October Term, 2002

PAUL DENNIS REID, JR.

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court.

CITATIONS TO OPINIONS

The opinions delivered in this case by other courts are (1) State v. Reid, 91 S.W.3d 247 (Tenn. 2002), attached as Appendix ("App.") A; and (2) State v. Reid, No. M1999-00803-CCA-R3-DD (Tenn. Crim. App. 2001), attached as App. B.

JURISDICTIONAL BASIS

On November 26, 2002, the Tennessee Supreme Court filed its opinion in State v. Reid, 91 S.W.3d 247 (Tenn. 2002). On December 19, 2001, the Tennessee Supreme Court denied Petitioner's timely filed rehearing petition. On March 6, 2003, counsel for Petitioner filed an Application for Extension of Time to file this petition. On March 12, 2003, Justice Stevens extended the time for filing this petition to and including April 18, 2003. Because Petitioner has timely filed this petition, this Court has jurisdiction to consider same. See 28 U.S.C. § 1257(a); Supreme Court Rule 13.3

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the following constitutional provisions:

The Eighth Amendment to the United States Constitution, which provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution, which provides that "[No] State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On Sunday morning, February 16, 1997, the bodies of two workers at a Captain D's Restaurant were discovered in the restaurant. They had been shot. A Davidson County, Tennessee, jury found Petitioner Paul Dennis Reid, Jr., guilty of two counts of first-degree murder and one count of especially aggravated robbery based on the following evidence:

Petitioner's thumb print was found on a movie rental card belonging to one of the victims which was found by a road the day after the killings;

the length of shoe prints inside the Captain D's were consistent with Petitioner's shoe size;

two witnesses identified Petitioner as a man who came by the Captain D's restaurant the night before the killings inquiring about a job;

a person driving past the Captain D's the morning of the killings saw a vehicle that resembled a vehicle Petitioner drove;

another person driving past the Captain D's the morning of the killings saw one of the victim's talking to a tall man such as Petitioner;

another person driving past the Captain D's briefly saw a man in the parking lot who he identified as Petitioner after seeing Petitioner on television four months later;

prior to the killings, Petitioner had shown an interest in getting a gun and said that one way of making money was robbery; and

while Petitioner was in financial trouble before the killings, he had cash and paid off some obligations after the killings.

See State v. Reid, 91 S.W.3d 247, 261-65 (Tenn. 2002).

At the sentencing hearing, the jury sentenced Petitioner to death.

On appeal, T.C.A. § 39-13-206(c)(1)(D) provided that the Tennessee Supreme Court "*shall* determine whether ... [t]he sentence of death is excessive or disproportionate to the penalty imposed in other cases, considering both the nature of the crime and the defendant." After affirming Petitioner's first-degree murder conviction, the Tennessee Supreme Court purported to undertake this task. After inventorying various factors it believed relevant to its inquiry, including Petitioner's race, it came to the unscientific conclusion that Petitioner's death sentence was not disproportionate to the death sentences of others.

Justice Birch dissented. He expressed his belief, as he has done repeatedly over the years, that the proportionality review protocol the Court employed was inadequate. See State v. Reid, 91 S.W.3d at 288-89 (Birch, J., dissenting) (App. A at 32-33). Justice Birch stated that the proportionality review protocol used by the Court failed to protect defendants from the arbitrary imposition of the death penalty and violated Tennessee's proportionality review statute. Id.

History validates Justice Birch's concerns. Petitioner's case was the 130th time the Tennessee Supreme Court conducted proportionality review. It was the 129th death sentence the Tennessee Supreme Court found proportionate to other death sentences.

REASONS FOR GRANTING THE WRIT

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTIONS AND HIS RETRIAL IS BARRED

This Court reverses a conviction based upon insufficient evidence when no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). If, upon review, this Court concludes that the evidence was insufficient to support the jury's verdict, retrial is barred. See Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). A reversal based on insufficient evidence is tantamount to saying that the prosecution, given its one opportunity, failed to prove its case and cannot try to do so again. Burks, 437 U.S. at 11-12. Such is the case here.

Physical Evidence

There is no physical evidence in this case that establishes the Petitioner's identity as the perpetrator. The Petitioner's fingerprints were not found at the scene (XX 2903).[1] Police did, however, find other fingerprints at the scene that were never identified. Some of these prints were found in non-public areas of the restaurant, including two (2) unidentified prints found on a metal box in the office area (XX 2880-2882). Police did not attempt to lift prints off a key found on the counter of the restaurant (XIX 2850).

[1] Petitioner shall cite the trial record "Volume number" "page."

A hair found on one of the victim's legs was also unidentified, although police compared the hair to known hair samples from both victims and the Petitioner (XX 2948).

Police made no effort to lift fingerprints off two unusually-placed pieces of paper found arranged on the only table in the restaurant that was not clean (XXI 3131, see collective exhibit 22). Indeed, police did not even seize these papers. Cigarettes found in and around the ashtray at this table were tested for the presence of DNA evidence. Tests determined that the DNA on the cigarettes belonged to two (2) different people, but did not belong to the Petitioner (XXII 3214-3215). Neither of the victims smoked the brand of cigarettes found in the ash tray (XVI 2338-2339), but police made no effort to determine whether a Captain D's employee who smoked, and who worked the previous evening, had smoked any of these cigarettes (XVII 2446). This employee did not respond to subpoenas (II 267) and did not testify at trial.

None of the shoe prints found at the scene matched any of the shoes subsequently found during a search of the Petitioner's residence (XX 2930).

No evidence seized during searches of the Petitioner's residence establishes his guilt (XXI 3149-3150). Police found no weapons and no ammunition during these searches. No blood or bloodstained items were found, nor was a wallet missing from one of the victims. A trash can that was removed from the restaurant was never recovered (XXI 3131, 3149), nor were missing bank bags. As previously indicated, none of the Petitioner's shoes matched the shoe prints found at the scene. Although police found approximately $1,000 in coins, all in jars, at the Petitioner's residence (XXI 3123), such a discovery is hardly indicative of the Petitioner's guilt;

only approximately $250 in coins was taken from the restaurant (XVII 2417). Receipts found at the Petitioner's residence (collective exhibit 62), as well as the Petitioner's bank records (exhibits 29 and 30) show that the Petitioner spent approximately the same amount of money from his checking account after the murders as he spent previously.

While the State sought to portray the Petitioner as being financially desperate, the evidence showed that approximately two (2) weeks prior to the incident, he borrowed $200 from a title loan company (see exhibit 27), although he had been approved by the company to receive up to $350 (XVIII 2695, 2699). Furthermore, the fact that Petitioner spent approximately $5,100 on a pre-paid automobile lease shortly after this incident does not prove his guilt. A witness testified that the Petitioner told him he had enough cash to purchase that lease because he was "good at saving" and his father was "helping" him (XIX 2785). The Petitioner's credit report and bank records also reflected that he had access to credit card accounts as a possible source of cash (XIX 2756-2758, 2782).

The Petitioner's fingerprint on the movie rental card (exhibits 9 and 35) that had been in the possession of one of the victims does not establish his guilt. The card was found after the robbery, more than 11 miles from the restaurant (XXI 3035). Several identification cards belonging to the victim were found along a one (1) to one and one-half (1 ½) mile stretch of Ellington Parkway in Nashville. The Parkway is a divided highway, and the victim's cards were found along both sides of the highway, as well as in the median (see exhibit 36). The Petitioner, who lived in the general vicinity of the Parkway, drove a car that frequently broke down (XVIII 2647, 2680-2681). A bank card belonging to a person named Wade Bushman was found near some of the victim's cards, but Bushman was never identified by the State at trial (XX 2855).

Finally, several bloodhounds brought to the scene where the cards were found all tracked a scent to the same nearby residence, a residence unconnected to the Petitioner (XX 2853-2854, 2859).

Testimonial Evidence

Similarly, the testimonial evidence presented by the prosecution in this case fails to establish the Petitioner's guilt.

Captain D's employees Michael Butterworth and Jason Carter both identified the Petitioner as having come to the restaurant inquiring about an employment application on the evening before the murders (XVI 2357, XVII 2427). Such identifications, even if accurate, obviously do not prove the Petitioner's guilt for crimes committed on the following day. But the descriptions given to police by Butterworth and Carter indicate that their identifications of the Petitioner were not accurate. Both described the man who came to the restaurant as having long hair, a ponytail, and no mustache (XVI 2371-2372, 2374-2375; XVII 2450-2451). The Petitioner always wore short hair, never had a ponytail, and always wore a mustache during the time in question (XVIII 2630, 2674). In addition, Butterworth failed to identify the Petitioner in a photographic lineup shown to him by police (exhibits 4 and 5), and identified the Petitioner only after seeing him again during television coverage of the Petitioner's arrest (XVI 2362-2363). Finally, Butterworth said that the man who came to Captain D's drove away in a dark-colored car, and at that time, the Petitioner drove a light-blue car (XVI 2373; XVIII 2681-2682).

Jerry Marlin told police that he saw a blue Ford Tempo parked outside the restaurant at approximately 8:45 on the morning of the murders (XVII 2467). Marlin described the vehicle as

having damage to both its front and rear (XVII 2477). The Petitioner drove a blue Ford Escort with slight damage to the front, and no damage to the rear (XVII 2483). Marlin acknowledged at trial that he could not positively identify the Petitioner's vehicle as the same one he saw on the morning in question (XVII 2476).

Debbie Hines testified that she saw two people in front of Captain D's at approximately 8:55 a.m. She testified that she now recognizes one of the persons as one of the victims, but acknowledged that she could not identify the other person (XVII 2490-2491, 2496).

Mark Farmer identified the Petitioner as the same person he saw in the Captain D's parking lot walking to a car at approximately 9:20 to 9:30 a.m. on the date of the murders (XVII 2510, 2519). Farmer's description of the man to police, however, did not accurately describe the Petitioner. Farmer did not see a mustache on the man, whom he described to police as being of Mexican or African descent (XVII 2529-2530). Farmer also thought the car that the man entered was plum or reddish in color (XVII 2506, 2520-2521, 2528). Farmer insisted he could see the color of the man's eyes, although he was at least 100 feet away from the man and was driving past the restaurant when he saw him (XVII 2508-2509, 2522). Farmer also saw the Petitioner on television before he identified him (XVII 2512, 2517-2518), and was never shown a physical lineup or photographic lineup by police.

Even if Farmer was correct, and he did see the Petitioner at Captain D's on February 16 at approximately 9:20, that still is not evidence of the Petitioner's guilt. Officer Jeff Wells testified that he stopped at Captain D's around 10:00 a.m. and there were no unusual people or

cars in the parking lot (XVI 2389, 2391). Hence, the car, along with the person that Farmer had seen, had left. In addition, Michael Butterworth testified that he called Captain D's twice that morning sometime after 10:00 a.m. The first time, he got a busy signal, but the second time, no one answered (XVI 2358-2359, 2380). The logical conclusion from these facts is that the incident occurred either during or after the time Butterworth was making his calls.

Testimony concerning the Petitioner's alleged statements to friends prior to the murders also fails to establish his guilt. Jeffrey Potter testified that in January or February of 1997, the Petitioner asked Potter to find a gun for him, and mentioned robbery as a way to make money (XVIII 2623-2624). Potter acknowledged, however, that he never told police about the Petitioner's reference to robbery (XVIII 2631-2632). Danny Tackett testified that the Petitioner asked him to get a .32 revolver at a pawn shop, but Tackett refused (XVIII 2645). Tackett never provided this information in his initial interview with police, however (XXI 3139). Tackett also testified that the Petitioner was always making jokes, and that he did not take seriously most of the Petitioner's remarks (XVIII 2675). Robert Bolin testified that in late February of 1997, he sold two (2) .25 automatic handguns to the Petitioner. Bolin testified that the Petitioner told him that he previously had a .32 revolver (the same caliber used in the murders), but did not like the way it shot (XX 2969). Bolin acknowledged, however, that the transcript of his interview with police reflects that he told police that this transaction took place in January of 1997, before the murders (XX 2970). The transcript of the interview also makes no mention of the Petitioner's alleged remark about having a .32 revolver (XX 2971).

The State also introduced a videotape of the Petitioner's statement to police (exhibits 59 and 60), but that statement did nothing to establish the Petitioner's guilt. In fact, during that statement, the Petitioner denied that he committed these crimes, and stated several times that he was "not the triggerman" (XXI 3075, 3080, 3089, 3102).

Based on the above evidence, no rational juror could have found that Petitioner killed the victims and robbed the restaurant. As a result, the evidence is insufficient to support Petitioner's convictions, and his retrial is barred. Jackson v. Virginia, 443 U.S. at 319; Burks v. United States, 437 U.S. at 18.

II. INCLUDING IN PROPORTIONALITY REVIEW INTUITIVE FEELINGS RESPECTING THE DEFENDANT'S RACE CONFLICTS WITH THIS COURT'S UNCEASING EFFORTS TO ERADICATE FROM THE CRIMINAL JUSTICE PROCESS ANY CONSIDERATION OF RACE

This Court recognizes that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Thus, this Court has committed itself to "unceasing efforts" seeking to eradicate from the criminal justice process any consideration of race. See Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); Alexander v. Louisiana,

405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

In the context of capital proceedings, this Court explicitly acknowledges the illegitimacy of race as a consideration during sentencing decisions. Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Thus, this Court holds a death sentence invalid when racial considerations enter into any such decision. McCleskey v. Kemp, 481 U.S. 279, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

In disregard of this Court's commitment to eradicating racial prejudices from the criminal justice process, when performing proportionality review in a capital case, the Tennessee Supreme Court includes in its calculus intuitive feelings its members harbor respecting the defendant's race.

Section 39-13-206(c)(1)(D), Tenn. Code Ann., requires that on direct review of a capital case, Tennessee's appellate courts determine 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." Apparently spurred by repeated criticism that no criteria existed to perform this analysis, see, e.g., State v. Harris, 839 S.W.2d 54, 84 (Tenn. 1992)(Reid, C.J., dissenting), in State v. Bland, 958 S.W.2d 651 (Tenn. 1997), the Tennessee Supreme Court elaborated about how it performs this proportionality review. It stated that it employs a "precedent-seeking approach" in which

> a reviewing court ... compares the case before it to other cases in which the defendants were convicted of the same or similar crimes by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved.

Bland, 958 S.W.2d at 664. As to the prong requiring consideration of the defendant's characteristics, the Tennessee Supreme Court specifically stated that

> criteria relevant to a comparison of the characteristics of defendants ... include ... the defendant's ... *race* ....

Bland, 958 S.W.2d at 667 (emphasis added). The court finished by noting that when it performs its proportionality review, it is not engaged in an "objective test", and it does not employ "mathematical or scientific techniques." Rather, in comparing cases and considering, among other things, the heritage of the defendants, the Tennessee Supreme Court relies "upon the experienced judgment and intuition of its own members." Bland, 958 S.W.2d at 668. Thus, in Bland, the Tennessee Supreme Court acknowledges that when it performs proportionality review, its members include in their assessment their intuitive feelings respecting the defendant's race.

On direct appeal of Petitioner's conviction, the Tennessee Supreme Court purported to perform the comparative proportionality review State law requires. To assist it perform this review, the trial court provided it a form that specifically asked for, and informed the Tennessee Supreme Court of, Petitioner's race. See Tennessee Supreme Court Rule 12, Report Of Trial Judge In First-Degree Murder Cases, at Question B.5. In performing proportionality review in Petitioner's case, the Tennessee Supreme Court stated that it would consider various factors, including Petitioner's race. State v. Reid, 91 S.W.3d at 286 (App. A at 30-31). It therefore cannot be disputed that race entered into the decision that Petitioner's death sentence was proportionate to sentences given others in Tennessee. While injecting racial predilections into any capital sentencing decision offends the Constitution, incorporating such biases into proportionality review is particularly disturbing.

In Furman v. Georgia, this Court held unconstitutional death penalty statutes as then written concluding that they were

> cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of (capital crimes), many just as reprehensible as these, the petitioners (in Furman were) among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . (T)he 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.

Furman v. Georgia, 408 U.S. 238, 309-10, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). In Furman's wake, State legislatures drafted statutes that sought to incorporate procedural safeguards addressing the arbitrary imposition of the death penalty which Furman condemned. In Greg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court held that, on its face, Georgia's post-Furman statute created a process consistent with Furman. This Court based its holding primarily on two components of the Georgia statute.

First, the Georgia statute enumerated specific, narrowly defined, aggravating circumstances that had to be found prior to the infliction of the death penalty. Gregg, 428 U.S. at 196. Second, this Court noted that the Georgia statute contained "an important additional safeguard against arbitrariness and caprice." Gregg, 428 U.S. at 198.

> [T]o guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.

Id. This Court therefore concluded that "[o]n their face these procedures seem to satisfy the concerns of Furman." Id.

Like the Georgia statute, Tennessee's death penalty statute 1) requires that a sentencing jury must find an aggravating circumstance before it can impose a death sentence; and 2)

provides for automatic proportionality review. In Tennessee, however, racial prejudice infects the second process, transforming it from "an additional safeguard against arbitrariness and caprice" into a guarantee that the arbitrary and irrelevant factor of the defendant's race will enter into Tennessee's capital sentencing procedure. This Court cannot remain mute in the face of such open disregard to this Court's intolerance of racial prejudice in the criminal justice process.

III. THE PROPORTIONALITY REVIEW PERFORMED BY THE TENNESSEE SUPREME COURT ARBITRARILY DEPRIVED PETITIONER OF HIS STATE-CREATED RIGHT TO MEANINGFUL REVIEW

The proportionality review performed by the Tennessee Supreme Court amounts to no review at all. By failing to perform any meaningful review, the Tennessee Supreme Court has arbitrarily deprived Petition of a State-created property right.

The Fourteenth Amendment's Due Process Clause protects individuals against arbitrary governmental deprivation of a recognized property right. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Property interests are created by, and their dimensions defined by, sources independent of the Constitution such as state laws. Roth, 408 U.S. at 577. If a state law provides a person with a legitimate claim of entitlement to a specific benefit, then the person has a property right to that benefit which the Due Process Clause protects. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Bishop v. Wood, 426 U.S. 341, 344-45, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Roth, 408 U.S. at 577. Loudermill demonstrates application of this principle.

In Loudermill, terminated school district employees sued boards of education for failing to provide them adequate process prior to their discharge. This Court concluded that an Ohio

statute provided the employees a property interest to continued employment which the Due Process Clause protected. That statute provided that the employees were entitled to retain their positions "during good behavior and efficient service", and they could not be discharged "except ... for ... misfeasance, malfeasance, or nonfeasance in office." Because this statute provided the employees a legitimate entitlement to continued employment in the absence of improper behavior, this Court held that the statute created a property interest in continued employment that the Due Process Clause protected. Loudermill, 470 U.S. at 538-39.

In this case, as in Loudermill, a State statute created a legitimate entitlement to a specific benefit.

Section 39-13-206(c)(1)(D), Tenn. Code Ann., provides that on direct review of a death penalty case, the Tennessee Supreme Court "*shall*" review the death sentence and resolve whether it is proportionate to other sentences imposed under similar circumstances. Apparently spurred by repeated criticism that no criteria existed to perform this analysis, see, e.g., State v. Harris, 839 S.W.2d 54, 84 (Tenn. 1992) (Reid, C.J., dissenting), in State v. Bland, 958 S.W.2d 651 (Tenn. 1997), the Tennessee Supreme Court elaborated about how it performs this proportionality review. It stated that it employs a "precedent-seeking approach" in which

> a reviewing court ... compares the case before it to other cases in which the defendants were convicted of the same or similar crimes by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved.

Bland, 958 S.W.2d at 664. The court noted that in employing the "precedent-seeking approach", it is not engaged in an "objective test", and it does not employ "mathematical or scientific techniques." Rather, in comparing cases the Tennessee Supreme Court relies "upon the

experienced judgment and intuition of its own members." Bland, 958 S.W.2d at 668. Under that judgment and intuition, however, it proportionality review has become a mirage.

Prior to reviewing Petitioner's case, the Tennessee Supreme Court had performed proportionality review of an individual's death sentence 129 times. In every case but one, it found the death sentence imposed proportionate to a sentence imposed in a similar case. See State v. Austin, 87 S.W.3d 447 (Tenn. 2002); State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002); State v. Stevens, 78 S.W.3d 817 (Tenn. 2002); State v. McKinney, 74 S.W.3d 291 (Tenn. 2002); State v. Bane, 57 S.W.3d 411 (Tenn. 2001); State v. Stout, 46 S.W.3d 689 (Tenn. 2001); Terry v. State, 46 S.W.3d 147 (Tenn. 2001); State v. Sims, 45 S.W.3d 1 (Tenn. 2001); State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000); State v. Keen, 31 S.W.3d 196 (Tenn. 2000); State v. Suttles, 30 S.W.3d 252 (Tenn. 2000); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000); State v. Henderson, 24 S.W.3d 307 (Tenn. 2000); State v. Morris, 24 S.W.3d 788 (Tenn. 2000); State v. Keough, 18 S.W.2d 175 (Tenn. 2000); State v. Hall, 8 S.W.3d 593 (Tenn. 1999); State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999); State v. Smith, 993 S.W.2d 6 (Tenn. 1999); State v. Burns, 979 S.W.2d 276 (Tenn. 1998); State v. Pike, 978 S.W.2d 904 (Tenn. 1998); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998); State v. Hall & Quintero, 976 S.W.2d 121 (Tenn. 1998); State v. Vann, 976 S.W.2d 93 (Tenn. 1998); State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998); State v. Mann, 959 S.W.2d 503 (Tenn. 1997); State v. Hall, 958 S.W.2d 679 (Tenn. 1997); State v. Bland, 958 S.W.2d 651 (Tenn. 1997); State v. Hodges, 944 S.W.2d 346 (Tenn. 1997); State v. Bush, 942 S.W.2d 489 (Tenn. 1997); State v. Keen, 926 S.W.2d 727 (Tenn. 1996); State v. Hines, 919 S.W.2d 573 (Tenn. 1996); State v. Harris, 919 S.W.2d 323 (Tenn. 1996); State v. Walker, 910 S.W.2d 381 (Tenn. 1995); State v. Smith, 893 S.W.2d 908 (Tenn. 1994); State v.

Hutchison, 898 S.W.2d 161 (Tenn. 1994); State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994); State v. Hurley, 876 S.W.2d 57 (Tenn. 1993); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Smith, 868 S.W.2d 561 (Tenn. 1993); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993); State v. Smith, 857 S.W.2d 1 (Tenn. 1993); State v. Caughron, 855 S.W.2d 526 (Tenn. 1993); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Harris, 839 S.W.2d 54 (Tenn. 1992); State v. Black, 815 S.W.2d 166 (Tenn. 1991); State v. Bates, 804 S.W.2d 868 (Tenn. 1991); State v. Boyd, 797 S.W.2d 589 (Tenn. 1990); State v. Teel, 793 S.W.2d 236 (Tenn. 1990); State v. Payne, 791 S.W.2d 10 (Tenn. 1990); State v. Jones, 789 S.W.2d 545 (Tenn. 1990); State v. McCormick, 778 S.W.2d 48 (Tenn. 1989); State v. Alley, 776 S.W.2d 506 (Tenn. 1989); State v. Cauthern, 778 S.W.2d 39 (Tenn. 1989); State v. Henley, 774 S.W.2d 908 (Tenn. 1989); State v. Taylor, 774 S.W.2d 163 (Tenn. 1989); State v. Wilcoxsin, 772 S.W.2d 33 (Tenn. 1989); State v. Miller, 771 S.W.2d 401 (Tenn. 1989); State v. Taylor, 771 S.W.2d 387 (Tenn. 1989); State v. Thompson, 768 S.W.2d 239 (Tenn. 1989); State v. West, 767 S.W.2d 387 (Tenn. 1989); State v. Irick, 762 S.W.2d 121 (Tenn. 1988); State v. Johnson, 762 S.W.2d 110 (Tenn. 1988); State v. Sutton, 761 S.W.2d 763 (Tenn. 1988); State v. Wright, 756 S.W.2d 669 (Tenn. 1988); State v. Poe, 755 S.W.2d 41 (Tenn. 1988); State v. Barber, 753 S.W.2d 659 (Tenn. 1988); State v. Porterfield & Owens, 746 S.W.2d 441 (Tenn. 1988); State v. Coker, 746 S.W.2d 167 (Tenn. 1988); State v. Johnson, 743 S.W.2d 154 (Tenn. 1987); State v. House, 743 S.W.2d 141 (Tenn. 1987); State v. Bobo, 727 S.W.2d 945 (Tenn. 1987); State v. McNish, 727 S.W.2d 490 (Tenn. 1987); State v. Sparks, 727 S.W.2d 480 (Tenn. 1987); State v. Adkins, 725 S.W.2d 660 (Tenn. 1987); State v. Cooper, 718 S.W.2d 256 (Tenn. 1986); State v. King, 718 S.W.2d 241 (Tenn.

1986); State v. Carter, 714 S.W.2d 241 (Tenn. 1986); State v. Goad, 707 S.W.2d 846 (Tenn. 1986); State v. O'Guinn, 709 S.W.2d 561 (Tenn. 1986); State v. Harbison, 704 S.W.2d 314 (Tenn. 1986); State v. Barnes, 703 S.W.2d 611 (Tenn. 1985); State v. Hartman, 703 S.W.2d 106 (Tenn. 1985); State v. Martin, 702 S.W.2d 560 (Tenn. 1985); State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985); State v. Johnson, 698 S.W.2d 631 (Tenn. 1985); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); State v. Smith, 695 S.W.2d 954 (Tenn. 1985); State v. King, 694 S.W.2d 941 (Tenn. 1985); State v. Williams, 690 S.W.2d 517 (Tenn. 1985); State v. Teague, 680 S.W.2d 785 (Tenn. 1984); State v. McKay & Sample, 680 S.W.2d 447 (Tenn. 1984); State v. Caruthers, 676 S.W.2d 935 (Tenn. 1984); State v. Shefield, 676 S.W.2d 542 (Tenn. 1984); State v. Miller, 674 S.W.2d 279 (Tenn. 1984); State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984); State v. Buck, 670 S.W.2d 600 (Tenn. 1984); State v. Workman, 667 S.W.2d 44 (Tenn. 1984); State v. Cone, 665 S.W.2d 87 (Tenn. 1984); State v. Campbell, 664 S.W.2d 281 (Tenn. 1984); State v. Johnson, 661 S.W.2d 854 (Tenn. 1983); State v. Harries, 657 S.W.2d 414 (Tenn. 1983); State v. Williams, 657 S.W.2d 405 (Tenn. 1983); State v. Coe, 655 S.W.2d 903 (Tenn. 1983); State v. Adkins, 665 S.W.2d 196 (Tenn. 1983); State v. Laney, 654 S.W.2d 383 (Tenn. 1983); State v. Morris, 645 S.W.2d 392 (Tenn. 1982); State v. Melson, 641 S.W.2d 883 (Tenn. 1982); State v. Simon, 638 S.W.2d 850 (Tenn. 1982); State v. Johnson, 635 S.W.2d 498 (Tenn. 1982); State v. Harrington, 634 S.W.2d 645 (Tenn. 1981); State v. Pritchett, 630 S.W.2d 626 (Tenn. 1981); State v. Coleman, 621 S.W.2d 127 (Tenn. 1981); State v. Austin, 620 S.W.2d 467 (Tenn. 1981); State v. Strouth, 619 S.W.2d 112 (Tenn. 1981); State v. Moore, 618 S.W.2d 526 (Tenn. 1981); State v. Dicks, 618 S.W.2d 310 (Tenn. 1981); State v. Groseclose & Rickman, 614 S.W.2d 348 (Tenn.

1981); State v. Cozzolino, 605 S.W.2d 232 (Tenn. 1979); State v. Berry, 600 S.W.2d 750 (Tenn. 1980); State v. Houston, 592 S.W.2d 553 (Tenn. 1980).[2]

[2] In State v. Branam, 855 S.W.2d 563, 570-71 (Tenn. 1993), after the Tennessee Supreme Court invalidated the two aggravating circumstances the jury found, that court purported to find a death sentence disproportionate because the defendant's conduct failed to meet the Enmund/Tison standard. See Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). The court's finding is thus no more than an application of the Enmund/Tison standard which is dicta given that the court had already invalidated the death sentence.

In State v. Hale, 840 S.W.2d 307, 314-15 (Tenn. 1992), the Tennessee Supreme Court concluded that a death sentence based on conduct proscribed by a statute would be an unconstitutional sentence under the State Constitution. Hale is thus not a proportionality case, but, rather, a case where a state court interprets a state constitution to find a statute invalid.

Over time, the ruleless application of the intuition and judgment of the Tennessee Supreme Court justices has rendered proportionality review a farce. Because Tennessee Supreme Court justices therefore fail to perform any meaningful proportionality review, the Tennessee Supreme Court deprived petitioner of his legitimate expectation to such review as guaranteed by T.C.A. § 39-13-206(c)(1)(D). By doing so, the Tennessee Supreme Court violated the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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