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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. Georgia² 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.”\(^4\)

\(^3\) 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.”

And third, viewing how the sentencing system operates as a whole, the death penalty must not be imposed in an arbitrary and capricious manner. Justice 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. 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


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.

Furman, 408 U.S. at 274.

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).
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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[]

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.”).
... capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death.\textsuperscript{11}

\textit{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 \textit{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.\textsuperscript{12} As the Supreme Court explained, we must “look[] to the \textit{sentencing system as a whole} (as the Court did in \textit{Furman} . . . )”;\textsuperscript{13} a constitutional violation is established if a defendant demonstrates a “pattern of arbitrary and capricious sentencing.”\textsuperscript{14} It is worth noting that in \textit{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.\textsuperscript{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

\textsuperscript{11}\textit{Spaziano}, 468 U.S. at 460 n.7.
\textsuperscript{13}\textit{Id.} (emphasis added).
\textsuperscript{14}\textit{Id.} at 195 n.46.
\textsuperscript{15}See \textit{Furman} v. \textit{Georgia}, 408 U.S. 238, 309 n.11 (1972) (Stewart, J., concurring). See \textit{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 \textit{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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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.
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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

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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.
24 Woodson, 428 U.S. at 286.
eliminate the *Furman* problem of unfettered sentencing discretion. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that North Carolina’s mandatory death penalty statute

[202x675]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

\(^{25}\) *Id.* at 302.

\(^{26}\) *Id.* at 303 (emphasis added).

\(^{27}\) *Gregg*, 428 U.S. 153.


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designed to address Furman’s concern with arbitrariness by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision;\(^\text{29}\) (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;\(^\text{30}\) (iii) allowing the defendant to present mitigating evidence to ensure that the sentencing decision is individualized, which is another constitutional requirement;\(^\text{31}\) (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;\(^\text{32}\) and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions.\(^\text{33}\) 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.”\(^\text{34}\)

When Gregg was decided, states had no prior experience with “guided discretion” capital sentencing. Whether such a scheme would “fulfill Furman’s basic requirement”\(^\text{35}\) 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.

\(^{29}\) *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.

In 1977, Tennessee responded to *Furman*, *Woodson*, and *Gregg* by enacting its version of a guided discretion capital sentencing scheme. 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. 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 proven by the prosecution and any mitigating circumstances presented by the defense. The Tennessee Supreme Court is statutorily

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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.
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.” The Court’s consideration of whether a death sentence is “excessive or disproportionate to the penalty imposed in similar cases” is referred to as “comparative proportionality review.”

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

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

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.” The more aggravators the prosecution can prove, the more likely the jury will give

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44 Gregg, 428 U.S. at 189.
45 Id. at 200–04.

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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

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 (ii)(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.\textsuperscript{50}

\begin{itemize}
\item[(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.
\end{itemize}


\textsuperscript{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):

\begin{itemize}
\item[(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;
\item[(2)] The defendant was previously convicted of one (1) or more felonies, other than the present charge, \textit{whose statutory elements} involve the use of violence to the person;
\item[(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;
\item[(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;
\item[(5)] The murder was especially heinous, atrocious, or cruel, in that it involved torture or \textit{serious physical abuse beyond that necessary to produce death};
\item[(6)] The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
\item[(7)] The murder was \textit{knowingly} committed, \textit{solicited, directed, or aided by the defendant}, while the defendant \textit{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. Cole54 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{59} even though juvenile offenders are not eligible for the death penalty.\textsuperscript{60}

Additionally, in 1998 the legislature expanded the range of permissible evidence the prosecution can introduce relating to a prior violent felony conviction.\textsuperscript{61} The 1998 amendment permits introduction of evidence “concerning the facts and circumstances of the prior

\textsuperscript{56} \textit{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 \textit{State v. Ivy}, 188 S.W.3d 132 (Tenn. 2006).

\textsuperscript{57} See \textit{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.”).

\textsuperscript{58} See, e.g., \textit{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).

\textsuperscript{59} \textit{State v. Davis}, 141 S.W.3d 600, 616–18 (Tenn. 2004).

\textsuperscript{60} \textit{Roper v. Simmons}, 543 U.S. 551 (2005).

conviction” to “be used by the jury in determining the weight to be accorded the aggravating factor.” 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.”

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”—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.
struck down similar kinds of aggravators as unconstitutionally vague.\textsuperscript{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.’”\textsuperscript{66} In \textit{Cone v. Bell}, a Sixth Circuit panel declared Tennessee’s HAC aggravator to be unconstitutionally vague.\textsuperscript{67} The Supreme Court, however, reversed the Sixth Circuit and upheld Tennessee’s version based upon the narrowing construction.\textsuperscript{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 \textit{State v. Keen}, where the court explained:

\begin{quote}

The “especially heinous, atrocious[,] or cruel” aggravating
\end{quote}

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\textsuperscript{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).

\textsuperscript{67} Cone v. Bell, 359 F.3d 785, 794–97 (6th Cir. 2004), rev’d per curiam, 543 U.S. 447 (2005).

\textsuperscript{68} \textit{Bell}, 543 U.S. 447, 459–60.
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circumstance “may be proved under either of two prongs: torture or serious physical abuse.” This court has defined “torture” as the “infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.” The phrase “serious physical abuse beyond that necessary to produce death,” on the other hand, is “self-explanatory; the abuse must be physical rather than mental in nature.” The “word ‘serious’ alludes to a matter of degree,” and the term “abuse” is defined as “an act that is ‘excessive’ or which makes ‘improper use of a thing,’ or which uses a thing ‘in a manner contrary to the natural or legal rules for its use.’”

Our case law is clear that “[t]he anticipation of physical harm to oneself is torturous” so as to establish this aggravating circumstance. Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within the meaning of the statute.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. Rollins71 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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71 State v. Rollins, 188 S.W.3d 553, 572 (Tenn. 2006).
multiple times.\textsuperscript{72} In the guilt phase, the medical examiner testified to the cause of death, describing in detail the multiple stab wounds.\textsuperscript{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.\textsuperscript{74} According to the court, this evidence was sufficient to establish the HAC aggravator.\textsuperscript{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.”\textsuperscript{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.

\textsuperscript{72} Id. at 576.
\textsuperscript{73} Id. at 572.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
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.”

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.”

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

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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.
80 State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013).
81 The other felonies that support this aggravator are “first degree murder, arson, rape, robbery, burglary, theft,
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. The Court held that in such a case, the felony murder aggravator was unconstitutional because, by merely duplicating the elements of the underlying felony murder, it did not sufficiently narrow the class of death eligible defendants.

The legislature responded by amending the statute in 1995 to add two elements to the felony murder aggravator: that the murder was “knowingly” committed, solicited, directed, or aided by the defendant; and that the defendant had a “substantial role” in the underlying felony while the murder was committed. 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.

Although the legislature amended the (i)(7) felony murder aggravator in response to the *Middlebrooks* kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb” TENN. CODE ANN. § 39-13-204(i)(7) (2011).


83 *Id.* at 323.


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

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

Another important development in Tennessee’s death penalty jurisprudence has been the evisceration of any kind of meaningful “comparative proportionality

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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).
review of death sentences by the Tennessee Supreme Court.

As noted above, in an effort to protect against the “arbitrary and capricious” imposition of the death penalty, and following Georgia’s lead, the Tennessee scheme requires the Tennessee Supreme Court to conduct a “comparative proportionality review” in every capital case. 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.” According to the court, the statute’s purpose is to ensure “rationality and consistency in the imposition of the death penalty.” Justice Aldolpho A. Birch, Jr., explained:

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

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88 Id.
89 Id.
90 See, e.g., State v. Barber, 753 S.W.2d 659, 665–66 (Tenn. 1988).
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)).
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.’”\textsuperscript{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.\textsuperscript{93} Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review in capital cases. In \textit{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.”\textsuperscript{94} On January 1, 1999, the court issued a press release announcing the use of CD-ROMs to store copies of Rule 12 forms, in which then-Chief Justice Riley Anderson was quoted as saying, “The court’s primary interest in the database is for comparative proportionality review in [capital] cases, which is required by court rule and state law[.] ... The [Tennessee] Supreme Court reviews the data to ensure rationality and consistency in the imposition of


\textsuperscript{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. \textit{Id}.

\textsuperscript{94} State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987) (emphasis added).
the death penalty and to identify aberrant sentences during the appeal process.”

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, or whether there are other inappropriate criteria (such as race, poverty, geographic location, prosecutorial whim, or other factors) that play an untoward influence in capital sentencing decisions.

Unfortunately, the history of the court’s comparative proportionality review, and of Rule 12, has been problematic. Rule 12 data has rarely, if ever,


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).

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).
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 Reid99 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 proportionality review “absent[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

98 See discussion infra Part VI; see also infra Appendix 1.
101 State v. Hodges, 944 S.W.2d 346, 363 (Tenn. 1997) (Reid, J., dissenting).
proportionality review. Among other things, the court narrowed the pool of cases to be compared in the analysis. Under \textit{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.\footnote{Justices Reid and Birch dissented in \textit{Bland}. Justice Reid repeated his earlier complaints that the court’s comparative proportionality review analysis lacks proper standards. Justice Birch agreed with Justice Reid and further dissented from the court’s decision to narrow the pool of cases to be considered. \footnote{Thereafter, Justice Birch repeatedly dissented from the court’s decisions affirming death sentences, on the ground that the court’s comparative proportionality analysis was essentially meaningless. Justice Birch stated: “I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is inherently subjective, (2) the pool of cases used for comparison is too broad, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.” (citations omitted).}}

\footnote{State v. Bland, 958 S.W.2d 651, 665 (Tenn. 1997).}

\footnote{Id. at 674–79 (Reid, J., dissenting).}

\footnote{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. \textit{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 \textit{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 inherently subjective, (2) the pool of cases used for comparison is too broad, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.”) (citations omitted).}

\footnote{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.}
overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective.”

In the 2014 decision of State v. Pruitt, Justices William C. Koch, Jr., and Sharon G. Lee dissented from the court’s comparative proportionality methodology. 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.

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 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 \textit{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 \textit{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 \textit{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 affirm whatever decision the jury reaches at the trial level.”111

V. Simplifying the Lottery: A Tale of Two Cases

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110 Id. at 227–28 (footnotes omitted) (citations omitted).
TENNESSEE’S DEATH PENALTY LOTTERY
13 TENN. J.L. & POL’Y 85 (2018)

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 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.\(^\text{113}\)

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 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,\textsuperscript{114} and the other received four concurrent and two consecutive life sentences.\textsuperscript{115} On the other hand, the defendant in Case #2, who did not premeditate or intend the victim’s death, was sentenced to death.\textsuperscript{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 which has accounted for 52% of all new Tennessee death sentences since mid-2001, of which 86% involved black defendants.\textsuperscript{117} These may not be the only factors that could explain the disparity between these cases, but they stand out.

\textsuperscript{114} Moss, 2016 Tenn. Crim. App. LEXIS 709, at *1.
\textsuperscript{116} Pruitt, 415 S.W.3d at 186.
\textsuperscript{117} See infra Appendix 1.
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 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.,

118 See infra Appendix 1.
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

\[^{119}\] Office of Research, Tenn. Comptroller of the Treasury, Tennessee’s Death Penalty: Costs and Consequences (2004) [https://deathpenaltyinfo.org/documents/deathpenalty.pdf](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 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.
in at least 46% of adult first degree murder cases.\textsuperscript{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 \textit{Bland v. State}\textsuperscript{122} when the Tennessee Supreme Court decided to limit its comparative proportionality review only to other capital cases that it had previously reviewed.\textsuperscript{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 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

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.

\textsuperscript{121} \textit{See infra} Appendix 1. \textbf{The} Rule 12 noncompliance rate is \textbf{50\% in juvenile first degree murder cases.}

\textsuperscript{122} \textit{See supra} notes 102–105, \textbf{and} accompanying text.

\textsuperscript{123} \textbf{The perpetuation of Rule 12} on the books gives rise to two unfortunate problems. \textbf{First,} Rule 12 creates a false impression of meaningful data collection, which clearly is not the case when we realize the \textbf{46\% noncompliance rate} and the lack of evidence that Rule 12 data has served any purpose under the \textbf{current system}. \textbf{Second,} the \textbf{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.
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.”

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 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

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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, 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

<table>
<thead>
<tr>
<th>4-Year Period</th>
<th>Trials Resulting in Death Sentences (i.e., Initial Capital Trials)</th>
<th>New Death Sentences</th>
<th>Sustained Death Sentence(s)(^{126})</th>
<th>Ave. New Death Sentences per Year</th>
<th>1st Degree Murder Cases(^{127})</th>
<th>% “New” Death Sentences / 1st Degree Murders</th>
<th>% Sustained Death Sentences / 1st Degree Murders</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/77 – 6/30/81</td>
<td>25</td>
<td>25</td>
<td>6</td>
<td>6.25/year</td>
<td>155</td>
<td>16%</td>
<td>4%</td>
</tr>
<tr>
<td>7/1/81 – 6/30/85</td>
<td>37</td>
<td>33</td>
<td>12</td>
<td>8.25/year</td>
<td>197</td>
<td>17%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/85 – 6/30/89</td>
<td>34</td>
<td>32</td>
<td>15</td>
<td>8.00/year</td>
<td>238</td>
<td>13%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/89 – 6/30/93</td>
<td>38</td>
<td>37</td>
<td>18</td>
<td>9.25/year</td>
<td>282</td>
<td>13%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/93 – 6/30/97</td>
<td>21</td>
<td>17</td>
<td>9</td>
<td>4.455/year</td>
<td>395</td>
<td>4%</td>
<td>2%</td>
</tr>
<tr>
<td>7/1/97 – 6/30/01</td>
<td>32</td>
<td>24</td>
<td>14</td>
<td>6.00/year</td>
<td>316</td>
<td>8%</td>
<td>4%</td>
</tr>
<tr>
<td>7/1/01 – 6/30/05</td>
<td>20</td>
<td>16</td>
<td>5</td>
<td>4.00/year</td>
<td>283</td>
<td>6%</td>
<td>2%</td>
</tr>
<tr>
<td>7/1/05 – 6/30/09</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>1.00/year</td>
<td>271</td>
<td>1.5%</td>
<td>1.4%</td>
</tr>
<tr>
<td>7/1/09 – 6/30/13</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>1.50/year</td>
<td>284</td>
<td>2%</td>
<td>1.7%</td>
</tr>
<tr>
<td>7/1/13 – 6/30/17</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0.25/year</td>
<td>Incomplete Data(^{128})</td>
<td>Incomplete Data</td>
<td>Incomplete Data</td>
</tr>
<tr>
<td>TOTALS</td>
<td>221</td>
<td></td>
<td></td>
<td>4.88 per year (40 years)</td>
<td>&gt;2,514</td>
<td>&lt;8%</td>
<td>&lt;3.5%</td>
</tr>
</tbody>
</table>

\(^{126}\) 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. 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.

[134]
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. See supra note 128. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

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,
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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
reasonable scholar could maintain that there is any

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.

[137]
deterrence value to the death penalty when it is imposed with such infrequency.\textsuperscript{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.\textsuperscript{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 \textit{Furman}, “[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or

\textsuperscript{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, \textit{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., DETERRANCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper Eds., 2012) (“[R]earch 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.”).

\textsuperscript{135} The role of retribution in our criminal justice system is a debatable issue. \textit{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).
measurably to contribute to any other end of punishment in the criminal justice system.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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;\textsuperscript{139} since 2001, only eight counties, representing just 34\% of Tennessee’s

\textsuperscript{136} Furman v. Georgia, 408 U.S. 238, 311 (1972).

\textsuperscript{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].

\textsuperscript{138} See infra Appendix 2.

\textsuperscript{139} See infra Appendix 1, Table 21.
population, have imposed sustained death sentences.\textsuperscript{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:\textsuperscript{141}

\begin{center}
\begin{tabular}{|c|c|}
\hline
4-Year Period & Number of Counties Conducting Capital Trials\textsuperscript{142} During the Indicated 4-Year Period \\
\hline
7/1/1977 – 6/30/1981 & 13 \\
7/1/1981 – 6/30/1985 & 18 \\
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 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{140} Id. at Table 22. See also infra Appendix 2.
\textsuperscript{141} Id. at Table 24.
\textsuperscript{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.
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<table>
<thead>
<tr>
<th>Date Range</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/2009 – 6/30/2013</td>
<td>5</td>
</tr>
<tr>
<td>7/1/2013 – 6/30/2017</td>
<td>1</td>
</tr>
</tbody>
</table>

It is costly to maintain a capital punishment system. 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.

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County over the past 39 years, there have been ten first-degree

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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.
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.\textsuperscript{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.\textsuperscript{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 trial and direct appeal through post-conviction and


\textsuperscript{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].

[142]
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.\(^\text{147}\) 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:\(^\text{148}\)

<table>
<thead>
<tr>
<th>Length of Time on Death Row</th>
<th>Number of Defendants (as of 6/30/2017)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 30 Years</td>
<td>10</td>
</tr>
<tr>
<td>20 – 30 Years</td>
<td>20</td>
</tr>
<tr>
<td>10 – 20 Years</td>
<td>16</td>
</tr>
<tr>
<td>&lt; 10 Years</td>
<td>10</td>
</tr>
</tbody>
</table>

\(^\text{147}\) See infra Appendix 1, Table 20.

\(^\text{148}\) Id.
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.\(^\text{149}\)

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.\(^\text{150}\)

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,\(^\text{151}\) 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 population is an actuarial fact affecting the carrying out

\(^\text{149}\) 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.

\(^\text{150}\) 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 petitioners’ death.”) (quoting Thompson v. McNeil, 129 S. Ct. 1299, 1300 (200) (Stevens, J., respecting denial of certiorari)).

\(^\text{151}\) 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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Strickland} standard for determining ineffective assistance of counsel under the Sixth Amendment.\textsuperscript{157} In two additional cases affirmed by

\textsuperscript{154} See, \textit{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.”).

\textsuperscript{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).

\textsuperscript{156} These cases are listed \textit{infra} Appendix 3, \textit{List of Capital IAC Cases}.

\textsuperscript{157} \textit{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 \textit{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. These are findings of legal malpractice. 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.

See infra Appendix 1 at 214.

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

161 Id. at 52.
162 See infra note 176.
law practice.\textsuperscript{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.

\ldots

\ldots \text{"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."}\textsuperscript{164}

\textsuperscript{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. \textit{Cf.} William P. Redick, Jr., et al., \textit{Pretend Justice—Defense Representation in Tennessee Death Penalty Cases}, 38 U. MEM. L. REV. 303, 328–33 (2008).

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.


\(^{165}\) 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.

169 ABA Guidelines, supra note 164, at 928–29 (footnotes omitted).
6. Prosecutor 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{173} Sixth Circuit

\textsuperscript{172} \textit{See Office of the Dist. Att’y Gen. for the 20th Judicial Dist. of Tenn.}, supra note 133; \textit{see also infra} Appendix 2.
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


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. Ctr. Oct. 12, 2012) (vacating the conviction on IAC grounds although the prosecution has suppressed evidence).
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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. 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).
jurers’ 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

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.\textsuperscript{181} Trial counsel inadequately investigated the defendant’s social history and mental condition.\textsuperscript{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.\textsuperscript{183}

In Wilcoxson v. State, the defendant had been diagnosed at different times with schizophrenia, schizoaffective disorder, and bipolar disorder.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{182} Id. at 524–25.
\textsuperscript{183} Id. at 526.
\textsuperscript{185} Id. at 311, 314.
\textsuperscript{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. The evidence included an assessment by a forensic psychiatrist for the state, who was not discovered by defense counsel and therefore did not testify at trial, that the defendant was psychotic.

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

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. The federal court vacated the death sentence on the basis of ineffective assistance of counsel.

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

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188 *Id.* at *4–5.
190 *Id.* at 596, 608.
192 *Id.* at 642.
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penalty arena.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{195}

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

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item 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).
\end{enumerate}
\end{footnotesize}
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

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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

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


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.

[162]
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: ‘to the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.’” 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.” Consequently, the proper interpretation of the definition, and its application to specific cases, has generated considerable litigation. 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.

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
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

Crow: Mass Incarceration in the Age of Colorblindness
(2010); see also United States Sentencing Commission,
Demographic Differences in Sentencing (2017),
https://www.usccrc.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,
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
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.”

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. 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. 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.

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

213 Id. at R.

214 See infra Appendix 2. These numbers exclude retrials.

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. Similarly, in the six Tennessee capital cases that were

215 See infra Appendix 4.
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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{216} \textit{Id.} at 5–6.

court’s composition.\textsuperscript{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.

\textbf{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

\begin{footnotesize}
\textsuperscript{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—\textit{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. \textit{See} Dan Levine & Kristina Cooke, \textit{Uneven Justice: In States With Elected High Court Judges, a Harder Line on Capital Punishment}, \textit{Reuters} (Sept. 22, 2015), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/ [https://perma.cc/7XGW-2AYT].
\end{footnotesize}
TENNESSEE’S DEATH PENALTY LOTTERY
13 TENN. J.L. & POL’Y 85 (2018)

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

\textsuperscript{219} See infra Appendix 1 at 209.
Multi-Murder Cases - Breakdown By Number of Victims & Sentences\textsuperscript{220}

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

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

\textsuperscript{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.\textsuperscript{222} Justices Powell, Blackmun, and Stevens were among the seven in the majority.\textsuperscript{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 \textit{Gregg},\textsuperscript{224} would have constituted a majority going the other way.

Justice Powell dissented in \textit{Furman}, voting to uphold discretionary death penalty statutes, and also authored the Court’s decision in \textit{McCleskey v. Kemp}, which upheld Georgia’s death penalty against a challenge based upon demonstrated racial bias.\textsuperscript{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:

“\textit{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 \textit{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


\textsuperscript{223} \textit{Id.}

\textsuperscript{224} Justices Brennan and Marshall cast the dissenting votes. \textit{Id.}

of the West in maintaining the death penalty,” and it was enforced so rarely that it could not deter.\footnote{226}{John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 451–52 (1994).}

Justice Blackmun, who also dissented in \textit{Furman} and voted to uphold discretionary sentencing statutes, and voted with the majority in \textit{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.\footnote{227}{Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (internal citations omitted).}

Justice Stevens, who was relatively new to the Court when he joined the \textit{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

\footnote{227}{Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (internal citations omitted).}
unusual punishment violative of the Eighth Amendment."

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.

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 punishment.

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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:

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.\textsuperscript{233}


[178]
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.\textsuperscript{234} The Assessment Team conducted an extensive study of Tennessee’s system and issued its lengthy report in March 2007.\textsuperscript{235} The Team concluded that “Tennessee’s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures.”\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.authcheckdata.m.pdf [https://perma.cc/43LZ-QRRH].

\textsuperscript{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\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{237} Id. at iii–vi.
\textsuperscript{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)).
\textsuperscript{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.