1997).

[103] *Id.*

[104] *Id.* at 674–79 (Reid, J., dissenting).

[105] *Id.* at 679 (Birch, J., dissenting). Because of the meaningless of the court's comparative proportionality analysis, Justice Birch consistently dissented when the court affirmed death sentences. *See*, *e.g.*, State v. Leach, 148 S.W.3d 42, 69 (Tenn. 2004) (Birch, J., concurring and dissenting) ("I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in *State v. Bland*. As previously discussed, I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.") (citations omitted).

meaningless.[106] Justice Birch stated: "I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective."[107]

In the 2014 decision of *State v. Pruitt*, Justices William C. Koch, Jr.,[108] and Sharon G. Lee dissented from the court's comparative proportionality methodology.[109] Justice Koch pointed out the problems with *Bland* as follows:

> [T]he *Bland* majority then changed the proportionality analysis in a way that deviates not only from the language of Tenn. Code Ann. § 39-13-206(c)(1)(D) but also from the relevant decisions of the United States Supreme Court. Three prominent features of the *State v. Bland* analysis illustrate the difficulties with this change in approach.
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> First, the [c]ourt narrowed the pool of cases to be considered in a proportionality analysis. Rather than considering all cases that resulted in a conviction for first[ ]degree murder (as the [c]ourt had done from 1977 to 1997), the [c]ourt limited the

[106] *See* State v. Davis, 141 S.W.3d 600, 632–33 (Tenn. 2004) (Birch, J., concurring and dissenting). In this case, Justice Birch presented a list of such cases.
[107] *Id*. at 633.
[108] Justice Koch retired from the bench in July 2014. Press Release, Tenn. Admin. Office of the Courts, Supreme Court Justice Koch Announces Retirement to Become Dean at Nashville School of Law (Dec. 19, 2013), https://www.tncourts.gov/news/2013/12/19/supreme-court-justice-koch-announces-retirement-become-dean-nashville-school-law [https://perma.cc/GQM5-7ZDN].
[109] State v. Pruitt, 415 S.W.3d 180, 223 (Tenn. 2013) (Koch, J., concurring and dissenting).

pool to "only those cases in which a capital sentencing hearing was actually conducted . . . regardless of the sentence actually imposed." By narrowly construing "similar cases" in Tenn. Code Ann. § 39-13-206(c)(1)(D), the [c]ourt limited proportionality review to only a small subset of Tennessee's murder cases—the small minority of cases in which a prosecutor actually sought the death penalty.

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

The third limiting feature of the *State v. Bland* analysis is the seeming conflation of the consideration of the circumstances in Tenn. Code Ann. § 39-13-206(c)(1)(B) and Tenn. Code Ann. § 39-13-206(c)(1)(C) with the circumstance in Tenn. Code Ann. § 39-13-206(c)(1)(D). When reviewing a sentence of death for first[ ]degree murder, the courts must separately address whether "[t]he evidence supports the jury's finding of statutory

> aggravating circumstance or circumstances;" whether "[t]he evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances;" and whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."
>
> As applied since 1997, *State v. Bland* has tipped the scales in favor of focusing on the evidentiary support for the aggravating circumstances found by the jury and on whether these circumstances outweigh the mitigating circumstances. Instead of independently addressing the evidence regarding "the nature of the crime and the defendant," *Bland*'s analysis has prompted reviewing courts to uphold a death sentence as long as the evidence substantiates the aggravating circumstance or circumstances found by the jury, as well as the jury's decision that the aggravating circumstance or circumstances outweigh any mitigating circumstances.[110]

In an earlier case, Justice Birch pointedly summarized the problem with the court's comparative proportionality jurisprudence: "Because our current comparative proportionality review system lacks objective standards, comparative proportionality analysis seems to be little more than a 'rubber stamp' to

[110] *Id*. at 227–28 (footnotes omitted) (citations omitted).

affirm whatever decision the jury reaches at the trial level."[111]

V. Simplifying the Lottery: A Tale of Two Cases

As the legislature and the court have expanded the opportunity for arbitrariness by expanding the class of death eligible defendants, and as the court has removed a check against arbitrariness by declining to conduct meaningful comparative proportionality review, it is time to ask how Tennessee's capital punishment system operates in fact. Returning to the lottery scenario, let us simplify the problem by considering just two cases and asking two questions: (i) which of the two cases is more deserving of capital punishment? and, (ii) which of the two cases actually resulted in a death sentence?[112]

A. Case #1

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

Both of the defendants had previously served time in jail or prison. When one of the defendants was released from prison, the two of them got together and dealt drugs

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

[112] The description of Case #1 is a summary of the facts described during the direct appeal, State v. Moss, No. M2014-00746-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 709 (Tenn. Crim. App. Sept. 21, 2016) *perm app. denied*, 2017 Tenn. LEXIS 70 (Tenn. Jan. 19, 2017), and the denial of post-conviction relief, Burrell v. State, No. M2015-02115-CCA-R3-PC, 2017 Tenn. Crim. App. LEXIS 176 (Tenn. Crim. App. Mar. 9, 2017). The description of Case #2 is a summary of the facts described in State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013)

including marijuana, cocaine, crack cocaine, and pills. Their drug business was successful, progressing from selling to "crack heads" and addicts to selling to other dealers. One of the defendants, the apparent leader of the two, was described as intelligent.

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

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

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

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

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

B. Case #2

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

The defendant had prior convictions for aggravated burglary, robbery, criminal intent to commit robbery, and theft over $500. His I.Q. was tested at 66 and 68, which was within the intellectual disability range, but the court found that he was not sufficiently deficient in adaptive behavior to meet the legal definition of intellectual disability that would have exempted him from the death penalty.[113]

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

[113] *See* TENN. CODE ANN. § 39-13-203 (2014); Atkins v. Virginia, 536 U.S. 304 (2002) (disqualifying the intellectually disabled from the death penalty).

including brain trauma, fractured bones, and internal bleeding. The defendant slammed the car door and drove away. The man was taken to the hospital where he died of his head injuries the following day.

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

C. Analysis

We submit that the majority of persons presented with these two case scenarios, without any further information about the operation of Tennessee's death penalty system, would choose Case #1 as the more appropriate and likely candidate for the death penalty. In fact, however, in Case #1 neither defendant received a death sentence—one received six consecutive life sentences,[114] and the other received four concurrent and two consecutive life sentences.[115] On the other hand, the defendant in Case #2, who did not premeditate or intend the victim's death, was sentenced to death.[116]

These cases are not comparable. How could the single felony murder case result in a death sentence while the premeditated multi-murder case resulted in life sentences? They are both fairly recent cases. The multi-victim premeditated murder case was in a rural county in the Middle Grand Division of the state, where no death sentences have been imposed since 2001. By contrast, the single-victim felony murder case, involving a borderline intellectually disabled defendant, was in Shelby County

[114] *Moss*, 2016 Tenn. Crim. App. LEXIS 709, at *1.
[115] *Burrell*, 2017 Tenn. Crim. App. LEXIS 176, at *1.
[116] *Pruitt*, 415 S.W.3d at 186.

which has accounted for 52% of all new Tennessee death sentences since mid-2001, of which 86% involved black defendants.[117] These may not be the only factors that could explain the disparity between these cases, but they stand out.

These cases may represent an extreme comparison—although 90% of all multi-murder cases resulted in life or LWOP sentences[118]—but this comparison most clearly illustrates a problem with our death penalty system. Geographic location, differing prosecutorial attitudes, and the prejudicial influences of defendants' mental impairments are arbitrary factors that, along with other arbitrary factors discussed below, too often determine the application of capital punishment. In the next part, we review Mr. Miller's survey of first degree murder cases since 1977, which we believe supports the proposition that arbitrariness permeates the entire system.

VI. Mr. Miller's Survey of First Degree Murder Cases

A. The Survey Process

Given the Tennessee Supreme Court's abandonment of the original purpose behind Rule 12 data collection, how can we systematically evaluate the manner by which Tennessee has selected, out of more than 2,500 convicted first degree murderers, only 86 defendants to sentence to death—and only 6 defendants to execute—during the 40 years the system has been in place? Is there a meaningful distinction between death-sentenced and life-sentenced defendants? Are we imposing the death penalty only upon those criminals who are the "worst of the bad"? Does our system meet the

[117] *See infra* Appendix 1.
[118] *See infra* Appendix 1.

constitutional demand for heightened reliability, consistency, and fairness? Or is our system governed by arbitrary factors that should not enter into the sentencing decision?

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

Mr. Miller began his survey by reviewing the filed Rule 12 reports. He soon discovered, however, that in close to one-half of first degree murder cases, trial judges failed to file Rule 12 reports—and for those cases, there is no centralized data collection system. Further, many of the filed Rule 12 reports were incomplete or contained errors.[119]

Mr. Miller found that Rule 12 reports were filed in 1,348 adult first degree murder cases. He identified an additional 1,166 first degree murder cases for which Rule 12 reports were not filed, bringing the total of adult first degree murder cases that he has been able to find to 2,514.[120] Thus, trial judges failed to comply with Rule 12

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[119] OFFICE OF RESEARCH, TENN. COMPTROLLER OF THE TREASURY, TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES (2004) https://deathpenaltyinfo.org/documents/deathpenalty.pdf [https://perma.cc/3RDX-VCUT]. In 2004, the Tennessee Comptroller of the Treasury noted: "Office of Research staff identified a considerable number of cases where defendants convicted of first[ ]degree murder did not have a Rule 12 report, as required by law. . . . Rule 12 reports are paper documents, which are scanned and maintained on CD-ROM. The format does not permit data analysis." *Id.* at 46–47. The situation with Rule 12 reports has not improved since the Comptroller's report.

[120] There undoubtedly exist additional first degree murder cases for which Rule 12 reports were not filed and that Mr. Miller did not find. For example, some cases are settled at the

in at least 46% of adult first degree murder cases.[121] This astounding statistic is perhaps explainable by the fact that Rule 12 data has never been used by the court in a meaningful way and has become virtually obsolete since *Bland v. State*[122] when the Tennessee Supreme Court decided to limit its comparative proportionality review only to other capital cases that it had previously reviewed.[123]

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

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

[121] *See infra* Appendix 1. The Rule 12 noncompliance rate is 50% in juvenile first degree murder cases.

[122] *See supra* notes 102–105, and accompanying text.

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

Administrative Office of the Courts reports, and original court records, among other sources.

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

B. Factors Contributing to Arbitrariness

Mr. Miller's survey reveals that Tennessee's capital sentencing scheme fails to fulfill *Furman*'s basic requirement to avoid arbitrariness in imposing the ultimate penalty. Capital sentencing in Tennessee is not "regularized" or "rationalized." The statistics and the experiences of attorneys who practice in this area demonstrate a number of factors that contribute to system's capriciousness.

1. Infrequency and Downward Trend

As stated previously, frequency of application is the most important factor in assessing the constitutionality of the death penalty. As the death penalty becomes less frequently applied, there is an increased chance that capital punishment becomes "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[124] Infrequency of application sets the foundation for analysis of the system.

Since July 1, 1977, only 192 defendants received death sentences among the 2,514 Tennessee defendants who were convicted of first degree murder. Among those 192 defendants, only 86 defendants' death sentences

[124] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

have been sustained as of June 30, 2017, while the death sentences imposed on 106 defendants have been vacated or reversed. Accordingly, over the span of the past 40 years only approximately 3.4% of convicted first degree murderers have received sustained death sentences—and most of those cases are still under review. Of those 86 defendants whose death sentences have been sustained, only six were actually executed, representing less than 0.2% of all first degree murder cases—or less than one out of every 400 cases. In other words, the probability that a defendant who commits first degree murder is arrested, found guilty, sentenced to death, and executed is miniscule. Even if Tennessee were to hurriedly execute the approximately dozen death row defendants who are currently eligible for execution dates,[125] the percentage of executed defendants as compared to all first degree murder cases would remain extremely small.

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

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[125] Tennessee Supreme Court Rule 12.4 provides that an execution date will not be set until the defendant's case has completed the "standard three tiers" of review (direct appeal, post-conviction, and federal habeas corpus), which occurs when the defendant's initial habeas corpus proceeding has run its full course through the U.S. Supreme Court. The Tennessee Administrative Office of the Courts lists eleven "capital cases that have, at one point, neared their execution date." *Capital Cases*, TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, http://www.tsc.state.tn.us/media/capital-cases [https://perma.cc/QD4Y-929R]. At the time of publication, execution dates had been set to occur in the latter part of 2018 in three cases: Billy Ray Irick (on death row for close to 32 years), Edmund Zagorski (on death row for over 34 years), and David Earl Miller (on death row for close to 37 years).

Table 1: Frequency of Tennessee Death Sentences in 4-Year Increments

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[126]	Ave. New Death Sentences per Year	1st Degree Murder Cases[127]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25/year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25/year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00/year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25/year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45/year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00/year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00/year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00/year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50/year	284	2%	1.7%
7/1/13– 6/30/17	3	1	1	0.25/year	Incomplete Data[128]	Incomplete Data	Incomplete Data

[126] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.
[127] Counted by defendants, not murder victims.
[128] Thus far Mr. Miller has found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years.

TOTALS	**221**	**195**[129]	**89**[130]	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

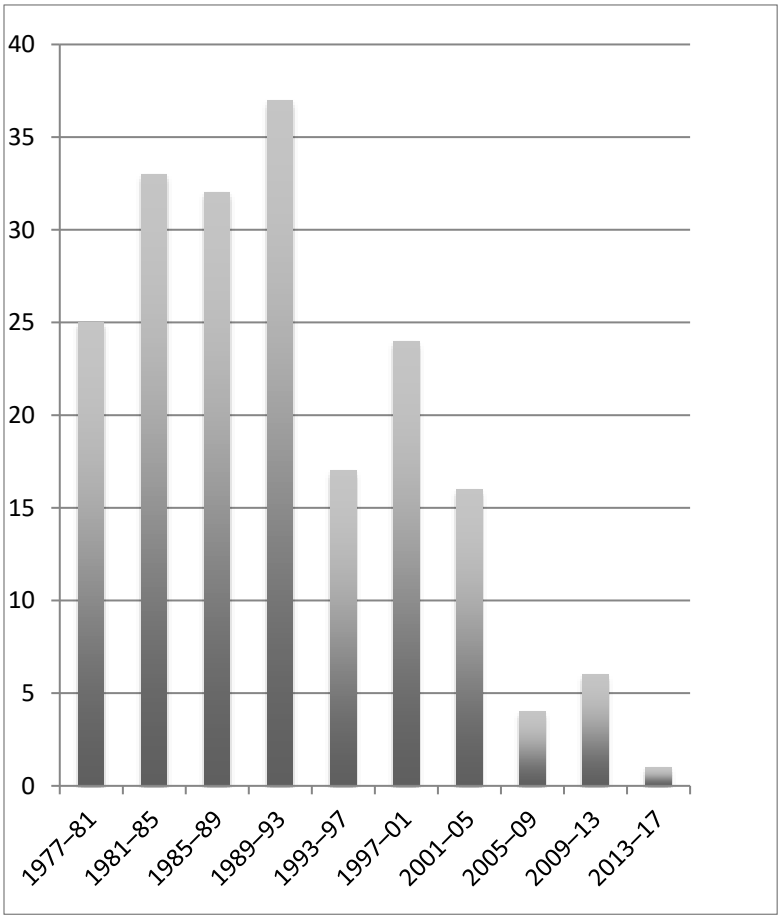
Graph of New Death Sentences[131] **in Tennessee by 4-Year Increments**

According to Tennessee Bureau of Investigation statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See infra* Appendix 1, Table 25.

[129] One defendant had three separate "new" trials each resulting in "new" and "sustained" death sentences, while another defendant had two such trials. *See* Furman v. Georgia, 408 U.S. 238 (1972). Accordingly, there were 195 "new" trials involving a total of 192 defendants and 89 "sustained" death sentences involving a total of 86 defendants.

[130] *See supra* note 128. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

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



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

Nashville-Davidson County and 40 other counties, representing more than one-third of the state's population).[132]

Mr. Miller broke down the statistics into two groups—cases originally tried during the first 24 years, before June 30, 2001, and those originally tried during the most recent 16 years, through June 30, 2017. Mr. Miller used 2001 as a dividing line because it was during the period leading up to that year when Tennessee began experiencing its steep decline in the frequency of new death sentences. Also, 2001 was the year when the Office of the District Attorney General for Davidson County issued its Death Penalty Guidelines,[133] setting forth the procedure and criteria that the Office would use in determining when to seek a death sentence.

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

At this level of infrequency, it is impossible to conceive how Tennessee's death penalty system is serving any legitimate penological purpose. No

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[132] *See infra* Appendix 2. In April 2018, which falls outside the timeframe of Mr. Miller's survey, a new death sentence was imposed in Madison County on defendant Urshawn Miller. At the time of publication, this case was still in the trial court pending an expected motion for new trial. As of the date of this article, this is the only new death sentence in Tennessee since June 2014.

[133] OFFICE OF THE DIST. ATT'Y GEN. FOR THE 20TH JUDICIAL DIST. OF TENN., DEATH PENALTY GUIDELINES (Oct. 18, 2001) (On file with authors). The current Davidson County District Attorney confirmed to one of the authors that the guidelines remain in effect. Based on our inquiries, no other district attorney general office has adopted written guidelines or standards for deciding when to seek death.

reasonable scholar could maintain that there is any deterrence value to the death penalty when it is imposed with such infrequency.[134] There is minimal retributive value when the overwhelming percentage of first degree murder cases (now more than 98%) end up with life or LWOP.[135] Any residual deterrent or retributive value in Tennessee's sentencing system is further diluted to the point of non-existence by the other factors of arbitrariness listed below. As Justice White stated in *Furman*, "[T]he death penalty could so seldom be

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[134] Although a small minority of studies have purported to document a deterrent effect, none have documented such an effect in a state like Tennessee where the vast majority of defendants get life or LWOP sentences, and where those who do receive death sentences long survive their sentencing date, usually until they die of natural causes, and are rarely executed. In fact, "the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate." Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 CONN. L. REV. 765, 768 (2001); *see also* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper Eds., 2012) ("[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.").

[135] The role of retribution in our criminal justice system is a debatable issue. *See* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law."). Over time, "our society has moved away from public and painful retribution toward ever more humane forms of punishment." Baze v. Rees, 553 U.S. 35, 80 (2008) (Stevens, J., concurring). The United States Supreme Court has cautioned that, of the valid justifications for punishment, "retribution . . . most often can contradict the law's own ends. This is of particular concern . . . in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[136]

The decline in the frequency of new death sentences in Tennessee also evidences Tennessee's evolved standard of decency away from capital punishment. As further explained below, in the vast majority of Tennessee counties, including all counties within the Middle Grand Division, the death penalty is essentially dead.[137]

2. Geographic Disparity

Death sentences are not evenly distributed throughout the state. Whether it is a function of differing crime rates, political environment, racial tensions, the attitude of prosecutors, the availability of resources, the competency of defense counsel, or the characteristics of typical juries, a few counties have zealously pursued the death penalty in the past, while others have avoided it altogether. Over the 40-year period, only 48 of Tennessee's 95 counties (roughly one-half) have conducted trials resulting in death sentences,[138] but as indicated above, the majority of death sentences were reversed or vacated. More significantly, only 28 counties, representing 64% of Tennessee's population, have imposed sustained death sentences;[139] since 2001, only eight counties, representing just 34% of Tennessee's

[136] Furman v. Georgia, 408 U.S. 238, 311 (1972).
[137] The decline in new death sentences in Tennessee mirrors a nationwide trend. According to the Death Penalty Information Center, the nationwide number of death sentences has declined from a total of 295 in 1998 to a total of just 31 in 2016—a 90% decline. *See* Death Penalty Info. Ctr., *Facts About the Death Penalty*, https://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/HU36-8PC5].
[138] *See infra* Appendix 2.
[139] *See infra* Appendix 1, Table 21.

population, have imposed sustained death sentences.[140] In the most recent five-year period, from July 1, 2012, to June 30, 2017, Shelby County was the only county to impose death sentences.

The decline in the number of counties resorting to the death penalty is illustrated by the following table taken from Mr. Miller's report, which gives the number of counties that conducted capital trials (i.e., trials resulting in death sentences) during each of the ten 4-year increments during the 40-year period:[141]

4-Year Period	**Number of Counties Conducting Capital Trials[142] During the Indicated 4-Year Period**
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11

[140] *Id*. at Table 22. *See also infra* Appendix 2.
[141] *Id*. at Table 24.
[142] These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.

7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

It is costly to maintain a capital punishment system.[143] As the number of counties that impose the death penalty declines, an increasing majority of Tennessee's taxpayers are subsidizing the system that is not being used on their behalf, but instead is being used only by a diminishingly small number of Tennessee's counties.

Shelby County stands at one end of the spectrum. Since 1977, it has accounted for 37% of all sustained death sentences; over the past 10 years, it has accounted for 57% of Tennessee death sentences during that period; and, as mentioned above, it has accounted for all of Tennessee's death sentences during the most recent 5-year period.[144]

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County

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[143] There has been no study of the costs of Tennessee's system. *See* OFFICE OF RESEARCH, TENN. COMPTROLLER OF THE TREASURY, *supra* note 119, at i–iv (concluding that capital cases are substantially more expensive than non-capital cases, but itemizing reasons why the Comptroller was unable to determine the total cost of Tennessee's capital punishment system). Studies from other states, however, have concluded that maintaining a death penalty system is quite expensive, costing millions of dollars per year. For a general discussion of costs, see BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE, 95–100 (2017) (citing studies from several states). *See also Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/costs-death-penalty [https://perma.cc/AY2D-PMNB].

[144] *See infra* Appendix 2 at 244. This does not account for the most recent new death sentence in Tennessee that was imposed in Madison County in April 2018, which was outside the timeframe of Mr. Miller's survey. *See supra* note 132.

over the past 39 years, there have been ten first-degree murder cases involving eleven defendants and 22 victims (an average of 2.2 victims per case). No death sentences were imposed, even in two mass murder cases. For example, in the recent case of *State v. Moss*, discussed in Part V above, the defendant and his co-defendant were each convicted of six counts of first degree premeditated murder; the murders were egregious; but the defendants received life sentences, not death.[145] According to the Rule 12 reports, in another Lincoln County case, *State v. Jacob Shaffer*, on July 22, 2011, the defendant, who had committed a prior murder in Alabama, was convicted of five counts of first degree murder and was sentenced to LWOP, not death.[146]

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

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

3. Timing and Natural Death

To the consternation of many, capital cases take years to work through the three tiers of review—from

[145]State v. Moss, No. M2014-00746-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 709 (Tenn. Crim. App. Sept. 21, 2016) *perm app. denied,* 2017 Tenn. LEXIS 70 (Tenn. Jan. 19, 2017).

[146] *See* Claire Aiello, *Jacob Shaffer Pleads Guilty to Madison County Murder*, WHNT 19 NEWS (March 8, 2013, 1:27 PM), http://whnt.com/2013/03/08/shaffer-pleads-guilty-madison-county-murder/ [https://perma.cc/AUS6-3XJ2].

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

As of June 30, 2017, among the 56 surviving defendants on death row, the average length of time they had lived on death row was more than 21 years, and this average is increasing as the death row population ages while fewer new defendants are entering the population.[147] Only ten new defendants were placed on death row during the most recent ten years, equal in number to the ten surviving defendants who had been on death row for over 30 years. One surviving defendant had been on death row for more than 35 years. Mr. Miller's Report breaks down the surviving defendants' length of time on death row as follows:[148]

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

[147] *See infra* Appendix 1, Table 20.
[148] *Id.*

< 10 Years	10

Of the six whom Tennessee has executed, their average length of time on death row was 20 years, and one had been on death row for close to 29 years.[149]

The length of time defendants serve on death row facing possible execution further diminishes any arguable penological purpose in capital punishment to the point of nothingness. With the passage of time, the force of deterrence disappears, and the meaning of retribution is lost.[150]

Moreover, during the 40-year period, 24 condemned defendants died of natural causes on death row. This means that, so far at least, a defendant with a sustained death sentence is four times more likely to die of natural causes than from an execution. Even if Tennessee hurriedly executes the approximately dozen death-sentenced defendants who have completed their "three tiers" of review,[151] with the constantly aging death row population the number of natural deaths will continue to substantially exceed deaths by execution.

Given the way the system operates, a high percentage of natural deaths among the death row

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

[150] *See* Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J., respecting denial of certiorari) (dissenting from the denial immediately before Tennessee's execution of Cecil Johnson, who had been on death row for close to 29 years: "[D]elaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death.") (quoting *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (200) (Stevens, J., respecting denial of certiorari)).

[151] *See* TENN. SUP. CT. R. 12.4(A) (describing the "standard three-tier appeals process" in capital cases to include trial and direct appeal, state post-conviction proceedings, and federal habeas corpus).

population is an actuarial fact affecting the carrying out of the death penalty. Consequently, the timing of a case during the 40-year period, along with the health of the defendant, is an arbitrary factor determining not only whether a defendant will be sentenced to death, but also whether he will ever be executed. Furthermore, if a death-sentenced defendant is four times more likely to die of natural causes than by execution, then the death penalty loses any possible deterrent or retributive effect for that reason as well.

4. Error Rates

Of the 192 Tennessee defendants who received death sentences during the 40-year period, 106 defendants had seen their sentences or convictions vacated because of trial error, and only 86 defendants had sustained death sentences (of whom 56 were still living as of June 30, 2017)—and most of their cases are still under review.[152] This means that during the 40-year period the death sentence reversal rate was 55%. Among those reversals, three defendants were exonerated of the crime, and a fourth was released upon the strength of new evidence that he was actually innocent.[153]

If 55% of General Motors automobiles over the past 40 years had to be recalled because of manufacturing defects, consumers and shareholders would be outraged, the government would investigate, and the company certainly would go out of business. One of the fundamental principles under the Eighth Amendment is

[152] *See infra* Appendix 1 at 213. During the 40-year period, 24 defendants died of natural causes while their death sentences were pending. These are counted as "sustained" death sentences, along with the six defendants who were executed and the 56 defendants on death row as of June 30, 2017.
[153] *Id.*

that our death penalty system must be reliable.[154] With a 55% reversal rate, reliability is lacking.

The existence of error in capital cases and the prospect of reversal is a random factor that introduces a substantial element of arbitrariness into the system. Two causes of error—ineffective assistance of counsel and prosecutorial misconduct—are discussed below.[155]

5. Quality of Defense Representation

We have identified 45 defendants whose death sentences or convictions were vacated by state or federal courts on grounds of ineffective assistance of counsel.[156] In other words, courts have found that 23% of the Tennessee defendants sentenced to death were deprived of their constitutional right to effective legal representation. This is an astounding figure, especially given the difficulty in proving both the "deficiency" and "prejudice" prongs under the *Strickland* standard for determining ineffective assistance of counsel under the Sixth Amendment.[157] In two additional cases affirmed by

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

[155] Other reversible errors have included unconstitutional aggravators, erroneous evidentiary rulings, improper jury instructions, and insufficient evidence to support the verdict among other grounds for reversals. *See* THE TENN. JUSTICE PROJECT, TENNESSEE DEATH PENALTY CASES SINCE 1977 (June 15, 2008) (on file with authors).

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

[157] Strickland v. Washington, 466 U.S. 668, 689 (1984). The difficulty of proving ineffective assistance of counsel is embodied in the following oft-quoted passage from *Strickland*: "Judicial scrutiny of counsel's performance must be highly deferential. Because of the difficulties inherent in making the

the courts, Tennessee Governor Phil Bredesen commuted the death sentences based, in part, on his determination that the defendants suffered from "grossly inadequate defense representation" at trial and/or during the post-conviction process.[158] These are findings of legal malpractice.[159] If a law firm were judicially found to have committed malpractice in more than 23% of their cases over the past 40 years, the firm would incur substantial liability and dissolve. How can we tolerate a capital punishment system that yields these results?

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

> There is a strongly held belief in the legal community that attorneys do not receive reasonable compensation when representing clients as counsel appointed by the State. The Task Force was repeatedly reminded that, in almost every trial situation, the attorney for the

evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.*

[158] *See infra* Appendix 1 at 214.

[159] There are additional capital cases in which courts have vacated death sentences on grounds of ineffective assistance of counsel, only to be reversed on appeal. *See*, *e.g.*, Morris v. Carpenter, 802 F.3d 825, 828 (6th Cir. 2015) (reversing by applying a strict standard of reviewing state court decisions); Abdur'Rahman v. Bell, 226 F.3d 696, 698 (6th Cir. 2000) (affirming a finding of deficient performance, but reversing on the prejudice prong). These cases illustrate differing judicial viewpoints on capital punishment, which is another arbitrary factor discussed below.

> defendant will be paid less than every other person with the trial associated in a professional capacity—less than the testifying experts, the investigators, and interpreters.
>
> Attorneys and judges from across the state, in a variety of different roles and stages of their careers, as well as other officials and experts in the field were overwhelmingly in favor of increasing the compensation for attorneys in appointed cases. Concern regarding compensation is not new.[160]

According to the Task Force, there is a general consensus among lawyers and judges that "the current rates for paying certain experts . . . are below market rate."[161]

Virtually all defendants in capital cases are indigent and must rely upon appointed counsel for their defense.[162] A typical capital defendant has no role in choosing the defense attorneys who will represent him. Capital cases are unique in many respects and place peculiar demands on the defense: mitigation investigation, extensive use of experts, "death qualification" and "life qualification" in jury selection, and the sentencing phase of trial—the only kind of trial in the Tennessee criminal justice system in which a jury makes the sentencing decision. Thus, capital defense representation is regarded as a highly specialized area of

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[160] INDIGENT REPRESENTATION TASK FORCE, LIBERTY & JUSTICE FOR ALL: PROVIDING RIGHT TO COUNSEL SERVICES IN TENNESSEE 35 (2017) [hereinafter "Task Force Report"], http://tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf [https://perma.cc/ZU4N-5QUZ].

[161] *Id.* at 52.

[162] *See infra* note 176.

law practice.[163] As noted by the American Bar Association:

> [D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.
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> . . . .
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> . . . "Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law."[164]

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[163] Tennessee Supreme Court Rule 13 section 3 acknowledges the specialized nature of capital defense representation by imposing special training requirements on appointed capital defense attorneys. This is the only area of law in which the Tennessee Supreme Court imposes such a requirement. Unfortunately, the Tennessee training requirements for capital defense attorneys is inadequate. *Cf.* William P. Redick, Jr., et al., *Pretend Justice—Defense Representation in Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303, 328–33 (2008).

[164] Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 923 (2003) [hereinafter "ABA Guidelines"] (footnote omitted) (quoting Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and*

Handling a death case is all consuming, requiring extraordinary hours and nerves. It is difficult for a private attorney to build and maintain a successful law practice while effectively defending a capital case at billing rates that do not cover overhead.[165] Most public defender offices have excessive caseloads without having to take on capital cases.[166] For these and other reasons, capital defense litigation is a surpassingly difficult, highly specialized field of law requiring extensive training, experience, and the right frame of mind—as well as sufficient time and resources. In Tennessee, especially with the sharp decline in the frequency of capital cases, few attorneys have acquired any meaningful experience in actually trying capital cases through the sentencing phase, and the training is sparse. Moreover, given the constraints on compensation and funds for expert services, Tennessee offers inadequate resources to properly defend a capital case, or to attract the better lawyers to the field.[167]

On the other hand, some highly effective attorneys, willing to suffer the harsh economics and emotional stress of capital cases, do handle these kinds of cases, often with great success and at great personal and financial sacrifice.[168] Unfortunately, there simply are not enough of these kinds of lawyers to go around.

Arbitrary Death Sentences, 43 BUFF. L. REV. 329, 357–58 (1995)).

[165] *See* TENN. SUP. CT. R. 13, § 3(k) (setting maximum billing rates for appointed counsel and funding for investigators and experts).

[166] *See* Task Force Report, *supra* note 160, at 40–43.

[167] For a thorough discussion of the problems with capital defense representation in Tennessee, see Redick, et al., *supra* note 163.

[168] Effective capital defense representation requires defense counsel to expend their own funds to cover investigative services, because funding provided under Tennessee Supreme Court Rule 13 section 3(k) is grossly inadequate.

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

> Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." As Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings" of the death penalty system as a whole.[169]

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

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[169] ABA Guidelines, *supra* note 164, at 928–29 (footnotes omitted).

6. Prosecutorial Discretion and Misconduct

Prosecutors vary in their attitude towards the death penalty. Some strongly pursue it, while others avoid it. In more sparsely populated districts, the costs and burdens of prosecuting a capital case may be prohibitive. In other districts (such as Shelby County), the political environment and other factors may encourage the aggressive pursuit of the death penalty.[170] In a 2004 report on the death penalty, Tennessee's Comptroller of the Treasury concluded:

> Prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme cases, or the "worst of the worst." However, prosecutors in other jurisdictions make it a standard practice on every first[ ]degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a "bargaining chip" to secure plea bargains for lesser sentences. Many prosecutors also

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

> indicated that they consider the wishes of the victim's family when making decisions about the death penalty.[171]

In 2001, the Office of the District Attorney General for Davidson County, Tennessee, issued a set of Guidelines that Office would follow in deciding whether to seek the death penalty in any case.[172] Unfortunately, other district attorneys general have not followed suit as they resist any written limitations on the exercise of their prosecutorial discretion. There are no uniformly applied standards or procedures among the different district attorneys general in deciding whether to seek capital punishment. The lack of uniform standards, combined with the differing attitudes towards the death penalty among the various district attorneys general throughout the state, injects a substantial degree of arbitrariness in the sentencing system.

In addition to the vagaries of prosecutorial discretion, the occurrence of prosecutorial misconduct adds another element of capriciousness. Prosecutorial misconduct is a thorn in the flesh of the death penalty system that can influence outcomes.[173] Sixth Circuit

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171 OFFICE OF RESEARCH, TENN. COMPTROLLER OF THE TREASURY, *supra* note 119, at 13.

172 *See* OFFICE OF THE DIST. ATT'Y GEN. FOR THE 20TH JUDICIAL DIST. OF TENN., *supra* note 133; *see also infra* Appendix 2.

173 For a discussion of the prevalence of prosecutorial misconduct throughout the country, see INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 8–10 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [https://perma.cc/V5XA-H8Q7]. In a recent study, the Fair Punishment Project found that the Shelby County district attorney's office had the highest rate of prosecutorial misconduct findings in the nation. *The Recidivists: New Report on Rates of Prosecutorial Misconduct*, FAIR PUNISHMENT PROJECT (Aug. 9, 2017),

Judge Gilbert Merritt has written: "[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit. The Supreme Court and the lower federal courts are constantly confronted with these so-called *Brady* exculpatory and mitigating evidence cases. . . . In capital cases, this malfeasance violates both due process and the Eighth Amendment."[174]

We have located at least six Tennessee capital cases in which either convictions or death sentences were set aside because of prosecutorial misconduct, and at least three other cases in which courts found prosecutorial misconduct but affirmed the death sentences notwithstanding.[175] Presumably, capital cases are handled by the most experienced and qualified prosecutors, so there is no excuse for this level of

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http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/ [https://perma.cc/6KJ4-SL5Y].

[174] Gilbert Stroud Merritt, Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 677 (2009) (footnotes omitted) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

[175] *See* Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) (improper closing argument); House v. Bell, No. 3:96-cv-883, 2007 WL 4568444 (E.D. Tenn. 2007) (*Brady* violation); Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) (*Brady* violation); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (improper closing argument); State v. Smith, 755 S.W.2d 757 (Tenn. 1988) (improper closing argument); State v. Buck, 670 S.W.2d 600 (Tenn. 1984) (improper closing argument and *Brady* violation). There are other cases of *Brady* violations which did not serve as grounds for reversal. *See, e.g.*, Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017) (*Brady* violation); Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1088–90, 1102 (M.D. Tenn. 1998), *vacated in part*, 226 F.3d 696 (6th Cir. 2000) (vacating the sentence on ineffective assistance of counsel (IAC) grounds and finding that *Brady* violations were not material); Order Granting Post Conviction Relief, Rimmer v. State, Nos. 98-010134, 97-02817, 98-01003 (Tenn. Shelby Co. Crim. Crt. Oct. 12, 2012) (vacating the conviction on IAC grounds although the prosecution has suppressed evidence).

judicially found misconduct. Also, we can reasonably assume that undetected misconduct, potentially affecting convictions and sentences, has occurred in other cases. Suppressed evidence is not always discovered. Although inexcusable, some degree of misconduct is explainable, because prosecutors are elected officials, and capital cases are fraught with emotion and often highly publicized. These kinds of circumstances can lead to excessive zeal.

7. Defendants' Impairments

From our personal experiences, combined with our research, we submit that the vast majority of capital defendants are impaired due to mental illness and/or intellectual disability.[176] On the one hand, these kinds of impairments can serve as powerful mitigating circumstances that reduce culpability in support of a life instead of death sentence, although too frequently defendants' impairments are inadequately investigated and presented to the sentencing jury by defense counsel. On the other hand, a defendant's impairments can create obstacles in effective defense representation and can further create, in subtle ways, an unfavorable appearance to the jury during the trial. Too often, a defendant's impairments can unjustly aggravate the

[176] Poverty is another cause of mental impairment, which unfortunately is not discussed in the case law. According to a 2007 report, every Tennessee death-sentenced defendant who was tried since early 1990 was declared indigent at the time of trial and had to rely on court-appointed defense counsel; a large majority of those who were tried before then were also declared indigent. THE TENN. JUSTICE PROJECT, *supra* note 155. There is a growing body of social science research demonstrating the adverse psychological and cognitive effects of poverty. *See*, *e.g.*, SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES (2013); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 75–79 (1997).

jurors' and the court's attitude towards the defendant, which is another factor contributing to the arbitrariness of the system.

i. Mental Illness

Mental illness is rampant among criminal defendants. A study published in 2006 by the United States Department of Justice, Bureau of Justice Statistics, found that nationwide, 56% of state prisoners, 45% of federal prisoners, and 64% of those incarcerated in local jails suffered from a serious mental health problem.[177] Other studies indicate that the percentage of mentally ill inmates is particularly high on death row. [178] For example, one study found "that of the 28 people executed in 2015, seven suffered from serious mental illness, and another seven suffered from serious intellectual impairment or brain injury."[179] Another study concluded: "Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of severe mental illness."[180]

From examining Tennessee capital post-conviction cases, where evidence of mental illness among death-sentenced defendants is often investigated and developed in support of claims of ineffective assistance of

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[177] DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, *Mental Health Problems of Prison and Jail Inmates* (2006), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=789 [https://perma.cc/K7TE-N4ED].

[178] *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM. (June 14, 2016), http://www.mentalhealthamerica.net/positions/death-penalty [https://perma.cc/K9MY-BURJ].

[179] *Id.* at n.9 (citing *Report: 75% of 2015 Executions Raised Serious Concerns About Mental Health or Innocence*, DEATH PENALTY INFO. CTR. (2016), https://deathpenaltyinfo.org/node/6331 [https://perma.cc/QQJ8-DDQD]).

[180] *Id.* at n.9 (quoting Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1245 (2014)).

counsel, we can conclude that a significant number of defendants on Tennessee's death row suffer from severe mental disorders. The following cases illustrate the issue.

Cooper v. State was the first Tennessee case in which a death sentence was vacated on grounds of ineffective assistance of counsel.[181] Trial counsel inadequately investigated the defendant's social history and mental condition. [182] In post-conviction, expert testimony was presented that the defendant suffered from an affective disorder with recurrent major depression over long periods of time, and at the time of the homicide his condition had deteriorated to a full active phase of a major depressive episode. [183]

In *Wilcoxson v. State*, the defendant had been diagnosed at different times with schizophrenia, schizo-affective disorder, and bipolar disorder. [184] The Tennessee Court of Criminal Appeals found trial counsel's performance to be deficient in failing to raise the issue of the defendant's competency to stand trial, and in failing to present evidence of the defendant's psychiatric problems to the jury as mitigating evidence in sentencing. [185] While the court found that post-conviction counsel failed to carry their burden of retrospectively proving the defendant's incompetency to stand trial, the court vacated the death sentence on grounds of ineffective assistance of counsel for their failure to present social history and mental health mitigation evidence at sentencing. [186]

In *Taylor v. State* the post-conviction court set aside the defendant's conviction and death sentence on the ground that his trial counsel were deficient in their

[181] Cooper v. State, 847 S.W.2d 521 (Tenn. Crim. App. 1992).
[182] *Id.* at 524–25.
[183] *Id.* at 526.
[184] Wilcoxson v. State, 22 S.W.3d 289 (Tenn. Crim. App. 1999).
[185] *Id.* at 311, 314.
[186] *Id.* at 293.

investigation and presentation of the defendant's psychiatric disorders pre-trial in connection with his competency to stand trial, and during the trial in connection with his insanity defense and his sentencing hearing. [187] The evidence included an assessment by a forensic psychiatrist for the state, who was not discovered by defense counsel and therefore did not testify at trial, that the defendant was psychotic. [188]

In *Carter v. Bell*, according to expert testimony presented in federal habeas, the defendant suffered from psychotic symptoms involving hallucinations, paranoid delusions, and thought disorders consistent with paranoid schizophrenia or an organic delusional disorder. [189] His death sentence was vacated on grounds of ineffective assistance of counsel because his trial lawyers failed to investigate his social and psychiatric history. [190]

In *Harries v. Bell*, the federal habeas court found that the defendant's trial counsel failed to investigate and develop evidence of the defendant's abusive childhood background; his frontal lobe brain damage, which impaired his mental executive functions; and his mental illness, which had been variously diagnosed as bipolar mood disorder, anxiety disorder, and post-traumatic stress disorder. [191] The federal court vacated the death sentence on the basis of ineffective assistance of counsel. [192]

Adverse childhood experiences and severe mental illness can profoundly affect cognition, judgment, impulse control, mood and decision-making. Unfortunately, these cases are typical in the death

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[187] Taylor v. State, No. 01C01-9709-CC-00384, 1999 WL 512149 (Tenn. Crim. App. July 21, 1999).
[188] *Id.* at *4–5.
[189] Carter v. Bell, 218 F.3d 581 (6th Cir. 2000).
[190] *Id.* at 596, 608.
[191] Harries v. Bell, 417 F.3d 631 (6th Cir. 2005).
[192] *Id.* at 642.

penalty arena.[193] A defendant's mental illness, if not fully realized by defense counsel, and if not properly presented and explained to the jury at trial, can prejudice the defendant both in his relationship with his defense counsel and in his demeanor before the jury.[194]

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

> Many capital defendants are . . . severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."[195]

Regarding the potential effect of a defendant's mental illness at trial, Justice Kennedy's comment in

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

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

[195] ABA Guidelines, *supra* note 164, at 1007–08 (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE, Mar. 2000, at 31).

Riggins v. Nevada, involving the side-effects of antipsychotic medication in a capital case, is instructive:

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, . . . his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights.[196]

ii. Intellectual Disability

In *Atkins v. Virginia*, decided in 2000, the United States Supreme Court declared that if a defendant fits a proper definition of intellectual disability (or "mental retardation," as the term was used at the time), he is ineligible for the death penalty under the Eighth Amendment Cruel and Unusual Punishments Clause.[197] The Court left it to the states to formulate an appropriate

[196] Riggins v. Nevada, 504 U.S. 127, 142 (1992) (citation omitted).
[197] Atkins v. Virginia, 536 U.S. 304 (2002); *see also* Hall v. Florida, 134 S. Ct. 1986 (2014).

definition and procedure for determining intellectual disability. [198]

Before *Atkins* was decided, in 1990 the Tennessee General Assembly enacted Tennessee Code Annotated section 39-13-203 to exempt from the death penalty those defendants who fit the statutory definition of "mental retardation."[199] The statute has since been amended to change the label from "retardation" to "intellectual disability," but the three statutory elements to the definition remain the same: "(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age."[200] Many Tennessee capital defendants have low intellectual functioning, and a number of them can make viable arguments that they fit within the statutory definition of intellectual disability and therefore should be exempt from capital punishment, although often they do not prevail on this issue.[201]

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[198] Atkins, 536 U.S. at 317 (citing Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).

[199] 1990 Tenn. Pub. Acts 1038 (codified as amended in TENN. CODE ANN. § 39-13-203 (2010)).

[200] State v. Pruitt, 415 S.W.3d 180, 202 (Tenn. 2013) (quoting TENN. CODE ANN. § 39-13-203(a)); *see also* Van Tran v. Colson, 764 F.3d 594, 605 (6th Cir. 2014).

[201] A number of capital defendants have reported I.Q.'s in the borderline range of intellectual disability, even if many of them did not qualify for the intellectual disability exemption. *See*, *e.g.*, Nesbit v. State, 452 S.W.3d 779, 794 (Tenn. 2014) (reported I.Q. of 74); *Pruitt,* 415 S.W.3d at 202–03 (reported I.Q. of 66 and 68); Keen v. State, 398 S.W.3d 594, 617 (Tenn. 2012) (Wade, J., dissenting) (reported I.Q. of 67); State v. Strode, 232 S.W.3d 1, 4 (Tenn. 2007) (reported I.Q. of 69); State v. Rice, 184 S.W.3d 646, 660 (Tenn. 2006) (reported I.Q. of 79); Howell v. State, 151 S.W.3d 450, 463 (Tenn. 2004) (reported I.Q. of between 62 and 73, with a high score of 91); State v.

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

First, the statutory category of intellectual disability is arbitrarily and vaguely defined. Intellectual disability is determined on a multi-dimensional set of sliding or graduated scales, and the condition can manifest itself in a multitude of ways. How are we to measure those scales, and how are we to draw a fine line in identifying those who fall within the category of defendants who shall be exempted from capital punishment? For example, what is the practical difference between a functional I.Q. of 71 versus 69? In many cases, the defendant has been administered several I.Q. tests at different points in his life yielding different scores. How are those scores to be reconciled? Moreover, the measure of each scale cannot be ascertained strictly from raw test scores but requires the application of an expert witness's "clinical judgment."[202] In a battle of

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Carter, 114 S.W.3d 895, 900 (Tenn. 2003) (reported I.Q. of 78); State v. Dellinger, 79 S.W.3d 458, 465–66 (Tenn. 2002) (reported I.Q. of between 72 and 83); Van Tran v. State, 66 S.W.3d 790, 793–94 (Tenn. 2001) (reported I.Q. of between 65 and 72); State v. Blanton, 975 S.W.2d 269, 278 (Tenn. 1998) (reported I.Q. of 74); State v. Smith, 893 S.W.2d 908, 912 (Tenn. 1994) (reported I.Q. ranging from 54 to 88); State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (reported I.Q. of 76); State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990) (reported I.Q. of 78 to 82); Cribbs v. State, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *17 (Tenn. Crim. App. Dec. 21, 2009) (reported I.Q. of 73); Cooper v. State, 847 S.W.2d 521, 525 (Tenn. Crim. App. 1992) (I.Q. in the "sixties and seventies").

[202] Coleman v. State, 341 S.W.3d 221, 242 (Tenn. 2011). In *Coleman*, the Tennessee Supreme Court held that the statutory definition "does not require that raw scores on I.Q. tests be accepted at their face value and that the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. . . . ." *Id.* at 224.

testifying experts, whose clinical judgment are we to trust? As the Tennessee Supreme Court has acknowledged, "Without question, mental retardation is a difficult condition to accurately define. The United States Supreme Court, in *Atkins v. Virginia*, admitted as much, stating: '[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.'"[203] With reference to the I.Q. element of the statutory definition, the *Howell* Court went on to say, "The statute does not provide a clear directive regarding which particular test or testing method is to be used."[204] Consequently, the proper interpretation of the definition, and its application to specific cases, has generated considerable litigation.[205] These cases involve a battle of the experts, and whether a defendant is found to be intellectually disabled under the statutory definition and therefore exempt from the death penalty may well depend on the quality of his defense counsel, the personality and persuasiveness of the expert testimony, and the disposition and receptivity of the judge making the ultimate determination. In close cases, the issue has a markedly subjective aspect, leaving room for arbitrary decision-making.

The second factor contributing to arbitrariness relates to one of the reasons for disqualifying the intellectually disabled from capital punishment—their

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[203] *Howell*, 151 S.W.3d at 457 (quoting *Atkins*, 536 U.S. at 317).
[204] *Id*. at 459.
[205] *See*, *e.g.*, Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017) (reflecting years of litigation in a case involving a broad range of I.Q. scores); *Van Tran*, 764 F.3d 594 (vacating the state court's judgment after years of litigation and ruling that defendant was intellectually disabled and therefore exempt from execution); Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) (discussing a line of Tennessee intellectual disability cases illustrating the court's struggle in interpreting the meaning of the statutory elements).

reduced capacity to assist in their defense. In *Atkins*, the United States Supreme Court explained:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[206]

In this respect, intellectual disability and mental illness similarly affect the reliability of capital sentencing, by impairing, through no fault of the defendant, both the defendant's capacity to work with defense counsel and the defendant's capacity to present himself to the court and the jury in a favorable way.

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[206] *Atkins*, 536 U.S. at 320–21 (footnote omitted) (citations omitted).

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

8. Race

African Americans represent 17% of Tennessee's population, according to the U.S. Census Bureau, but they represent 44% of Tennessee's current death row population[207] (only 51% of the current death row population is non-Hispanic White).[208] While a number of factors may account for this discrepancy, it cannot be ignored, and it suggests a pernicious form of arbitrariness.

No one can doubt the existence of implicit racial bias in our criminal justice system, and this bias inevitably infects the capital punishment system.[209] The

[207] *See infra* Appendix 1.
[208] *See infra* Appendix 2.
[209] For general discussions of implicit racial bias, see generally Christine Jolls & Cass R. Sunstein*, The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jennifer L. Eberhardt et al.*, Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004). The presence of racial bias in our criminal justice system—whether explicit or implicit—has been well established. *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS (Samuel R. Gross et al, eds., 2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS

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

In 1997, the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness issued its *Final Report* at the conclusion of its two-year review of the state's judicial system.[210] Among other things, the Commission concluded that while no "explicit manifestations of racial bias abound" in the Tennessee judicial system, "institutionalized bias is relentlessly at work."[211] While our society continually attempts to eradicate the effects of implicit bias from our institutions, there is no indication that it has been eliminated from our capital sentencing system.

The American Bar Association commissioned a study of racial bias in Tennessee's capital punishment system that was published in 2007.[212] The study

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(2010); *see also* UNITED STATES SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING (2017), https://www.ussc.gov/research/research-reports/demographic-differences-sentencing [https://perma.cc/5QPE-6AJK] (concluding based on several studies that "Black male offenders continue[] to receive longer sentences than similarly situated White male offenders" by a substantial margin).

[210] TENN. SUP. CT. COMM'N ON RACIAL AND ETHNIC FAIRNESS, FINAL REPORT (1997), http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial__ethnic_fairness.pdf [https://perma.cc/YE42-93VR].

[211] *Id.* at 5.

[212] GLENN PIERCE ET AL., *Race and Death Sentencing in Tennessee: 1981-2000*, *in* AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT, app. (2007), https://www.americanbar.org/content/dam/aba/migrated/

concluded that the race of the defendant and the victim influences who receives the death sentence, "even after the level of homicide aggravation is statistically controlled."[213]

The recent trend regarding race is disturbing. Over the past ten years, from July 1, 2007, to June 30, 2017, there were nine trials resulting in new death sentences; in all but one of those cases (i.e., in 89% of the cases), the defendant was African American.[214] It appears that as the death penalty becomes less frequently imposed, it is imposed on African Americans in an increasing percentage of cases.

9. Judicial Disparity

While judges are presumed to be objective and impartial, from our experience in capital cases we know that different judges view these cases differently, and the predisposition of a judge can influence his or her decisions in capital cases. We can begin by looking at the deeply divided death penalty opinions issued by the Supreme Court on a yearly basis, from the nine differing opinions issued in *Furman v. Georgia* in 1972 through the five conflicting opinions issued in *Glossip v. Gross* in 2015 and in cases since then.[173] For example, Justices Brennan and Marshall categorically opposed the death penalty and always voted to reverse or vacate death sentences, while Justices Rehnquist and Scalia consistently voted to uphold death sentences. This split continues with the current members of the Court.

We see similarly opposing views expressed on the United States Court of Appeals for the Sixth Circuit.

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moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf [https://perma.cc/43LZ-QRRH].

[213] *Id.* at R.

[214] *See infra* Appendix 2. These numbers exclude retrials.

[173] Furman v. Georgia, 408 U.S. 238 (1972); Glossip v. Gross, 135 S. Ct. 2726 (2015).

These judges, persons of integrity and intelligence, acting in good faith, and looking at the same cases involving the same legal principles, often come to opposing conclusions about what the proper outcomes should be. Among the defense bar, and probably within the Attorney General's office, we know that in many federal habeas cases, the judge or panel that we draw will likely determine the outcome of the case.

Our review of the voting records of Sixth Circuit judges in capital habeas cases arising out of Tennessee emphasizes the point. The *Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases*, published as Appendix 4, breaks down the Sixth Circuit votes according to political party affiliation—i.e., according to whether the judges were appointed by Republican or Democrat administrations. We found 37 Sixth Circuit decisions in which the court finally disposed of capital habeas cases from Tennessee. In those cases, Republican-appointed judges cast 88% of their votes to deny relief and only 12% of their votes to grant relief. By contrast, Democrat-appointed judges cast only 22% of their votes to deny relief, and 78% of their votes to grant relief. In other words, the voting records for Republican-appointed judges were the opposite from the voting records for Democrat-appointed judges; Republican-appointed judges were significantly more favorable to the prosecution, whereas Democrat-appointed judges were significantly more favorable to the defense.[215]

The political skewing of the voting records is greater in the twenty cases that were decided by split votes, which represent a majority of the Sixth Circuit cases. In those cases, Republican-appointees voted against the defendant 93% of the time, and for defendant only 7% of the time; whereas Democrat-appointees voted exactly the opposite way—against the defendant only 7% of the time, and for the defendant 93% of the time.

[215] *See infra* Appendix 4.

Similarly, in the six Tennessee capital cases that were decided by the full en banc court, Republican-appointed judges cast 91% of their votes against the defendants, whereas Democrat-appointed judges cast 97% of their votes in favor of the defendants. In five of the six en banc cases, the court's decision was determined strictly along party lines.[216]

Without pointing to individual members of the Tennessee judiciary, it is reasonable to believe that different state court judges also differ in their exercise of judgment in these kinds of cases. All practicing attorneys know that a judge's worldview can shape his or her attitude towards the death penalty, towards criminal defendants, and towards the criminal justice system in general. These attitudes can affect decisions ranging from the final judgment in a post-conviction case to rulings on evidentiary and procedural issues during the course of pre-trial and trial proceedings.

That is to be expected in the highly controversial and emotionally charged arena of capital punishment. It is human nature. Everyone approaches these kinds of issues with certain cognitive biases shaped by differing worldviews.[217] Trial judges are elected officials, and we know from the experience of Justice Penny White that the politics of the death penalty can even influence the

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[216] *Id.* at 5–6.

[217] For interesting discussions of how different cognitive styles deal with controversial social issues in different ways, see generally RICHARD A. POSNER, HOW JUDGES THINK (2008); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 312 (2008); Dan M. Kahan & Donald Bramam, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 147 (2006). For studies of judicial bias based on differing political perspectives, see generally Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. Chi. L. Rev. 715 (2008); Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420 (2007).

court's composition.[218] It goes without saying that liberal judges tend to be somewhat more sympathetic to defense arguments and conservative judges tend to be somewhat more sympathetic to prosecution arguments. This is not necessarily a criticism, for in our society, diversity of viewpoint is a good thing. However, in highly charged death penalty cases where divergent points of view are more likely to come to the fore and where arbitrariness is not to be tolerated, differences in judicial disposition contribute to the capriciousness of the capital punishment system. From our study, this is obviously true to a remarkable degree in the federal court system, and there is good reason to believe it is true at least to some degree in the state court system as well.

C. Comparative Disproportionality: Single vs. Multi-Murder Cases

It is beyond the scope of this article to identify the many extremely egregious cases resulting in life or LWOP sentences, or to compare them to the many significantly less egregious cases leading to death sentences or executions. Yet the statistics concerning one simple metric make the point—number of victims. Mr. Miller has identified 339 defendants convicted of multiple counts of first degree murder since 1977. Of

[218] In 1996, Justice White became the only Tennessee Supreme Court Justice who was removed from office in a retention election. She was the political victim of a campaign to remove her from the court because of her concurring vote to reverse the death sentence in a single death penalty case—*State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Justice White's experience was discussed in a recent study regarding the effects of political judicial elections on judicial decision-making in capital cases. *See* Dan Levine & Kristina Cooke, *Uneven Justice: In States With Elected High Court Judges, a Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/ [https://perma.cc/7XGW-2AYT].

those, only 33 (or 10%) received sustained death sentences, whereas 306 (or 90%) received life or LWOP.[219] Several in the life/LWOP category were convicted of three or more murders. These numbers can be broken down as follows:

[219] *See infra* Appendix 1 at 209.

Multi-Murder Cases - Breakdown By Number of Victims & Sentences[220]

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

Virtually all of these defendants were found guilty of premeditated murder (as opposed to felony murder). Thus, from these statistics, if a defendant deliberately killed two or more victims, he was nine times more likely to be sentenced to life or LWOP than death; and the sentence he received most likely depended on extraneous factors such as the geographic location of the crime, the

[220] Table 13A, *Miller Report*.

prosecutor, quality of defense counsel, timing of the case, and the other factors described above.

On the other hand, compared to the 306 multiple murder defendants who were sentenced to life or LWOP instead of death, a majority of the defendants with sustained death sentences (53 out of a total of 86, or 62%) committed single murders, and several of them were found guilty of felony murder and not premeditated murder.[221]

This comparative disproportionality demonstrates a lack of rationality in Tennessee's system. The evidence of such inconsistent results, of sentencing decisions that cannot be explained solely on the basis of individual culpability, indicates that the system operates arbitrarily, contrary to the requirements of the Eighth Amendment.

VII. Conclusion

A. U.S. Supreme Court Dissenting Opinions

We are not alone in claiming that the historical record shows that capital sentencing systems like Tennessee's fail *Furman*'s commandment against arbitrariness and capriciousness. The death penalty has hung by a thin thread since it was reinstated in *Gregg*. The vote to uphold the guided discretion scheme in *Gregg*

[221] We have identified ten cases resulting in sustained death sentences in which the defendants were convicted of felony murder and not premeditated murder: *State v. Bell*, 480 S.W.3d 486 (Tenn. 2015); *State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003); *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003); *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000); *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994); *State v. Cazes*, 875 S.W.2d 253 (Tenn. 1994); *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992); and *State v. Barnes*, 703 S.W.2d 611 (Tenn. 1985).

was seven-to-two.[222] Justices Powell, Blackmun, and Stevens were among the seven in the majority.[223] However, after years of observing the application of guided discretion sentencing schemes in the real world, each of these Justices have changed his mind. These three Justices, combined with the dissenting Justices in *Gregg*,[224] would have constituted a majority going the other way.

Justice Powell dissented in *Furman*, voting to uphold discretionary death penalty statutes, and also authored the Court's decision in *McCleskey v. Kemp*, which upheld Georgia's death penalty against a challenge based upon demonstrated racial bias.[225] Shortly after his retirement, however, his biographer published the following colloquy:

> In a conversation with the author [John C. Jeffries, Jr.] in the summer of 1991, Powell was asked if he would change his vote in any case:
>
> "Yes, *McCleskey v. Kemp*."
>
> "Do you mean you would now accept the argument from statistics?"
>
> "No, I would vote the other way in any capital case."
>
> "In *any* capital case?"
>
> "Yes."
>
> "Even in *Furman v. Georgia*?"
>
> "Yes, I have come to think that capital punishment should be abolished." Capital punishment, Powell added, "serves no useful purpose." The United States was "unique among the industrialized nations

[222] Gregg v. Georgia, 428 U.S. 153 (1976).
[223] *Id.*
[224] Justices Brennan and Marshall cast the dissenting votes. *Id.*
[225] McCleskey v. Kemp, 481 U.S. 279 (1987).

> of the West in maintaining the death penalty," and it was enforced so rarely that it could not deter.[226]

Justice Blackmun, who also dissented in *Furman* and voted to uphold discretionary sentencing statutes, and voted with the majority in *Gregg*, first expressed his changed view in 1992:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the States and the Court to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. [227]

Justice Stevens, who was relatively new to the Court when he joined the *Gregg* majority, followed suit in 2008:

> I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and

[226] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451–52 (1994).
[227] Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (internal citations omitted).

> unusual punishment violative of the Eighth Amendment."[228]

With reference to current Justices who were not on the Court when *Gregg* was decided, in the case of *Glossip v. Gross*, Justices Breyer and Ginsburg recently looked at the historical record. In a careful analysis, they explained why a system such as Tennessee's can no longer be sustained. They summarized their analysis as follows:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.[229]

The *Glossip* dissent is significant because it represents a shifting view and eloquently reflects on the failed effort over forty years to apply guided discretion capital

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[228] Baze v. Rees, 553 U.S. 35, (2008) (Stevens, J., concurring in judgment) (alteration in original) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).
[229] Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

sentencing schemes that were supposed to address the problem of arbitrariness. The historical record in Tennessee, as well as in other states that have attempted to maintain capital sentencing systems, speaks to how this kind of system simply has not been able to accomplish that goal.

B. Opinions From the ALI and the ABA Tennessee Assessment Team

The opinions of the dissenting Supreme Court Justices are echoed by other leading authorities.

As mentioned above, Tennessee's capital punishment scheme was patterned after the Georgia scheme approved in *Gregg*, which in turn was patterned in part after section 210.6 of the American Law Institute's (ALI) Model Penal Code.[230] In 2009, the ALI withdrew section 210.6 from the Model Penal Code because of its concerns about whether death penalty systems can be made fair.[231] In recommending withdrawal of this section from the Model Penal Code, the ALI Council issued a Report to its membership stating, "Section 210.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it. . . . [O]n the whole the section has not withstood the tests of time and experience."[232] The Report went on to describe the ALI Council's reasons for its concerns about fairness in death penalty systems, as follows:

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[230] MODEL PENAL CODE § 210.6 (AM. LAW INST., Proposed Official Draft 1962).

[231] *See* AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (2009) https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf [https://perma.cc/5RBL-ZPQ6].

[232] *Id.* at 4.

> These [concerns] include (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks conscientiously—candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.[233]

[233] *Id.* at 5. The ALI reported an "overwhelming" vote for withdrawal of section 210.6. *Model Penal Code*, AM. LAW INST., https://www.ali.org/publications/show/model-penal-code [https://perma.cc/4W2E-MGTT].

In a similar vein and focusing on Tennessee, the American Bar Association appointed a Tennessee Death Penalty Assessment Team to assess fairness and accuracy in Tennessee's death penalty system.[234] The Assessment Team conducted an extensive study of Tennessee's system and issued its lengthy report in March 2007.[235] The Team concluded that "Tennessee's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures."[236] The Report identified the following areas "as most in need of reform":

- Inadequate procedures to address innocence claims
- Excessive caseloads of defense counsel
- Inadequate access to experts and investigators
- Inadequate qualification and performance standards for defense counsel
- Lack of meaningful proportionality review
- Lack of transparency in the clemency process
- Significant capital juror confusion

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[234] The members of the Assessment Team were Professor Dwight L. Aarons, Chair, Associate Professor of Law at The University of Tennessee College of Law; W.J. Michael Cody, former Tennessee Attorney General; Kathryn Reed Edge, former President of the Tennessee Bar Association; Jeffrey S. Henry, Executive Director of the Tennessee District Public Defenders Conference; Judge Gilbert S. Merritt, former Chief Judge of the United States Court of Appeals for the Sixth Circuit; attorney Bradley A. MacLean; and attorney William T. Ramsey.

[235] AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT (2007), https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf [https://perma.cc/43LZ-QRRH].

[236] *Id.* at iii.

- Racial disparities in Tennessee's capital sentencing
- Geographical disparities in Tennessee's capital sentencing
- Death sentences imposed on people with severe mental disability[237]

C. Final Remarks

It is clear from the statistics and our experience over the past 40 years that Tennessee's death penalty system "fails to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences."[238] The system is riddled with arbitrariness.

A person of compassion and empathy cannot deny that the death penalty is cruel. "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."[239] "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity."[240]

When over the past 40 years Tennessee has executed fewer than one out of every 400 defendants (less than 1/4 of 1%) convicted of first degree murder; when Tennessee sentences 90% of multiple murderers to life or life without parole and only 10% to death; when the

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[237] *Id*. at iii–vi.
[238] Woodson v. North Carolina, 428 U.S. 280, 302 (1976).
[239] Spaziano v. Florida, 468 U.S. 446, 469 n.3 (Stevens, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 290 (Brennan, J., concurring)).
[240] *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

majority of capital cases are reversed or vacated because of trial error; when the courts have found that in over 23% of capital cases, defense counsel's performance was constitutionally deficient; when the number of death row defendants who die of natural causes is four times greater than the number Tennessee actually executed; when we have seen only one new capital case in Tennessee since mid-2014; when we have not seen any death sentences in the Middle Grand Division since early 2001—then, it must also be said that the death penalty is an "unusual" and unfair punishment. The statistics make clear that Tennessee's system is at least as arbitrary and capricious as the systems declared unconstitutional in *Furman*—and that is without accounting for the exorbitant delays and costs inherent in Tennessee's system, which far exceed the delays and costs inherent in the pre-*Furman* era.

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

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APPENDIX 1

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

DATED: FEB. 7, 2018[1]

H. E. Miller, Jr.

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

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

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

[3] *See* TENN. CODE ANN. § 39-13-204 (2011) (sentencing for first degree murder); § 39-13-206 (1993) (appeal and review of death sentence).

In Tennessee, a death sentence can be imposed only in a case of "aggravated" first degree murder upon a "balancing" of statutorily defined aggravating circumstances[4] proven by the prosecution and the mitigating circumstances presented by the defense.[5] The Tennessee Supreme Court is statutorily required to review each death sentence "to determine whether: (A) [t]he sentence of death was imposed in any arbitrary fashion; (B) [t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) [t]he evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) [t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."[6] The court's consideration of whether a death sentence is "excessive or disproportionate to the penalty imposed in similar cases" is referred to as "comparative proportionality review."[7]

In 1978, the court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47), requiring that "in all cases . . . in which the defendant is convicted of first[ ]degree murder," the trial judge shall complete and file a report (the "Rule 12 Report") to include information about the case.[8] Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review.[9]

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[4] Aggravating circumstances are defined in Tennessee Code Annotated section 39-13-204(i).

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

[6] TENN. CODE ANN. § 39-13-206(c)(1).

[7] *See* State v. Thacker, 164 S.W.3d 208, 232 (Tenn. 2005).

[8] TENN. SUP. CT. R. 12.

[9] In *State v. Adkins*, 725 S.W.2d 660, 663 (Tenn. 1987), the court stated that "our proportionality review of death penalty

The modern history of Tennessee's death penalty system raises questions that go to the heart of constitutional issues: How have we selected the "worst of the bad"[10] among convicted first degree murderers for imposition of the ultimate sanction of death? Is there a meaningful distinction between those cases resulting in death sentences and those resulting in life (or life without parole) sentences? Does Tennessee's capital punishment system operate rationally, consistently, and reliably; or does it operate in an arbitrary and unpredictable fashion? Is there meaning to comparative proportionality review?

To assist in addressing these questions, I undertook a survey of all Tennessee cases resulting in first degree murder convictions since implementation of

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cases since Tennessee Supreme Court Rule 12 (formerly Rule 47) was promulgated in 1978 has been predicated largely on those reports and has never been limited to the cases that have come before us on appeal." See also the court's press release issued January 1, 1999, announcing the use of CD-ROMs to store copies of Rule 12 reports, in which then Chief Justice Riley Anderson was quoted as saying, "The court's primary interest in the database is for comparative proportionality review in these cases, which is required by court rule and state law[.] . . . The [Tennessee] Supreme Court reviews the data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process." Press Release, Tenn. Admin. Office of the Courts, Court Provides High-Tech Tool for Legal Research in Murder Cases, (Jan. 1, 1999), http://tncourts.gov/press/1999/01/01/court-provides-high-tech-tool-legal-research-murder-cases [https://perma.cc/K48E-E27V]. *But cf.* State v. Bland, 958 S.W.2d 651 (Tenn. 1997) (changing the comparative proportionality review methodology by limiting the pool of comparison cases to capital cases that previously came before the court on appeal).

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

the state's current death penalty system—covering the 40-year period from July 1, 1977, through June 30, 2017.

I. The Survey Process

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

Accordingly, over the past three years I have devoted untold hours searching various sources to locate and review Tennessee's first degree murder cases.[11] I have had the assistance of Bradley A. MacLean and other attorneys who handle first degree murder cases. I have also received generous help from officials with the Tennessee Administrative Office of the Courts and the Tennessee Department of Correction, along with numerous court officials throughout the state. I would like to specifically acknowledge the tremendous assistance offered by the staff of the Tennessee State Library.

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

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

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

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

[12] THE TENN. JUSTICE PROJECT, TENNESSEE DEATH PENALTY CASES SINCE 1977 (June 15, 2008) (on file with authors).

- Name and TOMIS number of the defendant;
- Date of the offense;
- Defendant's date of birth and age on the date of the offense;
- Defendant's gender and race;
- Number, gender, race, and age(s) of first degree murder victim(s) in each case;
- Whether a notice to seek the death penalty was filed (if indicated in the Rule 12 Forms);
- County where the judgment of conviction was entered, and county where the offense occurred (if different);
- Sentence imposed for each first degree murder conviction; and
- Whether a Rule 12 Report was filed.
- In capital cases, whether the conviction or sentence was reversed, vacated or commuted, and the status of the case as of June 30, 2017.

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

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

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

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

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

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

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

Appendix G: Chart of Adult Multi-Murder Cases.

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

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

A. Caveats

I am confident that I have found and reviewed all cases decided during the 40-Year Period in which death sentences have been imposed. This was a feasible task, for several reasons. The total number of capital trials that resulted in death sentences during this period (221) is relatively small compared to the total number of first degree murder cases (2,514)[13] that I have been able to find. The Tennessee Supreme Court reviews on direct appeal all trials resulting in death sentences, creating a published opinion in each case. There exist various sources of information that specifically deal with capital cases, including records maintained by public defender offices, The Tennessee Justice Project reports of 2007 and 2008, the monthly and quarterly reports on capital cases

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

issued by the Tennessee Administrative Office of the Courts, and records maintained by the Tennessee Department of Correction concerning the death row population.

On the other hand, I am equally confident that I have not found all first degree murder cases. I have carefully studied all filed Rule 12 Reports, but in 46% of first degree murder cases, trial judges failed to file the required Rule 12 Reports. This Rule 12 noncompliance is especially problematic in regards to the most recent cases because of the time it typically takes for a first degree murder case to create a readily accessible record as it works through the trial and appellate processes.[14]

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

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

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

in my view any errors are relatively minor and statistically insignificant except as otherwise noted.

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

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

II. Summary of Findings

A. Definitions

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

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

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

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

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

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

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

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

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

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

LWOP: Life without parole sentence.

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

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

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

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

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

Rule 12 Report: The report filed in a first degree murder case pursuant to Tennessee Supreme Court Rule 12.

Rule 12 Noncompliance: The failure of a trial judge to fill out and file a Rule 12 Report as required by Tennessee Supreme Court Rule 12. Rule 12 Compliance indicates that a Rule 12 Report was filed in the case, but

"Compliance" as used here does not indicate whether the Report was completely filled out in an accurate manner.

Sentence Relief: A defendant receives Sentence Relief from a Capital Trial when the death sentence from that Capital Trial is reversed on direct appeal, vacated in state post-conviction or federal habeas proceedings, or commuted by the Governor.[15]

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

Sustained Adult First Degree Murder Cases: Cases in which the defendant was age 18 or older on the date of the offense, the defendant was convicted of one or more counts of first degree murder, and the conviction was sustained on appeal and/or post-conviction review. In the master charts attached as Appendices A through D, the cases are dated as of the date of the offense and are listed according to the defendants convicted. In some cases, the same defendant was convicted of two or more first degree murders in two or more separate proceedings involving different first degree murder charges. In those

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

cases, the defendant is listed only once in the master charts and treated as one case, although the charts indicate if the defendant was involved in more than one separate case involving separate charges.

Sustained Juvenile First Degree Murder Cases are those in which the defendant was under 18 years of age at the time of the offense and was tried and convicted as an adult.

III. Sustained Adult First Degree Murder Cases

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

TABLE 1
Breakdown of Sustained First Degree Murder Cases By Rule 12 Compliance

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

TABLE 2
Breakdown of Sustained First Degree Murder Cases According to Sentences Statewide (Adult Cases)

Sentences for First Degree Murder Convictions (Adult) — Statewide	**Number of Defendants**	**% of the Total (rounded)**
Life	2,090	83%
Life Without Parole (LWOP)	332	13%

Sustained Death Sentence	85	3.4%[16]
Awaiting Retrial	7	0.2%
TOTAL	2,514	100%

TABLE 3
Breakdown of Sustained First Degree Murder Cases According to Sentences
Shelby County (Adult Cases)

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

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

TABLE 4
Breakdown of Sustained First Degree Murder Cases According to Sentences Davidson County (Adult Cases)

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

TABLE 5
Breakdown of Sustained First Degree Murder Cases According to Sentences Knox County (Adult Cases)

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

IV. Breakdown of Sustained Adult First Degree Murder Cases According to Race and Rule 12 Compliance

TABLE 6
Statewide Sustained Adult First Degree Murder Cases

Race (% Gen. Pop.)[17]	Rule 12 Reports Filed[18] (Compliance Rate)	Rule 12 Reports *Not* Filed[19] (Non-Compliance Rate)	Total Cases	% of Total Cases[20]
Black (17%)	646 (54% Filed)	543 (46% Not Filed)	1,189	47%
White (78%)	665 (53% Filed)	602 (47% Not Filed)	1,267	50%
Other (5%)	37 (64% Filed)	21 (36% Not Filed)	58	2%

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

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

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

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

TOTALS	**1,348 (54% Filed)**	**1,166 (46% Not Filed)**	**2,514**	100%

TABLE 7
Shelby County Sustained Adult First Degree Murder Cases

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

TABLE 8
Davidson County Sustained Adult First Degree Murder Cases

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

TABLE 9
Knox County Sustained Adult First Degree Murder Cases

Race (% Gen'l Pop.)	**Rule 12 Reports Filed**	**Rule 12 Reports *Not* Filed**	**Total Cases**	**% of Total Cases**
Black (8%)	42 (58% Filed)	30 (42% Not Filed)	72	42%
White (86%)	56 (59% Filed)	39 (41% Not Filed)	95	55%
Other	4	2		

(6%)	(67% Filed)	(33% Not Filed)	6	3%
TOTALS	**102 (59% Filed)**	**71 (41% Not Filed)**	**173**	100%

V. Multi-Murder Cases

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

TABLE 10: Multi-Murder Cases—Statewide

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

TABLE 11: Multi-Murder Cases—Shelby County

Sentences for Multi-Murder Convictions During the 40-Year Period Shelby County — Adult	**Number of Defendants**	**% of the Total Multi-Murder Cases**
Life	30	54%
Life Without Parole (LWOP)	14	25%

Sustained Death Sentence	12	21%
TOTAL	**56**	100%

TABLE 12: Multi-Murder Cases—Davidson County

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

TABLE 13: Multi-Murder Cases—Knox County

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

TOTAL	**24**	100%

TABLE 13A
Multi-Murder Cases—Breakdown By Number of Victims & Sentences

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

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

A. Pre-October 21, 2001, Multi-Murder Cases

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

TABLE 14
Pre-October 2001 Multi-Murder Cases
By Largest Counties

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

TABLE 15
Pre-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

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

B. Post-October 2001 Multi-Murder Cases

TABLE 16
Post-October 2001 Multi-Murder Cases
By Largest Counties

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

TABLE 17
Post-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

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

VI. Capital Cases

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

TABLE 18

Separate Capital Trials resulting in death sentences[21]	221
Defendants who received death sentences[22]	192

[21] These include all Initial Trials and Retrials.

[22] One defendant (Paul Reid) is listed with three Initial Capital Trials and another (Stephen Laron Williams) with Two Initial Trials, all on separate murder charges, which were not Retrials. Eighteen other defendants are listed with two trials on the same charges resulting in death sentences (i.e., an Initial Trial and a Retrial); and four are listed with three trials on the same charges (i.e., an Initial Trial and two Retrials), leaving a total of 26 Retrials. Of those Retrials, in 14 cases the

Defendants with Sustained Death Sentences	86 (45% of total Defs.)
Defendants whose death sentences were not Sustained	106 (55% of total Defs.)[23]
Trials resulting in Conviction Relief	28 (13% of total trials)
Trials resulting in Sentence Relief	104 (47% of total trials)
Total Trials resulting in Relief	132 (60% of total trials)[24]
Defendants with Pending Death Sentences	56 (29% of total Defs.)[25]
Defendants who died of natural causes with Sustained Death Sentences	24 (12% of total Defs.)
Multi-Murder Defendants with Sustained Death Sentences	32 (37% of Sust. Death Sent.)
Single-Murder Defendants with Sustained Death Sentences	54 (63% of Sust. Death Sent.)
Awaiting Retrial	8 (4% of total Defs.)
Executions in Tennessee	6 (3% of total Defs.)

B. Exonerations

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

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death sentences were reversed or vacated (54%), and in 12 cases they were sustained (46%), which closely corresponds with the overall ratio of reversed vs. sustained death sentences.

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

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

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

Michael Lee McCormick (acquitted in his retrial).

-Sentenced in 1988; Exonerated in 2008; 20 years on death row.

Paul Gregory House (charges dismissed based on evidence of actual innocence)

-Sentenced in 1986; Exonerated in 2009; 23 years on death row.

Gussie Willis Vann (charges dismissed based on evidence of actual innocence)

-Sentenced in 1994; Exonerated in 2011; 17 years on death row.

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

C. Commutations

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

Michael Boyd (a.k.a. *Mika'eel Abdullah Abdus-Samad)* was granted a commutation of his sentence to life without parole on September 14, 2007, after being on death row for 19 1/2 years. The Certificate of Commutation stated:

> [T]his appears to me an extraordinary death penalty case where the grossly inadequate legal representation received by the defendant at his post-conviction hearing, combined with procedural limitations, has prevented the judicial

> system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial . . . .

Gaile K. Owens' sentence was commuted to life on July 10, 2010, after being on death row for 2 1/2 years. The Certificate of Commutation stated:

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

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

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

D. Executions

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

TABLE 19

Executed Defendant	Sentencing Date	Execution Date	Time on Death Row
Robert Glenn Coe	Feb. 2, 1981	Apr. 19, 2000	19 years, 2 months
Sedley Alley	Mar. 18, 1987	June 28, 2006	19 years, 3 months
Philip Workman	Mar. 31, 1982	May 9, 2007	25 years, 1 month
Daryl Holton	June 15, 1999	Sept. 12, 2007	8 years, 3 months[26]
Steve Henley	Feb. 28, 1986	Feb. 4, 2009	22 years, 11 months
Cecil C. Johnson, Jr.	Jan. 20, 1981	Dec. 2, 2009	28 years, 10 months

E. Residency on Death Row

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

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

TABLE 20

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

The median residency on Death Row (as of June 30, 2017) was 21 1/2 years.

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

F. Geographic/Racial Distribution of Sustained Death Sentences

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

TABLE 21
Sustained Death Sentences by County/Race During 40-Year Period

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

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

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

Since October 2001,[28] 14 New Death Sentences, which have been sustained, were imposed in 8 counties—or in 8% of the counties representing 34% of Tennessee's general population (according to the 2010 Census).

TABLE 22
Sustained Death Sentences by County/Race
Since October 2001

County	Grand Division	Race of Def: Black	Race of Def: White	Race of Def: Other	Totals
Hardeman	West	0	1	0	1
Madison	West	2	0	0	1
Shelby	West	7	0	0	7
Tipton	West	1	0	0	1
Hamilton	East	0	1	0	1
Knox	East	1	0	0	1
Sullivan	East	0	1	0	1
Washington	East	0	1	0	1
Totals		10 (71%)	4 (29%)	0 (0%)	14 (100%)

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

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

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

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

G. Frequency and Decline

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

TABLE 23

4-Year Period	Trials Resulting in Death Sentences	New Death Sentences (i.e., Initial Capital Trials)	Sustained Death Sentences[29]	Ave. New Death Sentences per Year	1st Degree Murder Cases[30]	% "New" Death Sentences / 1st Degree Murders	% Sustained Death Sentences / 1st Degree Murders
7/1/77 – 6/30/81	25	25	6	6.25/year	155	16%	4%
7/1/81 – 6/30/85	37	33	12	8.25/year	197	17%	6%
7/1/85 – 6/30/89	34	32	15	8.00/year	238	13%	6%
7/1/89 – 6/30/93	38	37	18	9.25/year	282	13%	6%
7/1/93 – 6/30/97	21	17	9	4.45/year	395	4%	2%
7/1/97 – 6/30/01	32	24	14	6.00/year	316	8%	4%
7/1/01 – 6/30/05	20	16	5	4.00/year	283	6%	2%
7/1/05 – 6/30/09	5	4	4	1.00/year	271	1.5%	1.4%
7/1/09 – 6/30/13	6	6	5	1.50/year	284	2%	1.7%
7/1/13-6/30/17	3	1	1	0.25/year	Incomplete Data[31]	Incomplete Data	Incomplete Data

[29] Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.
[30] Counted by defendants, not murder victims.
[31] Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for

TOTALS	**221**	**195**[32]	**89**[33]	**4.88 per year (40 years)**	**>2,514**	**<8%**	**<3.5%**

VII. Frequency of Tennessee Death Sentences in 4-Year Increments

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

> 168 "New" death sentences ≥
> 7 "New" death sentences per year (13.2% of First Degree Murder Cases)
>
> 74 "Sustained" death sentences ≥
> 4 "Sustained" death sentences per year (5.8% of First Degree Murder Cases)

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

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

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a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to Tennessee Bureau of Investigation (TBI) statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. *See* Table 25.

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

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

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

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

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

TABLE 24
Number of Counties Conducting Capital Trials By 4-Year Increments

4-Year Period	Number of Counties Conducting Capital Trials[34] During the Indicated 4-Year Period
7/1/1977 – 6/30/1981	13
7/1/1981 – 6/30/1985	18
7/1/1985 – 6/30/1989	17
7/1/1989 – 6/30/1993	18
7/1/1993 – 6/30/1997	11
7/1/1997 – 6/30/2001	12
7/1/2001 – 6/30/2005	11
7/1/2005 – 6/30/2009	3
7/1/2009 – 6/30/2013	5
7/1/2013 – 6/30/2017	1

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

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

TABLE 25
New Death Sentences Compared to Murders
2002–2016

Year	"Murders"[35]	New Death Sentences	% New Death Sentences per Murders	Sustained New Death Sentences	% Sustained New Death Sentences per Murders
2002	385	6	1.6 %	1	0.3 %
2003	394	3	1.0 %	3	1.0 %
2004	350	4	1.1 %	0	0 %
2005	430	2	0.4 %	1	0.2 %
2006	409	1	0.3 %	1	0.3 %
2007	395	1	0.3 %	1	0.3 %
2008	408	1	0.3 %	1	0.3 %
2009	461	1	0.4 %	1	0.4 %
2010	360	2	0.6 %	2	0.6 %
2011	375	2	0.6 %	1	0.3 %
2012	390	1	0.3 %	1	0.3 %
2013	333	0	0 %	0	0 %
2014	375	1	0.3 %	1	0.3%
2015	406	0	0 %	0	0 %
2016	470	0	0 %	0	0 %
TOTALS	**5,941 (Avg = 396/year)**	**25 (1.7/year)**	**0.4 %**	**14 (0.9/ year)**	**0.2 %**

During the 10-year period 2003–2012:

Total non-negligent homicides = 3,972 ≥ 397/year
Total New Death Sentences = 18 ≥ 1.8/year
% New Death Sentences per non-neg. homicides = 0.5%
Total sustained New Death Sentences = 12 ≥ 1.2/year
% sustained new death sentences per non-neg. homicides = 0.3%

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

During the 4-year period 2013–2016:

Total non-negligent homicides = 1,584 ≥ 396/year
Total New Death Sentences = 1 ≥ 0.25/year
% New Death Sentences per non-neg. homicides = 0.06%

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

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APPENDIX 2

TENNESSEE TRIALS IN WHICH DEATH SENTENCES WERE IMPOSED

DURING THE PERIOD 7/1/1977 THROUGH 6/30/2017

This chart identifies in chronological order, by the defendant's name, each "Capital Trial" that resulted in the imposition of one or more death sentences. For purposes of this chart, the term Capital Trial includes a resentencing hearing.

The county listed is where the murder allegedly occurred, not necessarily where the case was tried.

A number in parentheses immediately following the defendant's name in a multi-murder case indicates the number of murder victims for which death sentences were imposed.

Asterisks indicate cases that have had two or more Capital Trials arising from the same charges. A single asterisk indicates the result of the defendant's first Capital Trial, a double asterisk indicates the result of the defendant's second trial for the same murder(s), etc. The other Capital Trials involving the same defendant and charges are cross-referenced in the far right column.

A Capital Trial is "Pending" if it has not been reversed or vacated—i.e., if the defendant is still under a

sentence of death from that Capital Trial. Because capital cases typically are challenged until a defendant is executed, a case remains Pending as long as the defendant is alive.

If a case is ultimately resolved by plea agreement or by the prosecution's withdrawal of the death notice (e.g., while the defendant is awaiting retrial or resentencing), that fact is not reflected in the chart.

Capital Trial No.	**Defendant**	**County Where Offense Occurred**	**Sentence Date (of instant sentencing proceeding)**	**Defendant Race and Gender**	**Type of Relief "(AR)" = Awaiting Retrial**	**Other Capital Trial(s) for Same Defendant**
1	Richard Hale Austin* see	Shelby	10/22/77	White/Male	Sentence Relief	No. 169
2	Ronald Eugene Rickman	Shelby	03/04/78	White/Male	Conviction Relief	
3	William Edward Groseclose	Shelby	03/04/78	White/Male	Conviction Relief	
4	Larry Charles Ransom	Shelby	04/07/78	Black/Male	Sentence Relief	
5	Ralph Robert Cozzolino	Hamilton	04/22/78	White/Male	Sentence Relief	
6	Russell Keith Berry	Greene	08/28/78	White/Male	Conviction Relief	
7	Donald Wayne Strouth	Sullivan	09/04/78	White/Male	DECEASED	

8	Richard Houston	Knox	11/03/78	Black/Male	Conviction Relief	
9	Donald Michael Moore	Shelby	11/10/78	White/Male	Sentence Relief	
10	Jeffrey Stuart Dicks	Sullivan	02/10/79	White/Male	DECEASED	
11	Luther Terry Pritchett	Marion	08/16/79	White/Male	Sentence Relief	
12	Michael Angelo Coleman	Shelby	04/19/80	Black/Male	Sentence Relief	
13	Carl Wayne Adkins*	Washington	01/29/80	White/Male	Sentence Relief	Nos. 52, 62
14	Loshie Pitts Harrington	Dickson	06/01/80	White/Male	Sentence Relief	
15	Stephen Allen Adams	Shelby	06/20/80	Black/Male	Sentence Relief	
16	Richard Weldon Simon	Montgomery	06/26/80	Black/Male	Sentence Relief	
17	Raymond Eugene Teague*	Hamilton	11/22/80	White/Male	Sentence Relief	No. 44
18	Hugh Warren Melson	Madison	12/05/80	White/Male	DECEASED	
19	Cecil C. Johnson, Jr. (3)	Davidson	01/20/81	Black/Male	EXECUTED	
20	Joseph Glenn Buck	Smith	01/24/81	White/Male	Sentence Relief	

21	Robert Glen Coe	Weakley	02/28/81	White/Male	EXECUTED	
22	Walter Keith Johnson*	Hamilton	03/25/81	White/Male	Sentence Relief	No. 47
23	Hubert Loyd Sheffield	Shelby	03/26/81	White/Male	Sentence Relief	
24	Timothy Eugene Morris	Greene	04/09/81	White/Male	Sentence Relief	
25	Thomas Gerald Laney	Sullivan	04/11/81	White/Male	Sentence Relief	
26	Ronald Richard Harries	Sullivan	08/08/81	White/Male	Sentence Relief	
27	Stephen Leon Williams	Hawkins	10/16/81	White/Male	Sentence Relief	
28	Laron Ronald Williams (2)	Shelby	11/06/81	Black/Male	DECEASED	
29	Laron Ronald Williams	Madison	12/14/81	Black/Male	DECEASED	
30	David Earl Miller*	Knox	03/17/82	White/Male	Sentence Relief	No. 76
31	Kenneth Wayne Campbell	Washington	03/26/82	White/Male	Sentence Relief	
32	Phillip Ray Workman	Shelby	03/31/82	White/Male	EXECUTED	
33	Michael David Matson	Hamilton	04/22/82	White/Male	Sentence Relief	
34	Gary Bradford Cone (2)	Shelby	04/23/82	White/Male	DECEASED	

35	Michael Eugene Sample (2)	Shelby	11/02/82	Black/Male	PENDING	
36	Larry McKay (2)	Shelby	11/02/82	Black/Male	PENDING	
37	Tommy Lee King	Maury	11/13/82	Black/Male	Sentence Relief	
38	Richard Caldwell	Henderson	12/04/82	White/Male	Conviction Relief	
39	Walter Lee Caruthers	Knox	02/08/83	Black/Male	Sentence Relief (AR)[1]	
40	David Carl Duncan	Sumner	04/01/83	Black/Male	Sentence Relief (AR)	
41	Richard Carlton Taylor*	Hickman	05/07/83	White/Male	Conviction Relief	No. 198
42	Willie James Martin	Shelby	06/24/83	Black/Male	Conviction Relief	
43	Charles Edward Hartman*	Montgomery	05/23/83	White/Male	Sentence Relief	No. 153
44	Raymond Eugene Teague**	Hamilton	08/25/83	White/Male	Sentence Relief	No. 17
45	Ricky Goldie Smith	Shelby	02/10/84	Black/Male	Sentence Relief	
46	Edmund George Zagorski (2)	Robertson	03/02/84	White/Male	PENDING	
47	Walter Keith Johnson**	Hamilton	03/08/84	White/Male	Sentence Relief	No. 22

[1] Died while awaiting Retrial.

48	William Wesley Goad	Sumner	03/22/84	White/Male	Sentence Relief	
49	Willie Claybrook	Crockett	06/06/84	Black/Male	Conviction Relief	
50	David Lee McNish	Carter	08/15/84	White/Male	Sentence Relief (AR)[2]	
51	James William Barnes	Washington	09/14/84	White/Male	DECEASED	
52	Carl Wayne Adkins**	Washington	10/01/84	White/Male	Sentence Relief	Nos. 13, 62
53	Edward Jerome Harbison	Hamilton	10/05/84	Black/Male	Sentence Relief (Com-mutation)	
54	James David Carter	Hamblen	11/14/84	White/Male	Sentence Relief	
55	Willie Sparks	Hamilton	11/14/84	Black/Male	Sentence Relief	
56	Kenneth Wayne O'Guinn	Madison	01/22/85	White/Male	DECEASED	
57	Terry Lynn King	Knox	02/06/85	White/Male	PENDING	
58	Vernon Franklin Cooper	Hamilton	02/15/85	White/Male	Sentence Relief	
59	Tony Lorenzo Bobo	Shelby	02/22/85	Black/Male	Sentence Relief	

[2] Died while awaiting Retrial.

60	Leonard Edward Smith*	Sullivan	03/20/85	White/Male	Conviction Relief	Nos. 97, 143
61	Charles Walton Wright (2)	Davidson	04/05/85	Black/Male	PENDING	
62	Carl Wayne Adkins***	Washington	06/28/85	White/Male	Sentence Relief	Nos. 13, 52
63	Rocky Lee Coker	Sequatchie	07/11/85	White/Male	Sentence Relief	
64	Thomas Lee Crouch	Williamson	08/08/85	White/Male	DECEASED	
65	Gregory S. Thompson	Coffee	08/22/85	Black/Male	DECEASED	
66	Donnie Edward Johnson	Shelby	10/04/85	White/Male	PENDING	
67	Erskine Leroy Johnson	Shelby	12/07/85	Black/Male	Conviction Relief	
68	Anthony Darrell Hines*	Cheatham	01/10/86	White/Male	Sentence Relief	No. 96
69	Sidney Porterfield	Shelby	01/15/86	Black/Male	DECEASED	
70	Gaile K. Owens	Shelby	01/15/86	White/ Female	Sentence Relief (Com-mutation)	
71	Paul Gregory House	Union	02/08/86	White/Male	Conviction Relief (Exonerated)	
72	Steve Morris Henley* (2)	Jackson	02/28/86	White/Male	Sentence Relief	No. 161

73	Roger Morris Bell	Hamilton	05/23/86	Black/Male	Sentence Relief	
74	Terry Dwight Barber	Lake	08/18/86	White/Male	DECEASED	
75	Billy Ray Irick	Knox	11/3/86	White/Male	PENDING	
76	David Earl Miller**	Knox	02/12/87	White/Male	PENDING	No. 30
77	Bobby Randall Wilcoxson	Hamilton	02/13/87	White/Male	Sentence Relief	
78	Sedley Alley	Shelby	03/18/87	White/Male	EXECUTED	
79	Stephen Michael West (2)	Union	03/25/87	White/Male	PENDING	
80	David Scott Poe	Montgomery	03/28/87	White/Male	Sentence Relief	
81	Darrell Wayne Taylor	Shelby	04/24/87	Black/Male	Sentence Relief	
82	Nicholas Todd Sutton (2)	Morgan	03/04/86	White/Male	PENDING	
83	Wayne Lee Bates	Coffee	05/21/87	White/Male	Sentence Relief	
84	James Lee Jones, Jr. (a.k.a. *Abu-Ali Abdur' Rahman*)	Davidson	07/15/87	Black/Male	PENDING	
85	Homer Bouldin Teel	Marion	08/31/87	White/Male	Sentence Relief	

86	Michael Lee McCormick	Hamilton	01/15/88	White/Male	Conviction Relief (Exonerated)	
87	Pervis Tyrone Payne (2)	Shelby	02/27/88	Black/Male	PENDING	
88	Michael Boyd (a.k.a. *Mikaeel Abdullah Abdus-Samud*)	Shelby	03/10/88	Black/Male	Sentence Relief (Com-mutation)	
89	Ronald Michael Cauthern*(2)	Montgomery	03/18/88	White/Male	Sentence Relief	No. 140
90	J.B. McCord	Warren	05/01/88	White/Male	Conviction Relief	
91	Edward Leroy Harris (2)	Sevier	05/13/88	White/Male	Sentence Relief	
92	John David Terry*	Davidson	09/22/88	White/Male	Sentence Relief	No. 157
93	Byron Lewis Black (3)	Davidson	03/10/89	Black/Male	PENDING	
94	Mack Edward Brown	Knox	05/22/89	White/Male	Conviction Relief	
95	Heck Van Tran (3)	Shelby	06/23/89	Asian/Male	Sentence Relief (AR)	
96	Anthony Darrell Hines**	Cheatham	06/27/89	White/Male	PENDING	No. 68
97	Leonard Edward Smith**	Sullivan	08/25/89	White/Male	Sentence Relief	Nos. 60, 143
98	Donald Ray Middlebrooks*	Davidson	09/22/89	White/Male	Sentence Relief	No. 144

99	Michael Wayne Howell	Shelby	10/26/89	Native Am/ Male	DECEASED	
100	Thomas Daniel Eugene Hale	Washington	11/18/89	Black/Male	Conviction Relief	
101	Jonathan Vaughn Evans	Hamblen	12/16/89	Black/Male	Sentence Relief	
102	Gary June Caughron	Sevier	02/03/90	White/Male	Sentence Relief	
103	John Michael Bane*	Shelby	02/23/90	White/Male	Sentence Relief	No. 156
104	Danny Branam	Knox	05/04/90	White/Male	Sentence Relief	
105	Harold Wayne Nichols	Hamilton	05/12/90	White/Male	PENDING	
106	Tommy Joe Walker	Knox	05/14/90	White/Male	Sentence Relief	
107	Randy Duane Hurley	Cocke	05/23/90	White/Male	Sentence Relief	
108	Oscar Franklin Smith (3)	Davidson	07/26/90	White/Male	PENDING	
109	David M. Keen*	Shelby	8/15/90	White/Male	Sentence Relief	No. 158
110	Victor James Cazes	Shelby	11/01/90	White/Male	DECEASED	
111	Jonathan Wesley Stephenson*	Cocke	10/19/90	White/Male	Sentence Relief	No. 194
112	Olen Edward Hutchison	Campbell	01/18/91	White/Male	DECEASED	

113	Kenneth Patterson Bondurant*	Giles	02/09/91	White/Male	Conviction Relief	No. 201
114	David Allen Brimmer	Anderson	03/02/91	White/Male	Sentence Relief	
115	Roosevelt Bigbee	Sumner	03/15/91	Black/Male	Sentence Relief	
116	Joseph Arlin Shepherd	Monroe	04/04/91	White/Male	Sentence Relief	
117	Ricky Eugene Estes	Shelby	06/26/91	White/Male	Conviction Relief	
118	James Blanton (2)	Stewart	07/27/91	White/Male	DECEASED	
119	Sylvester Smith	Shelby	09/27/91	Black/Male	Sentence Relief	
120	Millard Curnutt	Campbell	11/22/91	White/Male	DECEASED	
121	William Eugene Hall (2)	Stewart	12/04/91	White/Male	PENDING	
122	Derrick Desmond Quintero (2)	Stewart	12/04/91	Latino/Male	PENDING	
123	Henry Eugene Hodges	Davidson	01/28/92	White/Male	PENDING	
124	Craig Thompson	Shelby	02/29/92	Black/Male	Sentence Relief	
125	Timothy Dewayne Harris	Shelby	03/04/92	Black/Male	Sentence Relief	

126	Leroy Hall, Jr.	Hamilton	03/11/92	White/Male	PENDING	
127	Ricky Thompson*	McMinn	04/04/92	White/Male	Conviction Relief	182
128	Derrick Johnson	Shelby	04/22/92	Black/Male	Sentence Relief	
129	Robert Williams	Hamilton	06/19/92	Black/Male	Sentence Relief	
130	Richard Odom*	Shelby	10/15/92	White/Male	Sentence Relief	Nos. 177, 210
131	William Arnold Murphy	Shelby	11/20/92	White/Male	Sentence Relief	
132	Michael Dean Bush	Putnam	02/22/93	White/Male	Sentence Relief	
133	Gary Wayne Sutton	Blount	02/24/93	White/Male	PENDING	
134	James Anderson Dellinger (2)	Blount	02/24/93	White/Male	PENDING	
135	Fredrick Sledge	Shelby	11/04/93	Black/Male	Sentence Relief	
136	Christopher Scott Beckham	Shelby	11/17/93	White/Male	Sentence Relief	
137	Andre S. Bland	Shelby	02/14/94	Black/Male	PENDING	
138	Glen Bernard Mann	Dyer	07/19/94	Black/Male	DECEASED	
139	Gussie Willis Vann	McMinn	08/10/94	White/Male	Conviction Relief (Exonerated)	

140	Perry A. Cribbs	Shelby	11/16/94	Black/Male	Sentence Relief	
141	Preston Carter* (a.k.a. *Akil Jahi*) (2)	Shelby	01/25/95	Black/Male	Sentence Relief	No. 179
142	Ronald Michael Cauthern**(2)	Montgomery	01/25/95	White/Male	Sentence Relief	No. 89
143	Clarence C. Nesbit	Shelby	02/24/95	Black/Male	Sentence Relief (AR)	
144	Kevin B. Burns (2)	Shelby	09/23/95	Black/Male	PENDING	
145	Leonard Edward Smith***	Sullivan	09/27/95	White/Male	Sentence Relief	Nos. 60, 97
146	Donald Ray Middlebrooks**	Davidson	10/12/95	White/Male	PENDING	No. 98
147	Christa Gail Pike	Knox	03/30/96	White/Female	PENDING	
148	Tony V. Carruthers (3)	Shelby	04/26/96	Black/Male	PENDING	
149	James Montgomery (3)	Shelby	04/26/96	Black/Male	Conviction Relief	
150	Jon D. Hall	Henderson	02/05/97	White/Male	PENDING	
151	Farris Genner Morris, Jr. (2)	Madison	04/01/97	Black/Male	PENDING	
152	Bobby Gene Godsey, Jr.	Sullivan	04/25/97	White/Male	Sentence Relief	

153	Charles Edward Hartman**	Montgomery	08/01/97	White/Male	Sentence Relief	No. 43
154	Roy E. Keough	Shelby	05/09/97	White/Male	Sentence Relief	
155	Tyrone L. Chalmers	Shelby	06/19/97	Black/Male	PENDING	
156	John Michael Bane**	Shelby	07/18/97	White/Male	PENDING	No. 103
157	John David Terry**	Davidson	08/07/97	White/Male	DECEASED	No. 92
158	David M. Keen**	Shelby	08/15/97	White/Male	PENDING	No. 109
159	Jerry Ray Davidson	Dickson	09/03/97	White/Male	Sentence Relief	
160	Dennis Wade Suttles	Knox	11/04/97	White/Male	PENDING	
161	Steve Morris Henley** (2)	Jackson	12/15/97	White/Male	EXECUTED	No. 72
162	James Patrick Stout	Shelby	03/03/98	Black/Male	Sentence Relief	
163	Vincent C. Sims	Shelby	05/01/98	Black/Male	PENDING	
164	Kennath Artez Henderson	Fayette	07/13/98	Black/Male	PENDING	
165	Michael Dale Rimmer*	Shelby	11/09/98	White/Male	Sentence Relief	Nos. 200, 221
166	Gregory Robinson	Shelby	11/23/98	Black/Male	PENDING	

167	Gerald Lee Powers	Shelby	12/14/98	Asian/Male	PENDING	
168	William Pierre Torres	Knox	02/25/99	Latino/Male	Sentence Relief	
169	Richard Hale Austin**	Shelby	03/05/99	White/Male	DECEASED	No. 1
170	James A. Mellon	Knox	03/05/99	White/Male	Conviction Relief	
171	Paul Dennis Reid (2)	Davidson	04/20/99	White/Male	DECEASED	
172	Daryl Keith Holton (4)	Bedford	06/15/99	White/Male	EXECUTED	
173	Christopher A. Davis (2)	Davidson	06/17/99	Black/Male	Sentence Relief	
174	Timothy Terrell McKinney	Shelby	07/16/99	Black/Male	Conviction Relief	
175	William Richard Stevens (2)	Davidson	07/23/99	White/Male	DECEASED	
176	Paul Dennis Reid (2)	Montgomery	09/22/99	White/Male	DECEASED	
177	Richard Odom**	Shelby	10/01/99	White/Male	Sentence Relief	Nos. 130, 210
178	William Glenn Rogers	Montgomery	01/21/00	White/Male	PENDING	
179	Preston Carter** (a.k.a. *Akil Jahi*) (2)	Shelby	02/17/00	Black/Male	PENDING	No. 139

180	G'Dongalay Parlo Berry (2)	Davidson	05/25/00	Black/Male	Sentence Relief	
181	Paul Dennis Reid (3)	Davidson	05/27/00	White/Male	DECEASED	
182	Ricky Thompson**	McMinn	06/13/00	White/Male	Sentence Relief	No. 127
183	Arthur Todd Copeland	Blount	07/24/00	Black/Male	Conviction Relief	
184	David Lee Smith (2)	Bradley	11/06/00	White/Male	DECEASED	
185	Robert Lee Leach, Jr. (2)	Davidson	02/16/01	White/Male	DECEASED	
186	Robert Faulkner	Shelby	03/10/01	Black/Male	Conviction Relief (AR)	
187	Hubert Glenn Sexton (2)	Scott	06/30/01	White/Male	Sentence Relief	
188	Charles Edward Rice	Shelby	01/14/02	Black/Male	PENDING	
189	Steven Ray Thacker	Dyer	02/08/02	White/Male	DECEASED	
190	John Patrick Henretta	Bradley	04/06/02	White/Male	Sentence Relief	
191	Detrick Deangelo Cole	Shelby	04/19/02	Black/Male	Sentence Relief	
192	Leonard Jasper Young	Shelby	08/24/02	White/Male	Sentence Relief (AR)	
193	Andrew Thomas	Shelby	09/26/02	Black/Male	Conviction Relief (AR)	

194	Jonathan Wesley Stephenson**	Cocke	10/05/02	White/Male	PENDING	No. 111
195	David Ivy	Shelby	01/11/03	Black/Male	PENDING	
196	Steven James Rollins	Sullivan	06/21/03	White/Male	Conviction Relief	
197	Stephen L. Hugueley	Hardeman	09/16/03	White/Male	PENDING	
198	Richard Carlton Taylor**	Hickman	10/16/03	White/Male	Sentence Relief	No. 41
199	Marlan Duane Kiser	Hamilton	11/20/03	White/Male	PENDING	
200	Michael Dale Rimmer**	Shelby	01/13/04	White/Male	Conviction Relief	Nos. 165, 221
201	Kenneth Patterson Bondurant**	Giles	01/20/04	White/Male	Sentence Relief	No. 113
202	Robert Hood	Shelby	05/06/04	Black/Male	Sentence Relief	
203	Joel Schmeiderer	Wayne	05/15/04	White/Male	Sentence Relief	
204	James Riels (2)	Shelby	08/13/04	White/Male	Sentence Relief	
205	Franklin Fitch	Shelby	10/29/04	Black/Male	Sentence Relief	
206	Harold Hester	McMinn	03/12/05	White/Male	Sentence Relief	

207	Devin Banks	Shelby	04/11/05	Black/Male	Sentence Relief	
208	David Lynn Jordan (3)	Madison	09/25/06	White/Male	PENDING	
209	Nickolus Johnson	Sullivan	04/27/07	Black/Male	PENDING	
210	Richard Odom***	Shelby	12/08/07	White/Male	PENDING	Nos. 130, 177
211	Corinio Pruitt	Shelby	03/01/08	Black/Male	PENDING	
212	Henry Lee Jones (2)*	Shelby	05/14/09	Black/Male	Conviction Relief	No. 220
213	Lemaricus Davidson (2)	Knox	10/30/09	Black/Male	PENDING	
214	Howard Hawk Willis (2)	Washington	06/21/10	White/Male	PENDING	
215	Jessie Dotson (6)	Shelby	10/12/10	Black/Male	PENDING	
216	John Freeland	Chester	05/23/11	Black/Male	Sentence Relief	
217	James Hawkins	Shelby	06/11/11	Black/Male	PENDING	
218	Rickey Bell	Tipton	03/30/12	Black/Male	PENDING	
219	Sedrick Clayton (3)	Shelby	06/15/14	Black/Male	PENDING	
220	Henry Lee Jones (2)**	Shelby	05/16/15	Black/Male	PENDING	No. 212

221	Michael Dale Rimmer***	Shelby	05/07/16	White/Male	PENDING	Nos. 165, 221
222	Urshawn Miller[3]	Madison	04/03/18	Black/Male	PENDING	

[3] This case was tried after June 30, 2017—i.e. after the 40-year period.

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APPENDIX 3

LIST OF TENNESSEE CAPITAL CASES GRANTED RELIEF ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL

DURING THE 40-YEAR PERIOD 7/1/1977–6/30/2017

Tennessee capital cases granted relief in state court for IAC:

1. State v. Ransom, No. B57716 (Tenn. Shelby Co. Crim. Ct. Jan. 1, 1983) (sentence relief) (settled for life)

2. Teague v. State, 772 S.W.2d 915 (Tenn. Crim. App. 1988) (sentence relief) (settled for life)

3. Cooper v. State, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (grant of sentence relief from PC court aff'd) (resentenced to less than death)

4. Johnson v. State, No. 1037, 1992 WL 210576 (Tenn. Crim. App. Sept. 2, 1992) (sentence relief) (released in 2012 on Alford plea)

5. Campbell v. State, No. 03C01-9012-CR-00283, 1993 WL 122057 (Tenn. Crim. App. Apr. 21, 1993) (sentence relief) (settled for life sentence; subsequently paroled)

6. Adkins v. State, 911 S.W.2d 334 (Tenn. Crim. App. 1994) (sentence relief) (resentenced to less than death)

7. Teel v. State, No. 1460 (Tenn. Marion Co. Cir. Ct. Apr. 12, 1995) (sentence relief) (settled for life)

8. Bell v. State, No. 03C01-9210-CR-00364, 1995 WL 113420 (Tenn. Crim. App. Mar. 15, 1995) (sentence relief) (resentenced to less than death)

9. Goad v. State, 938 S.W.2d 363 (Tenn. 1996) (sentence relief) (resentenced to life)

10. Coker v. State, No. 4778 (Tenn. Sequatchie Co. Cir. Ct. Apr. 22, 1996) (sentence relief) (resentenced to life)

11. Brimmer v. State, 29 S.W.3d 497 (Tenn. Crim. App. 1998) (sentence relief) (resentenced to less than death)

12. Smith v. State, No. 02C01-9801-CR-00018, 1998 WL 899362 (Tenn. Crim. App. Dec. 28, 1998) (conviction relief) (settled for life)

13. Hurley v. State, No. 4802 (Tenn. Cocke Co. Cir. Ct. Dec. 12, 1998) (sentence relief) (settled for life)

14. Taylor v. State, No. 01C01-9707-CC-00384, 1999 WL 512149 (Tenn. Crim. App. July 21, 1999) (conviction relief) (settled for life)

15. Darrell Wayne Taylor v. State, Nos. P-7864, 86-03704 (Tenn. Shelby Co. Crim. Ct.) (settled for life; paroled)

16. McCormick v State, No. 03C01-9802-CR-00052, 1999 WL 394935 (Tenn. Crim. App. June 17, 1999) (conviction relief) (acquitted on retrial—exoneration)

17. Wilcoxson v. State, 22 S.W.3d 289 (Tenn. Crim. App. 1999) (sentence relief) (resentenced to less than death)

18. Caughron v. State, No. 03C01-9707-CC-00301, 1999 WL 49906 (Tenn. Crim. App. Feb. 5, 1999) (sentence relief) (resentenced to less than death)

19. State v. Bush, No. 84–411 (Tenn. Cumberland Co. Cir. Ct. Mar. 7, 2002) (sentence relief) (settled for life)

20. Vann v. State, No. 99-312 (Tenn. McMinn Co. Cir. Ct. May 29, 2008) (conviction relief) (charges dismissed—exoneration)

21. Nesbit v. State, P-21818 (Tenn. Shelby Co. Crim. Ct. July 9, 2009) (sentence relief)

22. Cribbs v. State, No. P-20670, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009) (sentence relief) (settled for life)

23. McKinney v State, No. W2006-02132-CCA-R3-PD, 2010 WL 796939 (Tenn. Crim. App. Mar. 9, 2010) (conviction relief) (after 2 subsequent mistrials (hung juries), pled to 2d degree murder and released)

24. Cole v. State, No. W2008-02681-CCA-R3PD, 2011 WL 1090152 (Tenn. Crim. App. Mar. 8, 2011) (sentence relief) (settled for life without parole)

25. Young v. State, No. 00-04018 (Tenn. Shelby Co. Crim. Ct. Mar. 28, 2011) (sentence relief)

26. Banks v. State, No. 03-01956 (Tenn. Shelby Co. Crim. Ct. Sept. 13, 2011) (sentence relief) (settled for LWOP)

27. Smith v. State, 357 S.W.3d 322 (Tenn. 2011) (sentence relief) (settled for life)

28. Stout v. State, No. W2011-00277-CCA-R3-PD, 2012 WL 3612530 (Tenn. Crim. App. June 12, 2012) (sentence relief) (sentenced to life)

29. Rollins v. State, No. E2010-01150-CCA-R3-PD, 2012 WL 3776696 (Tenn. Crim. App. Aug. 31, 2012) (sentence relief by trial P.C. court; conviction relief on appeal) (settled for life)

30. Rimmer v. State, Nos. 98–01034, 97–02817, 98–01033 (Tenn. Shelby Co. Crim. Ct. Oct. 12, 2012) (conviction relief) (retried, convicted, sentenced to death again after mitigation waiver)

31. Hester v. State, No. 00-115 (Tenn. McMinn Co. Cir. Ct. May 20, 2013) (settled for LWOP without PC hearing; at the plea hearing, State acknowledged IAC/mitigation)

32. Davidson v. State, 453 S.W.3d 386 (Tenn. 2014) (sentence relief) (settled for LWOP)

33. Schmeiderer v. State, No. 14488 (Tenn. Maury Co. Cir. Ct. Dec. 22, 2014) (settled for LWOP without PC hearing; agreed disposition order references IAC/mitigation)

Tennessee capital cases granted relief in federal court for IAC:

1. Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (sentence relief) (resentenced to death)

2. Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) (conviction relief) (resentenced to life)

3. Groseclose v. Bell, 131 F.3d 1161 (6th Cir. 1997) (conviction relief) (resentenced to life)

4. Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (sentence relief) (settled for life)

5. Caruthers v. Carpenter, 3:91-CV-0031 Docket (Doc) #287 and #288 (June 6, 2001) (order granting sentencing relief) (on appeal)

6. Timothy Morris v. Bell, No. 2:99-CD-00424 (E.D. Tenn. May 16, 2002) (sentence relief) (settled for life)

7. Harries v. Bell, 417 F.3d 631 (6th Cir. 2005) (sentence relief) (settled for life)

8. King v. Bell, No. 1:00-cv-00017 (M.D. Tenn. July 13, 2007) (sentence relief) (resentenced to life)

9. House v. Bell, No. 3:96-cv-883, 2007 WL 4568444 (E.D. Tenn. Dec. 20, 2007) (conviction relief) (charges dismissed in 2009—exoneration)

10. Cauthern v. Colson, 736 F.3d 465 (6th Cir. 2013) (sentence relief) (sentenced to life)

11. Duncan v. Carpenter, No. 3:88-00992 (M.D. Tenn. Mar. 4, 2015) (sentence relief)

12. McNish v. Westbrooks, No. 2:00-CV-095-PLR-CLC, 2016 WL 755634 (E.D. Tenn. Feb. 25, 2016) (sentence relief)

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APPENDIX 4

CHART OF SIXTH CIRCUIT VOTING IN TENNESSEE CAPITAL HABEAS CASES

Republican Appointed Judges

REPUBLICAN APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO *DENY* RELIEF	VOTES TO *GRANT* RELIEF (or remand)
Batchelder	1991	8	1
Boggs	1986	12	1
Cook	2003	10	1
Gibbons	2002	4	1
Griffin	2005	3	0
Guy	1985	0	1
Kethledge	2008	1	0
McKeague	2005	2	0
Nelson	1985	2	0
Norris	1986	7	0
Rogers	2002	6	0
Ryan	1985	3	3
Siler	1991	11	0
Suhrheinrich	1990	4	1

Sutton	2003	4	0
White	2008	2	2
TOTALS		**79 (88%)**	**11 (12%)**

Democrat Appointed Judges

DEMOCRAT APPOINTED JUDGES	DATE APPOINTED TO 6TH CIRCUIT	VOTES TO *DENY* RELIEF	VOTES TO *GRANT* RELIEF
Clay	1997	3	8
Cole	1995	4	7
Daughtrey	1993	1	3
Donald	2011	0	1
Gilman	1997	2	4
Keith	1977	0	2
Martin	1979	0	5
Merritt	1979	0	9
Moore	1995	3	6
TOTALS		**13 (22%)**	**45 (78%)**

Sixth Circuit Capital Habeas Cases from Tennessee
Final Dispositions in the Court of Appeals[1]

CASE	VOTES TO *DENY* RELIEF	VOTES TO *GRANT* RELIEF (or remand)
Houston v. Dutton 50 F.3d 381 (6th Cir. 1995)		Guy (R) Merritt (D) Ryan (R)
Austin v. Bell 126 F.3d 843 (6th Cir. 1997)		Martin (D) Merritt (D) Suhrheinrich (R)
Rickman v. Bell 131 F.3d 1150 (6th Cir. 1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Groseclose v. Bell 130 F.3d 1161 (6th Cir. 1997)	Suhrheinrich (R)	Keith (D) Ryan (R)
Coe v. Bell 161 F.3d 320 (6th Cir. 1998)	Boggs (R) Norris (R)	Moore (D)
Carter v. Bell 218 F.3d 581 (6th Cir. 2000)	Clay (D) Gilman (D) Nelson (R)	
Workman v. Bell	Batchelder (R) Boggs (R) Nelson (R) Norris (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D)

[1] The cases included in this chart are the final Sixth Circuit Court of Appeals dispositions of Tennessee capital habeas cases. This chart does not include other decisions that addressed collateral issues or that were superseded by subsequent Sixth Circuit Court of Appeals decisions.

227 F.3d 331 (6th Cir. 2000) (en banc)[2]	Ryan (R) Siler (R) Suhrheinrich (R)	Martin (D) Merritt (D) Moore (D)
Abdur'Rahman v. Bell 226 F.2d 696 (6th Cir. 2000)	Batchelder (R) Siler (R)	Cole (D)
Caldwell v. Bell 288 F.3d 838 (6th Cir. 2002)	Norris (R)	Clay (D) Merritt (D)
Hutchison v. Bell 303 F.3d 720 (6th Cir. 2002)	Cole (D) Moore (D) Siler (R)	
Alley v. Bell 307 F.3d 380 (6th Cir. 2002)	Batchelder (R) Boggs (R) Ryan (R)	
Thompson v. Bell 315 F.3d 566 (6th Cir. 2003)	Moore (D) Suhrheinrich (R)	Clay (D)
Donnie Johnson v. Bell 344 F.3d 567 (6th Cir. 2003)	Boggs (R) Norris (R)	Clay (D)
House v. Bell 386 F.3d 668 (6th Cir. 2004) (en banc)[3]	Batchelder (R) Boggs (R) Cook (R) Gibbons (R)	Clay (D) Cole (D) Daughtrey (D) Gilman (D)

[2] In Workman v. Bell, 160 F.3d 276 (6th Cir. 1998), Judges Nelson, Ryan, and Siler, all Republican appointees, voted to affirm the district court's denial of habeas relief. In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (en banc), the seven Democrat appointees voted to remand the case for further proceedings, while the seven Republican appointees voted to affirm the district court. Because the vote was evenly split, the district court's denial of habeas relief was affirmed. Mr. Workman was executed.

[3] The United States Supreme Court overturned the Sixth Circuit's en banc decision. House v. Bell, 547 U.S. 518 (2006).

	Norris (R) Rogers (R) Siler (R) Sutton (R)	Martin (D) Merritt (D) Moore(D)
Bates v. Bell 402 F.3d 635 (6th Cir. 2005)		Batchelder (R) Merritt (D) Moore (D)
Harbison v. Bell 408 F.3d 823 (6th Cir. 2005)	Cook (R) Siler (R)	Clay (D)
Harries v. Bell 407 F.3d 631 (6th Cir. 2005)		Boggs (R) Cook (R) Gibbons (R)
Payne v. Bell 418 F.3d 644 (6th Cir. 2005)	Cook (R) Rogers (R) Sutton (R)	
Henley v. Bell 487 F.3d 379 (6th Cir. 2007)	Cook (R) Siler (R)	Cole (D)
Cone v. Bell 505 F.3d 610 (6th Cir. 2007)[4]	Batchelder (R) Boggs (R) Cook (R)	Clay (D) Cole (D) Daughtrey (D)

On remand from the Supreme Court, the district court granted relief on Mr. House's claims relating to actual innocence, and the state then dismissed the charges—resulting in Mr. House's exoneration.

[4] In *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), Judges Norris (R), Merritt (D), and Ryan (R) voted unanimously to grant relief. The United States Supreme Court overturned that decision in *Cone v. Bell*, 535 U.S. 685 (2002). On remand, Judges Ryan and Merritt voted for relief, while Judge Norris (R) dissented. Cone v. Bell, 359 F.3d 785 (6th Cir. 2004). Again, the Supreme Court overturned the decision. Bell v. Cone, 543 U.S. 447 (2005). Then on remand, Judges Norris and Ryan voted to deny habeas relief, while Judge Merritt dissented. Cone v. Bell, 492 F.3d 743 (6th Cir. 2007). On Mr. Cone's petition for rehearing en banc, seven Democrat appointees dissented from the denial of rehearing en banc. Cone v. Bell, 505 F.3d 610 (6th Cir. 2007). The remaining judges, all

	Griffin (R) McKeague (R) Norris (R) Rogers (R) Ryan (R) Sutton (R)	Gilman (D) Martin (D) Merritt (D) Moore (D)
Cecil Johnson v. Bell 525 F.3d 466 (6th Cir. 2008)	Batchelder (R) Gibbons (R)	Cole (D)
Owens v. Guida 549 F.3d 399 (6th Cir. 2008)	Boggs (R) Siler (R)	Merritt (D)
West v. Bell 550 F.3d 542 (6th Cir. 2008)	Boggs (R) Norris (R)	Moore (D)
Irick v. Bell 565 F.3d 315 (6th Cir. 2009)	Batchelder (R) Siler (R)	Gilman (D)
Smith v. Bell 381 F. App'x 547 (6th Cir. 2010)	Cole (D) Cook (R) Griffin (R)	
Wright v. Bell 619 F.3d 586 (6th Cir. 2010)	Cole (D) McKeague (R) Rogers (R)	
Nicholus Sutton 645 F.3d 752 (6th Cir. 2011)	Boggs (R) Daughtrey (D)	Martin (D)
Strouth v. Colson 680 F.3d 596 (6th Cir. 2012)	Cook (R) Kethledge (R) Sutton (R)	
Cauthern v. Colson	Rogers (R)	Clay (D)

Republican appointees, either voted to deny rehearing en banc or acquiesced in the denial. (These opposing positions on the en banc petition are counted as votes in the chart.) Then, again the Supreme Court overturned the Sixth Circuit, Cone v. Bell, 556 U.S. 449 (2009), and remanded the case to the district court. Mr. Cone died on death row while his case was pending.

726 F.3d 465 (6th Cir. 2013)		Cole (D)
Hodges v. Colson 727 F.3d 517 (6th Cir. 2013)	Batchelder (R) Cook (R)	White (R)
Van Tran v. Colson 764 F.3d 594 (6th Cir. 2014)	Cook (R) Rogers (R) White (R)	
Middlebrooks v. Bell 619 F.3d 526 (6th Cir. 2010) Middlebrooks v. Carpenter 843 F.3d 1127 (6th Cir. 2016)	Clay (D) Gilman (D) Moore (D) White (R)	
Miller v. Colson 694 F.3d 691 (6th Cir. 2012)	Gibbons (R) Siler (R)	White (R)
Morris v. Carpenter 802 F.3d 825 (6th Cir. 2015)	Boggs (R) Clay (D) Siler (R)	
GSutton v. Carpenter 617 F. App'x 434 (6th Cir. 2015)	Boggs (R) Cook (R) Gibbons (R)	
Thomas v. Westbrooks 849 F.3d 659 (6th Cir. 2017)	Siler (R)	Merritt (D) Donald (D)
Black v. Carpenter 866 F.3d 734 (6th Cir. 2017)	Boggs (R) Cole (D) Griffin (R)	

Further notes:

Split Decisions: Of the 37 cases charted above, 21 (or 57%) resulted in split decisions. In these split decision cases, 92% of the Republican appointee votes were *against* relief, while 92% of the Democrat appointee votes were *for* relief. The votes according to party affiliation of the judges were:

Republican Appointee Votes *Against* Relief = 50 (93%)

Republican Appointee Votes *For* Relief = 4 (7%)

Democrat Appointee Votes *Against* Relief = 3 (7%)

Democrat Appointee Votes *For* Relief = 37 (93%)

Since 2005, no Republican appointee majority has voted for relief.

En Banc Opinions: We have identified six Sixth Circuit en banc opinions in capital cases from Tennessee. Three are included in the chart because those en banc decisions resulted in final disposition of the petitioners' habeas claims in the Sixth Circuit Court of Appeals. The other three are not included in the chart because they decided collateral issues that were not dispositive of the petitioners' habeas claims. The en banc opinions are as follows:

O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996) (en banc) (per curiam) (7-6 decision resulting in a remand to state court, in which 4 Democrat appointees and 3 Republican appointees voted favorably for the petitioner; while 5 Republican appointees and 1 Democrat appointee voted unfavorably against the petitioner) (not included in the chart);

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (en banc) (a tie 7-7 vote strictly along party lines, effectively denying habeas relief) (included in the chart);

Abdur'Rahman v. Bell, 392 F.3d 174 (2004) (en banc) (in a 7-6 decision on a habeas procedural issue, all 6 Democrat appointees and 1 Republican appointee voted in favor of the petitioner, and 6 Republican appointees and no Democrat appointees voted against the petitioner—i.e., the single swing Republican appointee vote enabled the case to continue) (not included in the chart);

House v. Bell, 386 F.3d 668 (6th Cir. 2004) (en banc) (8-7 vote, strictly along party lines, denying habeas relief) (included in the chart);

Alley v. Little, 452 F.3d 620 (6th Cir. 2006) (en banc) (8-5 vote rejecting method-of-execution claim, in which 7 Republican appointees and 1 Democrat appointee voted against the petitioner, and 5 Democrat appointees voted for the petitioner) (not included in the chart);

Cone v. Bell, 505 F.3d 610 (6th Cir. 2007) (all 7 Democrat appointees dissented from denial of en banc review, while all 9 Republican appointees supported denial of en banc review—resulting in denial of habeas relief) (included in the chart).

Among these en banc opinions, Republican appointees cast 42 of their 46 votes (91%) against the petitioners, while Democrat appointees cast 36 of their 37 votes (97%) in favor of the petitioners.

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APPENDICES A–H

DIGITAL APPENDICES

Appendices A–H are digital Excel spreadsheets of the data used in Appendix 1. These appendices are available for download on the *Tennessee Journal of Law and Policy*'s website at: https://tennesseelawandpolicy.org/volumes/volume-13/.

The individual archival links are to the direct download.

App. A: *Tennessee Adult Defendant with Sustained First Degree Murder Convictions (7/1/1977–6/30/2017) With Rule 12 Reports* [https://perma.cc/R8F2-3T7J]

App. B: *Tennessee Sustained Adult First Degree Murder Convictions (7/1/1977–6/30/2017) With NO Rule 12 Reports* [https://perma.cc/FY2R-BZXF]

App. C: *Juvenile Defendants Convicted of First Degree Murder (7/1/1977–6/30/2017) With Rule 12 Reports* [https://perma.cc/REM2-QAQV]

App. D: *Juvenile Defendants Convicted of First Degree Murder (7/1/1977–6/30/2017) With NO Rule 12 Reports* [https://perma.cc/PT2V-QEPH]

App. E: *Adult and Juvenile Defendants with Sustained First Degree Murder by Grand Division County During Period of July 1, 1977, to June 30, 2017* [https://perma.cc/W8ZF-LSQD]

App. F: *Adult Defendants Convicted of Sustained First Degree Murder Convictions (7/1/1977–6/30/2017) By Grand Division, County, Rule 12 or NO Rule 12 Report* [https://perma.cc/6H8T-6639]

App. G: *Defendants With Sustained First Degree Murder Convictions of Multiple Victims With Number and Age of Victims (7/1/1977–6/30/2017) Plus Rule 12 Report Filed (Yes/No)* [https://perma.cc/RKL9-5YQW]

App. H: *Trials in Which Death Sentences Were Imposed During the Period of 7/1/1977–6/30/2017)* [https://perma.cc/VQZ7-YCYA