IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. M1988-00096-SC-DPE-DD
	)	
PERVIS TYRONE PAYNE	)	CAPITAL CASE

RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE; AND REQUEST FOR A HEARING; AND REQUEST FOR CERTIFICATE OF COMMUTATION

FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DISTRICT OF TENNESSEE

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I. Introduction

The United States Supreme Court recognizes that:

> [Intellectually disabled] defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins v. Virginia, 536 U.S. 304, 305 (2002). Mr. Payne is unquestionably intellectually disabled and suffers from neurocognitive impairment. He is innocent. He was wrongfully convicted and sentenced because he was unable to assist his lawyers and made a poor witness who was no match for the experienced prosecutor, factors which combined disastrously with the fact that Mr. Payne is black and the victims white as well as the brutal nature of the crime.

II. Pervis Payne is indisputably intellectually disabled. His execution would be illegal. This Court should either deny the motion to set execution date because the Tennessee legislature has failed to create a procedural mechanism to permit the adjudication of his *Atkins v. Virginia* claim or create a procedure for the adjudication of his claim in accordance with its inherent authority.

No one disputes that Mr. Payne is intellectually disabled. Indeed recent testing by Dr. Daniel Martell reveals that Mr. Payne's reported IQ

on the WAIS-IV is 72.[1] Additionally, Dr. Martell's testing reveals significant neurocognitive impairment. Mr. Payne's adaptive behavior deficits are well documented, as is the age of onset.

A. Unassailable evidence of intellectual disability.

Pervis Payne meets all three *Atkins* requirements. He has a reported IQ of 72. Dr. Martell will testify that the phenomenon of norm obsolescence (known as the "Flynn effect") is genuinely accepted in the psychological community. When the aging of norms of the WAIS-IV are considered, Mr. Payne has a functional IQ of 68.4. Dr. Martell likewise observed significant deficits in adaptive functioning across all three domains. Dr. Martell's review of the record and his own clinical examination make clear that Mr. Payne's intellectual disability manifested during the developmental period. Dr. Martell is unequivocal in his opinion.

Dr. Martell's evaluation supports and reinforces Dr. Daniel Reschly's previous finding with respect to Mr. Payne's significant

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[1] Mr. Payne's lawyers of nearly 18 years left the Office of the Federal Public Defender during the summer of 2018. At that time, undersigned counsel of record was embroiled in complex lethal injection litigation and subsequent execution-related litigation. Mr. Payne's new team embarked on a full-scale reinvestigation of the case. Counsel retained Dr. Daniel Martell to perform a thorough neuropsychological examination (which had never been done in the case). Dr. Martell also administered a new IQ test. Due to the press of time and the State's request for a total of 9 executions, 7 of which are clients of undersigned counsel, Dr. Martell's report is not yet complete. This pleading is signed under Rule 11. A report from Dr. Martell is forthcoming.

adaptive deficits. Dr. Reschly, an intellectual disability expert (formerly at Vanderbilt University), concludes that Pervis Payne is intellectually disabled. Dr. Reschly administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) to Mr. Payne, on which he obtained a full-scale I.Q. of 74. Ex. 1, Report of Dr. Daniel Reschly. Previously, on individualized I.Q. tests, Mr. Payne had twice received full-scale I.Q. scores of 78 on the Wechsler Adult Intelligence Scale, Revised (WAIS-R), administered 1987 and 1996. Applying the standard error of measurement (SEM) to such tests—as *Moore v. Texas*, 137 S. Ct. 1039 (2017), requires–as well as the "Flynn Effect" (adjustment for the obsolescence of test norms over time), and using his clinical judgment, it is Dr. Reschly's opinion that Pervis Payne suffers significantly subaverage intellectual functioning and adaptive deficits that manifested during the developmental period. *Id.*

As Dr. Reschly explains, Pervis Payne meets the criteria for intellectual disability. Pervis Payne is intellectually disabled under the medical standards set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2010 and by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), published in 2013. *See* Ex #1, Reschly Report, p. 1.[2]

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[2] Numerous defendants with analogous facts have received Atkins relief. Pruitt v. Neal, 788 F.3d 248 (7th Cir. 2015) (); Winston v. Pearson, 683 F.3d 489, 2012 WL 2369481 (4th Cir. 2012) (finding ID with scores as high as 77); Thomas v. Allen, 607 F.3d 749 (11th Cir. 2010) (finding the district court did not err in disregarding a high score of 77 that was

1. Mr. Payne's educational records corroborate the experts' findings.

Records document that Mr. Payne's school-aged peers and teachers consistently referred to him as "slow." Ex. #2, Declaration of Martha Fayne, Ex. #3, Affidavit of Zak Hayslett, Ex. #4, Affidavit of Mary Williams, Ex. #5, Affidavit of Everlina Flowers Sloan, Ex. #6, Affidavit of Denise Wakefield Giles. One teacher referred to Mr. Payne as "mentally retarded." Ex. #2, Declaration of Martha Fayne. Affidavits indicate that the school system failed to provide Mr. Payne with needed educational resources. Ex. #4, Affidavit of Mary Williams. It appears that this was due in part to the fact that the school district's special education curriculum was insufficient. Ex. #2. Declaration of Martha Fayne. Mr.

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obtained outside the developmental period when the mean of the pre-18 scores was below 70); Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010) (holding that state court's failure to conduct an evidentiary hearing deprived him of due process and finding ID with scores as high as 80 where testimony was that the high scores were "outliers");Tarver v. Thomas, 2012 WL 4461710 (S.D. Ala. 2012) (finding ID with scores as high as 76 analysis of actual tasks required for his employment revealed he was only capable of low level labor and never maintained a job for long); United States v. Roland, 281 F. Supp. 3d 470 (D.N.J. 2017) (finding ID with scores of 75 and 78);); People v. Superior Court, 155 P.3d 259 (Cal. 2007) (finding ID despite scores as high as 92); People v. Vidal, 155 P.3d 259 (Cal. 2007). People v. Vidal, 21 Cal.Rptr. 3d 542 (Cal. Ct. App. 2004) (finding ID despite scores as high as 92); Hall v. State, 201 So.3d 628 (Fla. 2016) (finding ID with scores as high as 79); Pennsylvania v. Williams, 61 A.3d 979 (Pa. 2013) (and finding ID despite a high score of 81).

Payne was unable to graduate, though he tried. Ex. #7, Declaration of John William Scott (Payne's High School Principle). He attended school through the twelfth grade. *Id.*; Ex. #2, Declaration of Martha Fayne. After failing the Tennessee Proficiency Exam five times, Mr. Payne dropped out of school. *Id.* The Tennessee Proficiency Exam is based on an eighth or ninth grade proficiency. *Id.* An average ninth grade student would be able to pass this test on the first try. *Id.*

Denise Giles was a classmate of Mr. Payne's from kindergarten through seventh grade. Ex. #6, Declaration of Denise Giles. Ms. Giles tutored Mr. Payne and other remedial students. *Id.* Ms. Giles reports that Pervis could not read, diagram sentences, or spell. *Id.* In seventh grade Pervis was reading at a first or second grade level. *Id.* He could not sound out a word but knew simple words like cat and dog. *Id.* He did not understand when to use "ph" and when to use "f" or when to use "c" and when to use "k". *Id.* He had a hard time grasping even simple concepts. *Id.*

Ms. Giles would pull him out of the regular classroom and take him and the other remedial students to a different classroom to help them. *Id.* Ms. Giles was promoted to the eighth grade, but Mr. Payne was held back. *Id.* The teachers allowed Mr. Payne to cheat off of other students' tests. *Id.* Even when copying, he had trouble spelling correctly. *Id.*

Beyond the peer tutoring he received, Mr. Payne was also getting special assistance from his teachers. Mr. Payne attended resource classes and was pulled out for both Math and English. Ex. #8, Affidavit of Mary Ella Payne, Ex. #9, Affidavit of Lovie Pryor, Ex. #22, Affidavit of Glenda Calhoun. His middle school social studies teacher Everlina Flowers Sloan

describes Mr. Payne as "very slow" and states that Mr. Payne had a hard time comprehending the material and would invariably fail the examinations. Ex. #5, Declaration of Everlina Flowers Sloan. Ms. Sloan would break the material down to a first or second grade level, but Mr. Payne still had difficulty finding the answers on his own. *Id.* In the end, Ms. Sloan would just point the answer out to him. *Id.*

> I would let him retake the test and sit and help him get the answers to the test. I would read the questions to him, and sometimes I would just have to give him the answers.

Id. Ms. Sloan believed that the proper placement for Mr. Payne was special education. *Id.* His hand writing was illegible. He could not read aloud. He could not keep two step instructions in his mind at the same time. "Although Pervis was trying he just could not get it. He would become frustrated because he could not understand." *Id.*

Mr. Payne was placed in a ninth grade arithmetic class for students who were not proficient in mathematics and needed individualized attention. Ex. #10, Declaration of Joseph Parker. Mr. Payne failed the first six weeks of the class, causing his teacher to have to devote even more attention to him. *Id.* This was the only year Mr. Payne had mathematics in high school and the only year he passed the math portion of the Tennessee Proficiency Exam. *Id.*

Mr. Payne's ninth grade English teacher states that Mr. Payne was not a good reader. Ex. #4, Affidavit of Mary Williams. He had poor comprehension and writing skills. His spelling was "atrocious." *Id.* She explains in her declaration that students in resource classes were excused or omitted from some of the requirements. *Id.* For example,

students were required to complete a research and writing assignment, but Mr. Payne was incapable of completing this assignment. *Id.*

More than one teacher reports that Mr. Payne was not expected to do work on grade level and was simply given a grade based on his effort in resource classes. Ex. #9, Affidavit of Lovie Pryor, Ex. #5, Affidavit of Everlina Flowers Sloan. One teacher states that his grades were padded because of his father's role in the community. Ex. #9, Affidavit of Lovie Pryor. Teachers gave him additional help, which sometimes included just giving him the answers. Ex. #5, Affidavit of Everlina Flowers Sloan, Ex. #6, Affidavit of Denise Wakefield Giles.

Martha Fayne, Mr. Payne's tenth-grade science teacher who has a master's degree in Education, describes him as "intellectually disabled." Ex. #2, Declaration of Martha Fayne. Ms. Fayne explains:

> Pervis was slow and had low comprehension. I remember having to give him individual help in order for him to pass the class. He didn't read well enough to understand the material on his own, and even when the material was explained to him, he had to be told over and over what to do. He couldn't retain instructions or information from one day to the next.

Id.

His high school Principal, John William Scott, states that Pervis had some learning disabilities. Ex. #7, Declaration of John William Scott. Mary Ella Payne, Mr. Payne's aunt by marriage, taught the resource reading class at Drummond Elementary where Mr. Payne was enrolled. Ex. #8, Declaration of Mary Ella Payne. She confirms that Mr. Payne was in resource class. *Id.* She recalls that he "had difficulty comprehending things." *Id.* Mary Ella Payne believes that Mr. Payne's parents "didn't

really address any of his learning problems." *Id.* Rather, "[t]hey were more concerned with his religious education." *Id.* Mary Ella Payne confirms that Mr. Payne "had a limited vocabulary" and had difficulty following instructions which require multiple steps. *Id.*

Mary Williams, Mr. Payne's ninth-grade English teacher, describes him as a slow student who just could never get it. Ex. #4, Declaration of Mary Williams. She recalls that Pervis could not even memorize enough to pass a test. *Id.*

Lovie Pryor, the elementary math program teacher, describes Pervis as a challenged child who struggled with language and the ability to reason. Ex. #9, Declaration of Lovie Pryor.

2. Mr. Payne's family and peers observed his adaptive deficits.

Rolanda Payne Holman is Mr. Payne's younger sister. Mr. Payne is seven years older than she. Rolanda reports that Mr. Payne was unable to help her with her homework. Ex. #11, Declaration of Rolanda Payne Holman. Rolanda states that the family knew Mr. Payne struggled academically. *Id.* She describes how he could only follow instructions that were short and simple. *Id.* If the instructions were long or complicated, he would forget something and fail to complete the task. *Id.* Mr. Payne was unable to comprehend complex questions. *Id.* Mr. Payne could not use an iron. *Id.* He would burn holes in his clothes when he ironed. *Id.* If the fabric was nice, his mother did the ironing. *Id.* Mr. Payne's mother did not allow him to wash clothes. *Id.* His parents

accepted his limitations and did not pressure him to do better in school. *Id.*

Multiple witnesses report that Mr. Payne could not retain information. Given more than one thing to do at a time, he was incapable of retaining both. He could not memorize enough to pass an English test. Ex. #4, Affidavit of Mary Williams.

As a teenager, Mr. Payne worked for a short time at a Pizza Hut. His supervisor, Warren Monego, describes Mr. Payne as "slower mentally" and "mentally challenged." Ex. #12, Declaration of Warren Monego. For example, Mr. Monego explains:

> Simple instructions were posted at the work stations. But even after personalized training, Pervis needed to look at the instructions on a regular basis, and had to be reminded frequently to look at the instructions. This was extremely unusual for an employee in a lay job.

Id. Mr. Monego took notice that Mr. Payne "was forever trying to hide the fact that he was mentally challenged." *Id.*

Mr. Payne helped his father, Carl Payne, with his painting[3] business. Ex. #13, Declaration of Carl Payne. Mr. Payne recalls "Pervis

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[3] The paint was lead-based. Ex. #13, Declaration of Carl Payne. Lead-based paint has been linked to intellectual disability. *See* Oscar Tarrago, et al., *Case Studies in Environmental Medicine, Lead Toxicity*, Agency for Toxic Substances and Disease Registry (https://www.atsdr.cdc.gov/csem/lead/docs/CSEM-Lead_toxicity_508.pdf) (last visited December 27, 2019); Ex. #14, Lourdes Schnass, et al., *Reduced Intellectual Development in Children with Prenatal Lead*

could follow simple [oral] directions or instructions ... but I generally had to repeat them several times to be sure he understood. If the instructions had too many steps, he could not follow them." *Id.* Carl Payne never wrote down the instructions. *Id.*

Mr. Payne was developmentally delayed. Carl Payne states that Pervis learned to walk and talk later than his siblings. *Id.* He could not fix meals for the family or do his own laundry. *Id.* Carl Payne describes Pervis' vocabulary as limited. *Id.* Mrs. Payne had to help Pervis with his homework almost every night. *Id.* Mr. Payne stuttered until his later teenage years. Ex. #13, Declaration of Carl Payne. This stutter got worse when he was frustrated or excited. Irene Thomas, the Payne's next door neighbor, recalls that Pervis needed to be fed up until age 5. Ex. #15, Declaration of Irene Thomas.

Mr. Payne's younger sister by five years, Tyrasha Payne, also remembers him struggling academically in Math and English. She recalls that her mother was constantly having school meetings to discuss Mr. Payne's academic struggles. She also describes how her mother had to pay special attention to him. Her mother told her it was because Mr. Payne was born prematurely and did not develop properly until around age two. Their mother shopped for Mr. Payne's clothes all of his life. Even after he was a teenager and other kids had started shopping for their own clothes, she was still shopping for him.

Exposure, ENVIRONMENTAL HEALTH PERSPECTIVES, Vol. 114, No. 5, p. 791 (May 2006).

Mr. Payne's friend, Ruth Wakefield Johnson, states that she always knew something was wrong with Pervis. Ex. #16, Declaration of Ruth Wakefield Johnson. "We would talk and he always gave me the impression of blankness, he'd just be staring at me." *Id.* "Pervis did not think for himself." *Id.*

Mr. Payne could not count money or add up items purchased at a store. Ex. #3, Declaration of Zac Hayslett. He struggled to read and had a very limited vocabulary. He would not read aloud and teachers would not ask him to because they knew of his struggles. Ex. #, Declaration of Everlina Flowers Sloan. Pervis could not use a ruler or measuring tape. Ex. #13, Declaration of Carl Payne.

Zac Hayslett, Mr. Payne's teenage best friend, played the organ at church and Mr. Payne played the drums when the normal drummer was out, but "Pervis could not follow a pattern or syncopation and a drum solo was out of the question." Ex. #3, Declaration of Zac Hayslett. Zac recalls vividly that it took Pervis longer to catch on to things than it took the rest of them. *Id.* He states that Mr. Payne was "kinda slow" and would sometimes get frustrated that he couldn't learn. *Id.* Zac is younger than Mr. Payne but had to help him with words, as Mr. Payne had a very limited vocabulary. *Id.* According to Zac, Mr. Payne had no trouble getting to places he had been before; however, he struggled with new places. "Pervis didn't know street names and he didn't understand maps." *Id.*

Mr. Payne was gullible. He will go along with whatever is suggested without ever thinking of the consequences. Ex #17, Affidavit of Sydney

Thomas. When driving the church van he would often be asked to make multiple stops, drop people off, and end up being late to church. *Id.*

Vera Wherry, a neighbor, states that "people took advantage of Pervis." Ex. #18, Declaration of Vera Wherry. If you needed anything done he would do it. At times people used him for rides because he had a car.

3. Individually administered intelligence tests confirm Mr. Payne's Intellectual disability.

In 1987, Mr. Payne was administered the Weschler Adult Intelligence Scale-Revised ("WAIS-R"). Ex. #19, WAIS-R Record Form of Pervis Payne, 1987. His reported full-scale IQ score was 78. *Id.* After taking into account norm obsolescence, his functional IQ would have been approximately 75.3. *Id.* Taking into consideration the standard error of measurement, the score would fall as low as 70.3. In 1996, he was administered another WAIS-R and received a reported full-scale IQ score of 78. Ex. #20, WAIS-R Record Form of Pervis Payne, 1996. In consideration of the aging norms, this score would reflect a functional IQ of 72.6. In light of the standard error of measurement, his IQ could have been as low as 67.6 In 2010, Mr. Payne was given a WAIS-IV. His full-scale reported IQ score was 74 which corrects to 73. Ex. #1, Reschly Report, p. 20. Given the standard error of measurement, the 2010 score reflects an IQ score as low as 67.

Within the past six weeks, Mr. Payne was administered a comprehensive neuropsychological battery by Dr. Daniel Martell. He received a reported full-scale IQ score of 72. Given that the norms on the

WAIS-IV are even more outdated, his corrected score is 68.4. The standard error of measurement would place his IQ as low as 63.4.

Dr. Martell has reviewed all of the adaptive behavior data and agrees with Dr. Reschley that Mr. Payne meets all of the criteria for a diagnosis of intellectual disability as defined by the American Association of Intellectual and Developmental Disabilities and the American Psychological Association.

Dr. Martell's testing is the most comprehensive to date. He conducted neurocognitive testing to look at Mr. Payne's capacity for reasoning, problem-solving, planning, abstract thinking, academic learning, and learning from experience. The results of that testing revealed clinically significant and significantly subaverage functioning in the following areas:

- Mr. Payne's reading skills are in the Bottom 5th percentile for his age
- Mr. Payne's mathematics skill are below the bottom 0.1 percentile for his age
- Mr. Payne's language functioning is significantly impaired, with evidence of expressive aphasia including dysnomia (an inability to find words for things), paraphasia (an inability to pronounce words correctly), and neurodevelopmental stuttering.
- Both his immediate and delayed memory are functioning in the bottom 1st percentile, as is his auditory memory.
- Testing of his frontal lobe executive functioning revealed deficits involving his capacity for:

(1) divided attention and multitasking;

(2) impulse control;

(3) behavioral perseveration (i.e. a pathological repetition of behavior without self-awareness or control); and

(4) failure to maintain cognitive "set" (i.e., he has great difficulty keeping track of what he is supposed to be doing).

B. Pervis Payne's execution would be constitutionally illegal.

The Eighth Amendment to the United States Constitution excludes persons with intellectual disability from the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 304 (2002). The Fourteenth Amendment made Eighth Amendment protections mandatory for the states. When the United States Supreme Court decided that persons with the intellectual disability are ineligible for the death penalty, it stripped the power of states to carry out executions of these individuals. Period. "[T]he Constitution 'restrict [s] ... the State's power to take the life of' *any* intellectually disabled individual. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Atkins*, 536 U.S. at 321) (emphasis in original.) This is not a question of procedure. It is substantive law based on decades of death penalty jurisprudence.

When the Supreme Court reinstated the death penalty in 1976, it made clear that there are two fundamental pre-requisites to the imposition of the ultimate punishment: eligibility and selection. *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 US 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976). A state statutory scheme must have in place a mechanism for determining who is eligible for the death

penalty to be constitutional. If, and only if, a defendant is deemed eligible, the jury must conduct an individualized sentencing analysis to select those defendants for whom the death penalty should be reserved. The eligibility question is categorical. The selection question is individualized. The Supreme Court has held that those persons who are ineligible for the death penalty are actually innocent of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992).

An analogy can be drawn to juvenile defendants who the court deemed ineligible for the death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005). If we learned today that Mr. Payne's birth certificate was in error and he was actually 17 years, 11 months, and 29 days old at the time of the crime, instead of 20, no one would question the fact that he would be removed from death row. Persons under the age of 18 are excluded from the death penalty and the states are not free to ignore this prohibition. The same is true for persons with intellectual disability.

Given the uncontested proof of Mr. Payne's intellectual disability, his execution would be illegal.

C. This Court has the authority to create a procedural vehicle for Mr. Payne to adjudicate his *Atkins* claim, particularly where the legislature has ignored this Court's request for it to act.

This Court has twice decreed, "Tennessee has no business executing persons who are intellectually disabled." *Payne v. State*, 493 S.W.3d 478, 486 (Tenn. 2016); *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). This proposition remains true today. Despite this undeniable truth, this Court has repeatedly locked the courthouse doors to the adjudication of Mr. Payne's plainly meritorious constitutional claim. In 2016, this Court

"encourage[d] the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed." *Payne*, 493 S.W.3d at 492.

When this Court determined that Mr. Payne could not bring his claim via numerous post-conviction procedural vehicles which he invoked, the Court wrote, "[o]ur decision in this case does not foreclose the Petitioner from availing himself of any and all state and federal remedies still available to him." *Payne*, 493 S.W.3d at 492. But Mr. Payne did invoke every remedy known in the law from the Magna Carta to *Moore v. Texas*. Each and every time the state has relied on procedural roadblocks to keep his claim out of court. This is it. This is his only remaining remedy. This Court must act, or sanction the illegal execution of a man who is constitutionally ineligible for the death penalty.

This Court has the authority to create a procedural vehicle where the legislature has failed. In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court was faced with similar set of circumstances. There, the Court observed that no statute existed to permit the adjudication of a claim of incompetence to be executed. Recognizing that "the Eighth Amendment to the United States Constitution *precludes execution* of a prisoner who is incompetent[,]" *Van Tran*, 6 S.W.3d at 260 (emphasis added), this Court created a procedure for a defendant to present his claim. In *Van Tran*, this Court invoked its inherent power:

> Our conclusion that no existing statute provides a procedure for litigating the issue of competency to be executed does not

> end the inquiry, however. It has long been recognized and widely accepted that the Tennessee Supreme Court is the repository of the inherent power of the judiciary in this State. *Petition of Burson*, 909 S.W.2d 768, 772 (Tenn. 1995) (citing cases). Indeed, Tenn. Code Ann. §§ 16–3–503 and –504 (1994) broadly confer upon this Court all discretionary and inherent powers existing at common law at the time of the adoption of the state constitution. *Id.* We have also recognized that this Court has not only the power, but the duty, to consider, adapt, and modify common law rules. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999); *Cary v. Cary*, 937 S.W.2d 777, 781 (Tenn. 1996) (citing cases). Finally, we have recently held in the context of a capital case that *Tennessee courts have inherent power to adopt appropriate rules of criminal procedure when an issue arises for which no procedure is otherwise specifically prescribed. State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998).

Van Tran, 6 S.W.3d at 264–65 (emphasis added.) The Court recognized that it had "an affirmative constitutional duty to ensure that no incompetent prisoner is executed." *Id.* at 265.

Here too, this Court has an affirmative constitutional duty to ensure that no intellectually disabled prisoner is executed. This court has the inherent judicial authority, and the constitutional obligation, to create a remedy for the adjudication of Mr. Payne's *Atkins* claim.

It is right to do so. Mr. Payne is exactly the defendant the Supreme Court feared is at risk for wrongful execution. As described below, Mr. Payne is also likely innocent. Yet his intellectual disability and a

sensationalized black-on-white crime[4] combined to doom him to a wrongful conviction and sentence.

D. Alternatively, the Court should deny the motion and decline to set an execution date which would be plainly illegal.

If this Court determines that it lacks the authority to create a procedure to adjudicate Mr. Payne's *Atkins* claim, the only remaining constitutional option is to deny the State's motion to set an execution date until such time as the General Assembly creates such a procedure. Anything less is untenable.

III. Pervis Payne has a strong case of actual innocence. This Court previously denied DNA testing in reliance on *State v. Alley* which has since been overruled. Newly discovered, suppressed, exculpatory evidence exists.

Pervis Payne has maintained his innocence for more than thirty years. He came upon the crime scene simply because his girlfriend lived across the hall. He heard a noise and went to help. He was overwhelmed by what he saw. He panicked and ran. His actions were that of a scared, intellectually disabled, twenty-year old. There is nothing in Mr. Payne's background before, or since, that is consistent with the sort of person who would commit such a crime.

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[4] The murders of Charisse and Lacie Christopher, and the stabbing of Nicholas Christopher, were horrific. Nothing in this motion is intended to in any way diminish the tragedy of what happened to them or to disrespect their families. It is an unfortunate fact that when a crime invokes overwhelming emotion and justifiable sympathy for the victim, the human desire to bring peace and closure to the victim's family is a factor leading to wrongful convictions.

The evidence at Mr. Payne's 1988 trial was purely circumstantial. Mr. Payne had no motive to commit this crime. At the time of the incident, he had no prior criminal history – juvenile or adult. Ex. #21, Presentence Report. He had no history of violence and no history of serious drug use. His upbringing was stable. Ex. # 22, T.T. XI, p. 1566, testimony of Carl Payne. He came from a firm household where he presented no problems as a child or teenager. *Id.* The son of a minister, Mr. Payne was close with his family and grew up in the church. *Id.* He was a respected young man in his neighborhood, and though he struggled academically in school, he presented no disciplinary issues. Moreover, Mr. Payne was a caring father figure for his then-girlfriend's children, for whom he was providing support. Ex. #24, T.T. XI, p. 1508, Testimony of Bobbie Thomas.

A. The prosecution's theory at trial was pure speculation and inconsistent with the evidence. Previously undisclosed evidence which includes blood-soaked (and possibly semen-stained) comforter, sheets, and pillow, completely contradicts the prosecution's case.

1. The prosecution concocted a motive out of whole cloth.

Police could not determine why Mr. Payne— who had no prior criminal history— would commit this crime. Mr. Payne did not know the victim and would not have had a reason to speak with her, let alone attack her. His then-girlfriend, Bobbie Thomas, who lived across the hall from the victim, confirmed that he did not know the victim. Ex. #47, T.T. at 1182, Testimony of Bobbie Thomas. There is no evidence that would prove otherwise.

Prosecutors advanced *a theory* that Mr. Payne was high from ingesting drugs and looking for sex (because he had been looking at a Playboy magazine). Ex. #25, State Closing Argument at 1350-51. The story the State presented to the jury was that Mr. Payne went upstairs and saw the victim's door open. *Id.* When he went in, he made sexual advances to her, which she resisted. *Id.* The State argued that when the victim resisted, Mr. Payne attacked her and stabbed her to death. *Id.* According to the prosecution's theory, the events took place in the kitchen.

There were several issues with the State's theory: 1) there is no evidence that Mr. Payne used drugs; 2) young men who look at Playboy are not incited to rape and murder;[5] 3) the key piece of evidence that the state relied on for sexual motive is a tampon that was not discovered until two days after the murder and does not appear in any of the crime scene photos or video taken on the day of the homicide; 4) the victim was fully clothed; 5) the blood (or lack thereof) on Pervis Payne's clothing is consistent with his testimony and inconsistent with the State's theory; 6) Pervis Payne did not have any scratches or abrasions consistent with a struggle;[6] and 7) On December 20, 2019, after obtaining a court order to view all of the evidence in the possession of the Shelby County Criminal Court Clerk (including residue), for the first time defense counsel were

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[5] The insinuation was an appeal to outdated racial stereotyping.

[6] Mr. Payne had stretch marks from weight lifting that the state insinuated were scratches from the incident. Photographs of Mr. Payne's shoulder taken upon arrest clearly show stretch marks, but no scratches. Ex. #44, Photograph taken day of arrest.

shown a bag containing items recovered from the bedroom including a blood (and possibly semen) soaked comforter, bedsheets, and pillow.

a. There is no evidence that Mr. Payne used drugs.

There is no written police report that mentions any observation that Mr. Payne appeared to be on drugs the day of his arrest. Multiple police officers came into contact with Mr. Payne. Not one wrote a report saying that he appeared under the influence. Mr. Payne's mother, Bernice Payne, begged police to perform a drug test on her son. Ex. #23, T.T. XI, Testimony of Bernice Payne at p. 1562. Police refused. The failure to perform a drug test effectively destroyed exculpatory evidence which would have rebutted the state's theory.

At trial, the State claimed that a piece of paper they found on Mr. Payne tested positive for traces of cocaine.[7] This piece of paper (which Payne has always denied was his) is the only evidence that the State offered to connect Mr. Payne to drugs. But there is no evidence that Mr. Payne ever used cocaine.

b. There is no evidence that anyone attempted to rape the victim, let alone any evidence of sexual motive for the murder.

The State furthered its theory by asserting that Mr. Payne wanted to have sex with the victim. There was no evidence introduced that would prove Mr. Payne had sex or intended to have sex with the victim. The State argued that Mr. Payne pulled a bloody tampon from the victim. Ex.

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[7] Though police had this evidence for months, they did not hand it over to defense counsel until the day before trial.

#26, T.T. IX, pg. 1369, State's Closing. But no tampon was collected when the crime scene was processed. Numerous photos and video of the crime scene were taken, none depicted a tampon. Police claimed they found the tampon two days later when they returned to the scene to collect additional evidence. The only verification of the tampon's existence and location of discovery came from testimony of police officers.

To further their sexual motivation theory, the State introduced evidence that acid phosphatase—an enzyme present in semen—was found in the victim's vagina. Ex. #26, T.T. IX, pg. 1369, State's Closing. The State used this information to suggest that Mr. Payne had sex with the victim even though its own expert witnesses testified they could not link the acid phosphatase to Mr. Payne. Ex. #27, T.T. IV pg. 500, Testimony of Richard Harruff. The most they could do was determine that semen had been present.

What the jury did not know, because the State withheld it, was that the victim had sex with her then-boyfriend, Darryl Shanks, within hours of the murder. Ex. #28, Affidavit of Daryl Shanks. Mr. Payne did not learn of this fact until his post-conviction hearing. At that hearing, Millington Police investigator Sammy Wilson testified that within four days of the incident he spoke with Mr. Shanks regarding the investigation. Ex. #29, P.C. Hearing, Vol. 1, pg. 31-32. Mr. Shanks told him he was with the victim night before the incident. *Id.* Detective Wilson testified that he shared his entire file with the district attorney. *Id.* D.A. Tom Henderson's notes that referred specifically to Darryl Shanks corroborate this. Ex. #30, Henderson File pg. 3.

Before the post-conviction hearing in 1992, Mr. Shanks signed an affidavit stating:

> "The last time I saw Charisse was during the early morning hours of June 27, 1987. I stopped at her apartment and spent the night with her and we had sex. I left the apartment approximately eight hours before she was killed. I did inform the prosecuting attorney, Henderson of this fact."

Ex. #28, Affidavit of Darryl Shanks.

Though Mr. Shanks recanted his affidavit at the post-conviction hearing, had trial counsel been aware of his admission to Detective Wilson, he could have successfully used this testimony to debunk the State's sexual motive theory. At the hearing Mr. Shanks claimed to suddenly remember that he was mistaken about having sex with the victim hours before her murder. Ex. #31, PC Hearing, Vol. 1, p. 48, Testimony of Darryl Shanks. This testimony is not credible.

The victim's sexual relations with her boyfriend hours before the homicide explains the presence of acid phosphatase and debunks the State's theory. Importantly, it relates to the trial testimony of the State's expert witness, Paulette Sutton, who testified that the victim had sexual intercourse three days prior to her death. Ex. #41, T.T. Vol. IV, p. 514, Testimony of Dr. Paulette Sutton.

2. Suppressed evidence of a blood (and possibly semen soaked) comforter, sheets, and pillow undermines the entire prosecution theory.

Undersigned counsel and her team initiated a re-investigation of the case. As part of that investigation, counsel sought to view and

photograph all of the evidence in the case, including the residue. Residue evidence is the evidence that the district attorney chooses not to introduce before the jury. However, the Shelby County Criminal Court Clerk's staff refused to produce the evidence for viewing without a court order. This unprecedented denial of access to view evidence was a first.

Because of the clerk's denial, Mr. Payne filed an Emergency Motion to be Permitted to View Evidence. Ex. #32, Emergency Motion to be Permitted to View Evidence. The motion was granted on December 20, 2019. Ex. #33, Order Granting Motion. Counsel for Mr. Payne traveled to Memphis, Tennessee on the same day to view the boxes of evidence.

Upon viewing boxes of physical evidence, Mr. Payne uncovered new, material, exculpatory evidence: A bloody comforter, bloody sheets, and a bloody pillow. A representative sampling of the photographs taken on December 20 is attached as collective exhibit. Ex. #34, Declaration of Investigator Ben Leonard and Collective Sample of Photographs. For thirty-two years the State has maintained that the crime scene was limited to kitchen area of the apartment. The crime scene report says that the rest of the house was neat. Ex. #35, Millington Police Report, p. 4. At trial officer Sammy Wilson testified "the kitchen area was where the crime scene was." Ex. #36, T.T. Vol. VI, p. 927, Testimony of Sammy Wilson. All of the testimony at the trial focused on the kitchen. The prosecution's closing argument referred to the crime scene as the kitchen. Ex. #26, T.T. IX, p. 1369, State's Closing, Ex. #37, T.T. IX, p. 1382, State's Closing. To date, no report regarding the discovery of the tampon or the bloody bed clothes has been provided.

It is clear from this new evidence that the crime began in the bedroom and ended in the kitchen. This newly discovered evidence contains significant and abundant DNA material which can be subjected to DNA testing. Moreover, the recent review of the evidence in the possession of the criminal court clerk's office reveals that the tampon is still in evidence and it can also be tested. *See* Tenn. Code Ann. § 40-30-304(2). ("[T]he Court shall order DNA analysis if it finds that the evidence is still in existence and in such a condition that DNA analysis may be conducted.").

B. Others had motive for the crime.

1. Victim's violent ex-husband.

The victim's ex-husband had a motive to commit the crime. Kenneth Christopher was the victim's ex-husband when she was murdered. It is undisputed that the victim's marriage to Mr. Christopher was toxic and filled with years of physical, mental, and emotional abuse. Mr. Christopher frequently abused the victim throughout the few years of their marriage. After years of abuse, neglect, and abandonment, the victim fled the household and moved back to Millington. Shortly after she returned to Millington, the victim filed for divorce from her abusive husband. Ex. #38, Christopher Complaint for Divorce. According to the divorce petition, grounds were for divorce were cruel and inhumane treatment, abandonment, and neglect.

Kenneth Christopher's abuse did not stop with the victim. He had a lengthy criminal history both before and after they were married. This record included violence on multiple occasions. Ex. #39, Kenneth Christopher's Criminal Record. It also revealed a history of drunkenness

(another ground for divorce). A review of Mr. Christopher's record reveals nearly ten driving under the influence charges. *Id.* His own mother called authorities to her home to assist her in handling his public drunkenness. Ex. #40, Affidavit of Mary Still.

After investigators arrested Mr. Payne, they looked into Mr. Christopher's whereabouts. They discovered that Mr. Christopher was serving the end of a five-year sentence for an aggravated assault conviction at Fort Pillow State Penitentiary. Available information now reveals that Mr. Christopher may have been able to leave the prison during the day without repercussion. Ex. #42, Declaration Caress Ushry. During the time he was incarcerated, minimum security inmates could leave the premises on the weekends and not be punished. *Id.* Mr. Christopher had a motive for the crime. He knew that Charisse was in a new relationship. Ex. #49, p. 4, Interview of Kenneth Christopher, 6/17/1992. He knew where she lived, as he had spoken with her at her home before. *Id.* At 5. His history of documented physical abuse, drunkenness, and violence would show that Mr. Christopher, more than anyone else, had a motive to commit these crimes.

2. Victim's involvement with drug use and possible drug trafficking.

Mr. Payne has always maintained there was another man in the victim's apartment before him. He testified that as soon as he opened the front door to the apartment building, he opened the door and "a black guy with a long, white – like a tropical shirt, kind of beige, had just – like he had just jumped from the second landing down to the steps and ran down

past me real quick." Ex. #43, T.T. Vol. VIII, Testimony of Pervis Payne, pg. 1215.

This man, who had blood on him, was tall and had on short pants. *Id.* at 1216-17. As the man rushed past Mr. Payne, he dropped items and loose change on the steps as he was running down the stairs. *Id.* at 1215. Mr. Payne stated that he picked up the items and change the man dropped and continued up the stairs to his girlfriend Bobbie Thomas' apartment. *Id.* He never saw the man again. *Id.* at 1217. Mr. Payne not only testified to this, but he also relayed this information to police officers when they were transporting him to headquarters after his arrest. *Id.* at 1235.

Years after Mr. Payne's conviction, John Ed Williams corroborated Mr. Payne's facts. Ex. #45, Affidavit of John Edward Williams. Mr. Williams lived in the same area in 1987 as the apartment where the incident took place. In a 1992 interview, Mr. Williams stated that he was in the area of the apartment building on the day the incident occurred. *Id.* He saw Mr. Payne walk into the apartment building. *Id.* Shortly after, he saw another black male walk out of the building. He stated that the man then got into a car and drove away. *Id.* Soon after, he saw Mr. Payne running from the apartment building. *Id.* Mr. Williams had seen the black man who came out of the building at the victim's apartment before on several occasions. *Id.* He stated that when he would see them together, they would usually argue. *Id.* In a second affidavit, Mr. Williams stated that he knew the victim to use drugs because he used drugs with her. Ex. #46, Second Affidavit of John Edward Williams, Feb. 3, 1992.

Leroy Jones also corroborated Mr. Williams' claim that the victim used drugs. Ex. #48, Affidavit of Leroy Jones. Mr. Jones stated that he knew the victim to be a drug user, as he was involved in drug trafficking himself. *Id.* He stated that his brother, Charles Jones, had the victim selling drugs for him. *Id.* When she owed him money, Charles Jones had another man, William Hall "take care of the Christopher woman." *Id.* Leroy Jones heard this conversation himself. *Id.* A week later, the victim was killed.

The victim's ex-husband, Kenneth Christopher admitted that he knew that the victim used drugs. Ex. #49, Transcript of Kenneth Christopher interview, pg. 23-24. He believed that she was using drugs at the time of the incident. *Id.* Mr. Christopher specifically stated that the victim used amphetamines. Methamphetamine and amphetamine were found in the victim's blood at the time of her death. Ex. #50, Toxicology Report.

C. Modern DNA testing can exculpate Mr. Payne.

Mr. Payne previously filed a request to have the biological evidence tested. Ex. #51, Petition for Post-Conviction DNA Analysis, Sept. 7, 2006. Mr. Payne's request to have available, biological evidence examined and tested was denied. *See Payne v. State*, No. W2007-01096-CCA-R3PD, 2007 WL 4258178, at *8 (Tenn. Crim. App. Dec. 5, 2007). The denial was based in large part on this Court's decision in *Alley v. State*, 2006 WL 1703820 (Tenn. 2006). *Alley* was overruled by *Powers v. State*, 343 S.W.3d 36 (Tenn. 2011).

It bears noting that the murder at issue in *Alley* occurred the summer before the crime here. Both occurred in Millington. Both cases involve a horrific crime scene.

If Mr. Payne is innocent, then a third party's DNA should be at the crime scene. In light of the discovery of the bloody bed clothes, Mr. Payne will renew his request for DNA testing pursuant to the statute.

D. Other individuals who, like Mr. Payne, were wrongly convicted because they happened upon a crime scene, have been exonerated. Justice requires that Mr. Payne be given an opportunity to show he is innocent.

Numerous individuals like Mr. Payne—wrongly sentenced to death based on evidence that they were present at a murder scene—have been exonerated. There are multiple examples of such exonerations:

- Chad Heins (FL) https://www.innocenceproject.org/cases/chad-heins/
- John Nolley (TX) https://www.innocenceproject.org/tarrant-county-district-attorney-dismisses-murder-charges-against-john-nolley/
- Darryl Adams (TX) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5089
- David Ayers (OH) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3868 (last visited Dec. 29, 2019).

Mr. Payne will only elaborate here on the case of Clemente Aguirre, whose conduct upon entering his neighbor's home and discovering a bloody scene was very similar to Mr. Payne's, and who, like Mr. Payne, was wrongfully convicted of capital murder as a result. In 2018, Mr.

Aguirre was exonerated of the murder of his next-door neighbors—a middle-aged woman and her mother—found stabbed to death in their home. *See* Innocence Project, https://www.innocenceproject.org/cases/clemente-aguirre-jarquin/ (hereinafter "Aguirre-Innocence Project") (last visited Dec. 29, 2019); *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016) (granting him a new trial based on new evidence of actual innocence). As Aguirre testified during the guilt-phase of his trial, he went to the victims' residence one night to see if they had beer and found them murdered—the younger one stabbed 129 times. *Aguirre-Jarquin*, 202 So. 3d at 788. The state's evidence included: a crime-scene analyst who testified that 64 bloody shoe impressions belonging to Aguirre were in the residence; a fingerprint examiner who said she identified Aguirre's fingerprint on the knife; testimony that a bag of bloody clothes in Aguirre's home contained DNA matching both victims; and a bloodstain pattern analyst who testified that the blood on the clothes were caused by "impact spatter" (consistent with the State's theory that he stabbed the victims) as opposed to "contact stains" (consistent with his trial testimony that he lifted one of the women onto his lap and tried to revive her). *Id.* Aguirre testified that he saw the murder weapon in the room, feared the killer was still inside the house, picked the knife up and walked to the bedroom of Samantha (the daughter and granddaughter of the victims), who was not there. *Id.* He then ran toward his house, tossed the knife into the grass, put his clothes into a plastic bag, and bathed. *Id.* He did not call the police because he was an illegal immigrant and afraid of deportation. *Id.*

At the state post-conviction stage, the Innocence Project got involved and secured DNA testing of more than 80 pieces of evidence. Aguirre-Innocence Project. The results of this testing and other evidence was presented in post-conviction hearings, including: a crime scene expert who testified that what was said to be blood spatter on Aguirre's clothing was actually blood that had transferred when he picked up the victims; an expert who testified that Aguirre was excluded as the source of the DNA at the scene and that Samantha's DNA was found in eight locations (consistent with her being the attacker); evidence that Samantha had been evaluated for psychiatric problems about 60 times; and evidence that Samantha had admitted to multiple people that she had committed the murders, including a statement that demons made her kill her family. *Id.*; *see also Aguirre-Jarquin*, 202 So. 3d at 789. Samantha's then-boyfriend testified at the post-conviction hearing that although she had spent the night at his home the night of the murders, he was "dead to the world" and could not say for sure whether she left during the night. *Id.*

Notably, the trial court focused on Aguirre's "abuse of process" because he filed a successive post-conviction motion to present affidavits from additional individuals to whom Samantha had confessed to the murders that had come to light after the first evidentiary hearing had concluded rather than seeking to amend his initial post-conviction motion. *Aguirre-Jarquin*, 2020 So. 3d at 789-90. The trial court also held that Samantha's statements were inadmissible hearsay, would not have produced an acquittal, and did not contradict the boyfriend's alibi testimony. *Id.* at 790.

The Florida Supreme Court reversed, holding that Aguirre was entitled to a new trial based on the newly discovered evidence. *Id.* A week before the second trail, the defense revealed a sworn affidavit from the wife of Samantha's former boyfriend stating that the boyfriend had told her (the wife) that Samantha took a taxi home the night of the murders and told him to come get her in the morning to pick up a load of laundry. Aguirre-Innocence Project. While jury selection was still in progress a week later, the prosecutor dismissed the charges against Aguirre "based upon new evidence that materially affects the credibility of a critical State witness." *Id.* Aguirre is out of jail now, pursuing an asylum claim and seeking to be declared a wrongly-convicted person. *Id.*

Like Aguirre, Mr. Payne must be given an opportunity to show that he is actually innocent. The State's motion should be denied.

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

This Court should create a categorical exemption from execution for the seriously mentally ill. An exemption is necessary, because a defendant's serious mental illness compromises the reliability imperative for a constitutionally reliable conviction and death sentence. In addition, because execution of the mentally ill violates contemporary standards of decency, an exemption would promote the interests of justice. Each of the objective factors set out by the Supreme Court as objective indicia of modern standards of decency weigh in favor of exemption: the national trend away from capital punishment entirely; widespread proposed

legislative exemptions for the mentally ill; polling data of American's views; opinions expressed by relevant professional organizations; and the opinion of the international community. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing *Harmelin v. Michigan,* 501 U.S. 957, 1000 (1910); *Rummel v. Estelle,* 445 U.S. 263, 274–275 (1980)).

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

The Diagnostic and Statistical Manual defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[8] "People with [severe mental illness] experience both a mental illness *and* a functional disability . . . and often have a long history of hospitalizations or intensive outpatient treatment due to severe psychological dysfunction."[9]

According to the American Psychological Association:

> [Serious Mental Illness, or SMI] refers to disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (*e.g.*, lasting at least a year); and that result in comparatively severe impairment in major areas of functioning, such as cognitive capabilities; disruption of normal developmental processes, especially in late adolescence; vocational capacity and social relationships. The [Diagnostic and Statistical

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[8] Ex. 53, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.

[9] Ex. 54, J. Sanchez et. al, *Predicting Quality of Life in Adults With Severe Mental Illness: Extending the International Classification of Functioning, Disability, and Health* (2016) 61 Rehab. Psych. 19, 20 (citations omitted).

> Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[10]

Similarly, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines "serious mental illness" as "someone over 18 having (within the past year) a diagnosable mental, behavior, or emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities."[11] The National Institute of Mental Health (NIMH)[12] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[13]

Mental illnesses that meet the diagnostic criterion for SMI are all generally associated in their acute state with hallucinations, delusions, disorganized thoughts, or significant disturbances in consciousness,

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[10] Ex. 55, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

[11] Ex. 56, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/find-help/disorders (last visited Dec. 22, 2019); *Mental Health and Substance Use Disorders.*

[12] Ex. 57, *Serious Mental Illness (SMI) Among U.S. Adults*, available at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited Dec. 22, 2019).

[13] Ex. 58, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited Dec. 22, 2019).

perception of the environment, accurate interpretation of the environment, and memory.[14]

B. Mr. Payne's mental illness renders his conviction and death sentence unconstitutionally unreliable.

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

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

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[14] *See* Ex. 59, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 60, § II.O5 (Anxiety Disorders); Ex. 61, § II.08 (Dissociative Disorders).

mentally ill, execution of individuals who are seriously mentally ill is likewise unconstitutional.

Individualized sentencing is the predicate for any constitutional imposition of the death penalty. In 1976, the Supreme Court held "the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304-05. In *Woodson*, the Court specified that the Eighth Amendment requires consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304; *accord Roberts v. Louisiana*, 428 U.S. 325, 329 (1976). Subsequently, the Court explicitly linked the consideration of mitigating evidence with the heightened need for reliability in capital cases in *Lockett v. Ohio*, 438 U.S. 586 (1978). *Lockett* held that a "risk" that mitigation may not be fully considered offends the constitution: "[P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605.

While insisting that individualized sentencing is the lynchpin of reliability in capital cases, the Supreme Court has recognized that some qualities are inherently difficult for jurors to appropriately weigh and consider. These facts are, by their very nature, "double edged." They

should mitigate a defendant's moral culpability, but societal misconceptions about those factors create too significant a risk that they will be misused for a defendant with those qualities to be reliably sentenced to death. The *Atkins* Court determined that where a reliable assessment of constitutionally protected mitigation lies beyond the jury's ability, jurors cannot be asked to consider a death sentence.[15]

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

The Supreme Court has identified six factors that so undermine the reliability of a jury assessment of individualized characteristics that categorical exemption from the death penalty is required. In exempting the intellectually disabled and juveniles from capital punishment in

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[15] *See*, Ex. 62, Scott E. Sunby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WILLIAM & MARY BILL OF RIGHTS JOURNAL, 21 (2014).

Atkins and *Roper*, and juveniles from mandatory life sentences in *Simmons*, the Court established a framework for the evaluation of when a categorical ban is necessary:

1) When the defendant's individualized characteristics inherently impair his cooperation with his lawyer and impair the lawyer's ability to prepare a defense, *Atkins*, 536 U.S. at 320-21; *Graham*, 560 U.S. at 77;
2) When the individualized characteristics inherently make the defendant a poor witness, *Atkins*, 536 U.S. at 320-21;
3) When the individualized characteristic inherently distorts the defendant's decision making, *Graham*, 560 U.S. at 78 (highlighting the unreliability produced by a juvenile's "[d]ifficulty in weighing long-term consequences");
4) When the characteristic has a "double edge" and is often misperceived by jurors as aggravating, *Roper*, 543 U.S. at 573;
5) When there is a lack of scientific consensus as to the characteristic (though not as to its mitigating nature), *Atkins,* 536 U.S. at 308-09; and
6) When there is a risk that the brutality of the crime will unduly outweigh the mitigating characteristic. *Roper*, 543 U.S. at 573;

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

Mental illness vitiates the reliability of any capital sentence thereby causing it to violate the Eighth Amendment. Mental illness and mentally ill people present jurors with the same daunting challenges as those the United States Supreme Court has already found to be too great

for the Eighth Amendment to countenance. Substitution of the words "mentally ill" for "juveniles" in the following excerpt from *Graham* demonstrates how completely these factors apply equally to both:

> [T]he factor[s] that distinguish the *mentally ill* from [other] adults also put them at a significant disadvantage in criminal proceedings. The *mentally ill* mistrust [other] adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than [other] adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the [non-impaired] adult world . . . , all can lead to poor decisions by one charged *while mentally ill*. These factors are likely to impair the quality of a *mentally ill* defendant's representation.

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

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

A mentally ill defendant is arguably less able to work with his counsel than a juvenile or intellectually impaired defendant. Cooperation with counsel is particularly at risk when the mental illness includes common symptoms of paranoia, psychosis, delusions, or deep depression. Many mentally ill people resist the stigma of being called "mentally ill" or become paranoid when such a label is used against them. When that occurs, counsel's attempt to mitigate the defendant's culpability through presentation of his mental illness may actually engender additional distrust from the client. Mental illness may prevent even an otherwise cooperative client from providing meaningful assistance because his

thought processes may be altered or disjointed; he may be unable to remember events accurately; and he may have difficulty with communicating. As with young and intellectually impaired defendants, the very characteristics that diminish a mentally ill defendant's culpability jeopardize his ability to assist counsel.

2. Mental illness makes a defendant a poor witness.

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

> impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe "significantly fewer bits of information about the context of the story and the events that initiated it." ... [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to "tell their story in the forensic context."[16]

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

If a defendant's mental illness manifests in outburst, inability to control movements, or by making inappropriate gestures or noises, the

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[16] Ex. 63, Michele LaVigne & Gregory Van Rybroek, "*He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships*, UNIV. OF WISC. LAW SCHOOL, SERIES PAPER No. 1228 at 4.

jurors may interpret such behavior as proof of a lack of remorse or as proof of dangerousness.[17] As Justice Kennedy observed in *Riggins v. Nevada*, 504 U.S. 127 (1992) (Kennedy, J., concurring), medicating a mentally ill defendant may actually make the situation worse: "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.* at 143-44.

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

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

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

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[17] Ex. 64, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1563 & n.22 (1998) (reporting Capital Jury Project findings describing jurors' reactions to defendants who engaged in outbursts during trial).

> Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf.

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

4. **Mental illness is a double-edged mitigator.**

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

The Capital Jury project has determined that, beyond all other aggravating factors, a jury's determination that a defendant might be dangerous in the future trumps all other considerations.[18] As the

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[18] Ex. 64, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998) (37.9% of jurors stated it would make them "much more likely" and 20% "slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 65, Marla Sandys, *Capital jurors, mental illness, and the unreliability principle: Can capital jurors*

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

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

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

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

Roper, 543 U.S. at 573.

Evidence shows that juries are incapable of reliably sifting through competing psychiatric testimony. Juries frequently view defense experts

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comprehend and account for evidence of mental illness? BEHAVIORAL SCIENCES & THE LAW (2018), available at https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2355 (last visited Dec. 23, 2019).

as hired guns who offer up excuses, while not discounting the opinions of prosecution experts.[19] Further, where juries have already rejected a defendant's mental health evidence in the form of an insanity or diminished capacity defense, there exists a distinct risk that the jury will be confused as to how to weigh mental illness (which it just rejected) as mitigation.

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

Mental illness frequently contributes the brutality of the crime, resulting in acts that appear particularly unnecessary, aberrant, sadistic, and frightening to the jury.[20] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

Just as the Eighth Amendment prohibits the execution of the intellectually disabled and juvenile defendants because of the risk that their conditions will not be properly considered as mitigating their culpability, so too does the execution of the seriously mentally ill violate the Constitution. As this Court has held, "although the Eighth

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[19] Ex. 66, Scott E. Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV., 1109, 1126-30 (1997).

[20] Ex. 67, Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013) (summarizing multiple cases where severely mentally ill defendants have been sentenced to death).

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

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

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

Courts must look to the "evolving standards of decency that mark the progress of a maturing society" when tasked with determining whether a punishment is "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court conducts two separate Eighth-Amendment analyses: (1) whether the death penalty is grossly disproportionate to a certain class of offenders (here, persons with serious

mental illness), *see Kennedy v. Louisiana*, 554 U.S. 407 (2008) (rape of a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (non-triggerman); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); and (2) whether the class of offenders categorically lacks the "capacity to act with the degree of culpability associated with the death penalty," *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles).

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

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

In evaluating whether a national consensus exists in the Eighth-Amendment context, the Supreme Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh (Penry I)*,

492 U.S. 302, 331 (1989). The Court also looks to "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual sentencing practices[, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Also, in looking at whether a national consensus exists, the Court examines the opinions of relevant professional organizations, polling data, and international consensus. *See Atkins*, 536 U.S. at 316 n.21.

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

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

Twenty-one states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and ten additional states have an actual or de facto (ten years since an execution) moratorium on executions.[21] A national consensus is emerging, as more than half of United States jurisdictions prohibit the death penalty in practice and 60% of Americans told Gallup they preferred life

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[21] *See* Ex. 68, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

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

Additionally, the Supreme Court looks to the consistency of the direction of change. *Atkins*, 536 U.S. at 314. Since 2010, nine states have taken affirmative stances against the death penalty; four states have passed legislation ending the death penalty (Connecticut, Illinois, Maryland, and New Hampshire), and six governors have imposed moratoriums on executions. (California, Colorado, Ohio, Oregon, Pennsylvania, and Washington).[22]

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

Since 2016, some of the most active death-penalty states have introduced legislation to exempt persons with serious mental illness from being eligible for the death penalty. These states include Arizona, Arkansas, Idaho, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia. In 2019 alone, nine state legislatures considered measures to ban the execution of individuals with SMI.[23]

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[22] Ex. 69, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

[23] *See* Ex. 68, *The Death Penalty in 2019, Year End Report,* Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited December 22, 2019).

On February 11, 2019, legislators in Tennessee introduced two bills to exclude persons with SMI from the death penalty. HB1455 and SB 1124. House Bill1455 was referred to the House Judiciary Committee on February 11 and assigned to the Criminal Justice Subcommittee on February 13. It was favorably reported out of subcommittee on March 13. SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[24]

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

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

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[24] Ex. 70, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 22, 2019).

capacity); Ky. Rev. Stat. Ann. § 532.025(2)(b) ("mental illness" and capacity); La. Code Crim. Proc. Ann. art. 905.5 ("mental disease or defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1)(c)(A) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (mental or emotional disturbance and capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102(j) (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity). Prior to its legislative abolishment of the death penalty in 2012, Connecticut specifically prohibited the execution of persons with serious mentally illness. Conn. Gen. Stat. § 53a-46a(h)(2).

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

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

Even though these states have statutory mitigating factors that allow the jury to take into count a defendant's serious mental illness, a jury's unreliability in doing so mitigates in favor of an outright exclusion of the death penalty for persons with SMI.[25]

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

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed. *See e.g.*, *Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316. As discussed below, an analysis of the evolving standards of decency demonstrates that the frequency of new death sentences has decreased considerably over time for *all* defendants, not just the seriously mentally ill. Many jurisdictions that have the death penalty as an option do not impose it.[26] Numerous other jurisdictions have eliminated it altogether.

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[25] *See* Ex. 62, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 2014 Wm. & Mary Bill Rts. J., Vol. 23:487, 492, 497 ("*Roper* thus strongly reinforced *Atkins*'s recognition that if circumstances prevent a juror from being able to give proper consideration to constitutionally protected mitigation, the death penalty *categorically* cannot be imposed." (emphasis in original)).

[26]Ex. 72, Pew Research Center, California is one of 11 states that have the death penalty but haven't used it in more than a decade (Mar. 14, 1999) https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-

In 2018, the Washington Supreme Court held that the death penalty violates the state constitution, as it is contrary to the evolving standards of decency: "We recognize local, national, and international trends that disfavor capital punishment more broadly." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018). But, even in states where the death penalty continues to be a sentencing option, jurors are increasingly less likely to impose it, particularly against defendants who are seriously mentally ill.[27] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[28]

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

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

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

[27] Ex. 64, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 73, Michelle E. Barnett, *When mitigation evidence makes a difference: effects of psychological mitigating evidence on sentencing decisions in capital trials*, 22 Behavioral Sciences and the Law 751 (2004) ("Mitigating evidence such as the defendant was suffering severe delusions and hallucinations . . . yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.").

[28] *Id.*

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

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for defendants with serious mental illness:[29]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[30]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[31]
- National Alliance on Mental Illness, *Death Penalty*.[32]

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[29] Ex. 74, American Psychological Association, *Associations concur on mental disability and death penalty policy*, Vol 38, No. 1, p. 14 (2007), https://www.apa.org/monitor/jan07/associations (noting the APA, the ABA, the American Psychiatric Association, and the National Alliance on Mental Illness' agreement that SMI offenders should not be subject to the death penalty) (last visited Dec. 22, 2019).

[30] Ex. 75, American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014)

[31] Ex. 76, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[32] Ex. 77, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[33]

The American Bar Association also publically opposes executing or sentencing to death the defendants with serious mental illness.[34] In 2016, the ABA published a white paper that concluded:

> The death penalty is the ultimate punishment that should be reserved for the most blameworthy individuals who commit the worst crimes - and it does not serve any effective or appropriate purpose when it is applied to individuals with severe mental illness. The Supreme Court has already recognized that there are two other categories of individuals who have similar functional impairments to people with severe mental illness that are inherently 'less culpable' to the point that it is unconstitutional to apply the death penalty in their cases. In light of this constitutional landscape, the growing consensus against this practice, and the fact that none of the current legal mechanisms afford adequate protection against the death penalty to those diagnosed with serious mental disorders or disabilities, it is time for the laws in U.S. capital jurisdictions to change.[35]

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[33] Ex. 78, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Dec. 22, 2019).

[34] Ex. 79, American Bar Association, *ABA Recommendation 122A*, Serious Mental Illness Initiative (adopted Aug. 2006), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/ (last visited 12/19/2019).

[35] Ex.80, https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/Se

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness exemption from the death penalty by a 2 to 1 majority."[36] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM.[37] In 2019, the ABA filed an amicus brief in the Nevada Supreme Court arguing that imposition of the death penalty on people with severe mental illness serves no legitimate penological purpose and asking the court to "categorically prohibit the execution of individuals who were suffering from severe mental illness at the time of their crimes."[38]

Turning to Tennessee, in 2018, the ABA published an analysis of the savings an exclusion for the mentally ill would likely generate for the state of Tennessee.[39] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally

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vereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Dec. 22, 2019).

[36] Ex. 81, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness; *see also* Ex. 82, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[37] Ex. 83, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

[38] Ex. 84, ABA Amicus Brief in Nevada Supreme Court.

[39] Ex. 85, ABA, Potential Cost Savings of Severely Mentally Ill Exclusion from the Death Penalty: An Analysis of Tennessee Data, https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2018-smi-cost-analysis-w-tn-data.pdf

ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like schizophrenia, can still be subject to the death penalty in Tennessee."[40] Mr. Cody noted that defendants with SMI differ from other defendants: "In 2007, an ABA study committee, of which I was a member, conducted a comprehensive assessment of Tennessee's death penalty laws and found that 'mental illness can affect every stage of a capital trial' and that 'when the judge, prosecutor and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.'"[41]

Other community organizations oppose the execution of persons with SMI. For example, in 2009, Murder Victims' Families for Human Rights published "Double Tragedies, Victims Speak Out Against the Death Penalty for People with Severe Mental Illness."[42] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[43]

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

- Frank R. Baumgartner and Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*' THE

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[40] Ex. 86, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[41] *Id.*

[42] Ex. 87, https://www.amnestyusa.org/double-tragedies/.

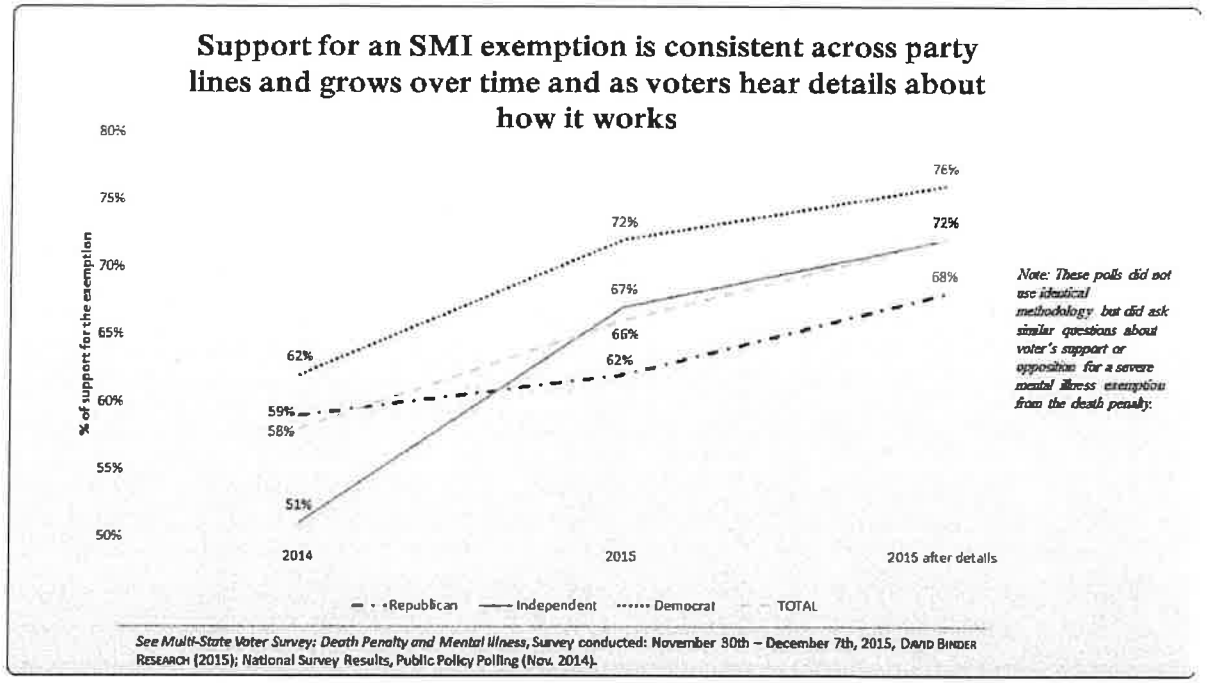
[43] Ex. 88.

WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the death penalty actually targets those who have mental illnesses."), Ex. 89.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 90.
- Bob Taft and Joseph E. Kernan, *End the Death Penalty for Mentally Ill Criminals*, THE WASHINGTON POST, March 24, 2017 (written by two former governors (Ohio and Indiana)), Ex. 91.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 92.

Public opinion polls also support this consensus:

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



- The ABA's 2016 polling found that 66% of respondents oppose the death penalty for people with "mental illness." The rate of opposition rose to 72% when respondents learned about the details of how a "severe mental illness" exemption would work. *Id.*
- In 2014, Public Policy Polling found that 58% of respondents opposed the death penalty for "persons with mental illness"; with 28% in favor and 14% unsure.[44]

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[44] Ex. 93, Public Policy Polling, National Survey Results, https://drive.google.com/file/d/0B1LFfr8Iqz_7R3dCM2VJbTJiTjVYVDVodjVVSTNJbHgxZWlB/view.

- A 2009 poll of Californians found 64% opposed the death penalty for the "severely mentally ill."[45]
- A 2007 North Carolina poll found that 52% of respondents were against imposing the death penalty on defendants who had a "severe mental illness or disability" at the time of the crime, with only 30% being in favor of the practice.[46]
- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[47] Opposition was similar to the rate of opposition of the death penalty for the "mentally retarded (82%)." *Id.* Notably, a higher percentage of respondents opposed the death penalty for the mentally ill (75%) than for juveniles (69%). *Id.*

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with

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[45] Ex. 94, Jennifer McNulty, *New poll by UCSC professor reveals declining support for the death penalty*, University of California Santa Cruz Newscenter, Sept. 1, 2009, http://news.ucsc.edu/2009/09/3168.html (last visited Dec. 22, 2019).

[46] Ex. 95, Rob Schofield, *NC Policy Watch Unveils Inaugural "Carolina Issues Poll:" Results Show that Voters are Supportive of Public, Humane Solutions in Mental Health and Affordable Housing* (Apr. 9, 2007), http://www.ncpolicywatch.com/2007/04/09/nc-policy-watch-unveils-inaugural-"carolina-issues-poll"/ (last visited Dec. 22, 2019).

[47] *See* Ex. 96, Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* https://news.gallup.com/poll/1606/death-penalty.aspx, p.12 (last visited Dec. 22, 2019).

capital punishment to abolish it for people who suffer to "from any form of mental disorder."[48] A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[49]

The European Union has also declared that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[50] Generally, the EU opposes the death penalty for all crimes.[51]

f. Evidence of National Consensus: Mental Health Courts

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[48] Ex. 97, *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999), *see Press Release*, https://www.un.org/press/en/1999/19990428.HRCN938.html ("The Commission urged all States that still maintained the death penalty . . . not to impose it on a person suffering from any form of mental disorder.").

[49] Ex. 98, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[50] Ex. 99, European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000).

[51] Ex. 100, October 10, 2019, World and European Day Against the Death Penalty, https://www.coe.int/en/web/human-rights-rule-of-law/day-against-death-penalty (last visited Dec. 22, 2019).

Jurisdictions nationwide are adopting mental health courts that take a holistic approach to rehabilitated persons with mental illness who are in the criminal justice system. Nationwide, there are over 300 mental health courts in all fifty states.[52] At least one hundred of these courts serve felony offenders.[53] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing ... [in which participants] voluntarily participate in a judicially supervised treatment plan."[54] These special courts clearly reflect a consistency in the direction of change in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded

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

The last "step" of the Eighth Amendment analysis requires a court to exercise its own independent judgment in determining whether the death penalty is a disproportionate response to the moral culpability of

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[52] Ex. 101, *Adult Mental Health Treatment Court Locator*, Substance Abuse & Mental Health Services Administration, https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults (last visited Dec. 22, 2019).

[53] *Id.*

[54] Ex. 102, *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), https://csgjusticecenter.org/wp-content/uploads/2012/12/mhc-primer.pdf (last visited Dec. 22, 2019).

the defendant. *See e.g., Atkins*, 536 U.S. at 312 (quoting *Coker v Georgia*, 433 U.S. 584, 597 (1977). To impose our society's gravest punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. Without such congruence, the punishment of death becomes "grossly disproportionate." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320.

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

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

536 U.S. at 318.

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

Although severely mentally individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

Conclusion:

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

V. The Death Penalty Is Racist.

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

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

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

Since its inception in 1796, the law in Tennessee has allowed for capital punishment.[55] "Until 1913, all individuals convicted of a capital offense were hanged. There are no official records of the number or names

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[55] Ex. 103, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS,https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

of those executed."[56] In 1916, Tennessee progressed to electrocution as a means to end human life. Electrocution remained the sole method of execution from 1916 until 1960. During this time, Tennessee executed 125 people. Of the 125, 85 were African-American including the 31 African-American men executed for rape.[57] After decades of legal battles on the constitutionality of the death penalty and method of execution, Tennessee made lethal injection the method of execution starting January 1, 1999.[58]

Parallel to the official, state-sanctioned death penalty, there has been a darker history of capital punishment in Tennessee. There have

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[56] Ex. 104, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

[57] In 1977, too late to save the 36 men Tennessee had already executed for the crime of rape, the United States Supreme Court found it unconstitutional to impose a sentence of death for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977). 455 people were executed for rape between 1930 and 1972. 89.1% of those men were black. Ex. 105, *Race, Rape, and the Death Penalty,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty

[58] Ex. 103, *Capital Punishment Chronology,* TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/content/dam/tn/correction/documents/chronology.pdf.

From 1960 to 2000 there was not a single execution in the state of Tennessee. Ex. 104, *Tennessee Executions*, TENNESSEE DEPARTMENT OF CORRECTIONS, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html.

been 237 reported extra-judicial lynchings in Tennessee—the birthplace of the Ku Klux Klan.[59] Of the 95 counties in Tennessee, 59 counties have reported lynchings. *Id.* The numbers of lynching per county range from one to twenty, with Shelby County holding the record for most lynchings. *Id.* In keeping with that history, Shelby County is also responsible for nearly 50% of the current number of people on death row. The individuals lynched in Memphis include Calvin McDowell, William Stewart, and Thomas Moss.[60] After opening the People's Grocery store in Memphis, TN, a thriving business, Misters McDowell, Stewart, and Moss were confronted and jailed by law enforcement officers along with over 100 other black men. *Id.* On March 9, 1892, masked men entered the jail and removed Mr. Moss, Mr. McDowell, and Mr. Stewart and hung them in an open field. *Id.* When the executioners asked Mr. Moss for his last words he stated, "Tell my people to go west. There is no justice for them here." *Id.*

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

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court addressed the discriminatory application of the death penalty. Concurring to the Court's per curiam holding that the death penalty violates the Eighth Amendment, Justice Douglas concluded that the

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[59] Ex. 106, *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/tennessee.

[60] Ex. 106, *Lynching in America*, EQUAL JUSTICE INITIATIVE, Calvin McDowell, William Stewart, and Thomas Moss (video).

capital statutes across the country were "pregnant with discrimination," *id.* at 257, and were counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment," *id.* at 255. Justice Douglas reasoned:

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

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

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

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

U.S. 545, 555 (1979); *Castaneda v. Partida,* 430 U.S. 482 (1977); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (declaring the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states"). Contrary to the mandates of the Supreme Court, the overt racism that led to the lynching of black citizens became ingrained in the justice system. This happened, in part, because for many years the courts viewed their duty as limited to minimizing racist enforcement of the law. *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman*, 408 U.S. at 257 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As Justice Black observed in *Callins v. Collins*, 510 U.S. 1141 (1994),

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

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

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

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

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

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

While blacks make up approximately 12% of the population, they account for 42% of the national death row.[61] *Id.* These disparities are well known and well documented. The death penalty is intended for the worst of the worst, (*see Harmelin v. Michigan*, 501 U.S. 957, 966 (1991)), yet research continues to show that race, not crime, is the more likely indicator for who receives the death penalty.

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[61] Ex. 107, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

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

D. Implicit biases influence prosecutorial discretion in seeking death.

A defendant's journey through the legal system has but one conductor: the prosecutor. From the pretrial decisions to the final closing statement, prosecutors bring their own perspectives, strategies, and biases into each decision. The most critical of these decisions, however, is whether to seek the death penalty. Prosecutors make such decisions against the backdrop of their own worldview – including their implicit, unconscious biases. Studies have shown that racialized implicit biases cause associations between black citizens and violence, criminality, and aggression.[62] Whites are associated with purity and seen as victims.[63] Research shows that merely seeing a black face can trigger negative

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[62] Ex. 108, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, SEATTLE UNIV. L. REV., V. 35:795.

[63] *Id.*

associations.[64] By the time a prosecutor has made a charging decision, she has been primed with both the race of the defendant and the victim. Similar to an implicit bias test, a prosecutor must then make choices about the charge, the strategy, plea negotiations, and, ultimately whether to seek death. If prosecutors' implicit biases align with the rest of the country's – and there is no reason to believe that they are uniquely immune – these racial associations impact every decision prosecutors make.[65] Racial priming affects charging decisions, how prosecutors perceive jurors, how they assess witnesses, what evidence they perceive as exculpatory, etc. Even when not acting intentionally, a prosecutor's implicit bias becomes the lens through which she dispenses justice.

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

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

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[64] *Id.* at 799; Ex. 109, Lisa Trei, *'Black' features can sway in favor of death penalty, according to study*, Standford Report (2006); Ex. 110, Jennifer Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes.* CORNELL LAW FACULTY PUBLICATION (2006).

[65] *Id.,* Ex. 111, Katherine Barnes, et al. *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 Arizona Law Review, 305 (2009). Ex. 112, Mike Dorning, *Plea Bargains Favor Whites in Death Penalty Cases, Study Says*, WASHINGTON POST, July 26, 2000.

constitutional practices aimed at achieving the same goal—preventing blacks from serving on juries. While some states began using seemingly neutral requirements such as intelligence, experience, or good moral character to keep black citizens out of the jury box, other states printed the names of black jurors on separate color paper so those names could be avoided during a putatively "random" drawing or, alternatively, utilized the jury commissioner as a proxy for the state's racism.[66]

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

> If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. The general attitude of the jury commissioner is shown by the following extract from his testimony: 'I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.'

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[66] Ex. 113, Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004).

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

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

In 1986, the Supreme Court declared any exclusion prospective jurors based on race unconstitutional. *Batson v. Kentucky,* 476 U.S.79 (1986).[67] However the Court's ruling proved difficult to enforce. In 2015, the New Yorker reported that in the approximately 30 years since *Batson*, courts have accepted the flimsiest excuses for striking black jurors and prosecutors have trained subordinates to strike black jurors without a judicial rebuke.[68] A 2010 report by the Equal Justice Initiative documented cases in which courts upheld prosecutors' dismissal of jurors because of allegedly race-neutral factors such as affiliation with a historically black college, a son in an interracial marriage, living in a black-majority neighborhood or that a juror "shucked and jived."[69]

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

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[67] Much of this section is drawn from Ex. 114, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[68] Ex. 115, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?* THE NEW YORKER, June 5, 2015.

[69] Ex. 116, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

- A study of criminal cases from 1983 and 1993 found that prosecutors in Philadelphia removed 52% of potential black jurors as compared to only 23% of nonblack jurors.[70]
- Between 2003 and 2012, prosecutors in Caddo Parish, Louisiana — one of the most aggressive death penalty counties in the country — struck 46% of prospective black jurors with preemptory challenges, as compared to 15% of non-blacks.[71]
- Between 1994 and 2002, prosecutors in Jefferson Parish, Louisiana struck 55% of blacks, but just 16% of whites.[72]
- Although blacks make up 23% of the population in Louisiana, *80%* of criminal trials had no more than two black jurors, and it notably takes only 10 of 12 juror votes to convict in that state.[73]
- A 2011 study found that between 1990 and 2010, North Carolina state prosecutors struck about 53% of black people eligible for juries in criminal cases as compared to about 26% of white people.[74] The study's authors concluded that the chance of this occurring in a

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[70] Ex. 117, ACLU, *Race and the Death Penalty.*

[71] Ex. 118, Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, Reprieve, August 2015.

[72] Ex. 115, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015.

[73]Ex. 116, EJI, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy.*

[74]Ex. 119, Barbara O'Brian & Catherine M. Grosso, *Report on Jury Selection Study*, MICH. ST. UNIV. COLLEGE OF LAW FACULTY PUBLICATIONS, Dec. 15, 2011.

race-neutral process was less than 1 in 10 trillion.[75] Even after adjusting for excuses given by prosecutors that tend to correlate with race, the 2-to-1 discrepancy remained.[76] The North Carolina legislature had previously passed a law stating that death penalty defendants who could demonstrate racial bias in jury selection could have their sentences changed to life without parole.[77] The legislature later repealed that law.[78]

- Recently, American Public Media's "In the Dark" podcast did painstaking research on the 26-year career of Mississippi District Attorney Doug Evans and found that during his career, Evans' office struck 50% of prospective black jurors, compared with just 11% of whites.[79]
- In the 32 years since *Batson*, the U.S Court of Appeals for the 5th Circuit — which includes Mississippi, Texas and Louisiana — has upheld a *Batson* challenge only twice, out of hundreds of challenges.[80]

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[75] *Id.*

[76] *Id.*

[77] Ex. 120, North Carolina Senate Bill 461, The Racial Justice Act.

[78] Ex. 121, Matt Smith, *"Racial Justice Act" repealed in North Carolina*, CNN, June 21, 2013.

[79] Ex. 122, Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APMReports, June 12, 2018.

[80] Ex. 123, Ian Millhiser, *Something has gone wrong with Jury Selection in Mississippi, and the Fifth Circuit is to Blame.*, THINK PROGRESS, Apr. 5, 2018.

- A survey of seven death penalty cases in Columbus, Georgia, going back to the 1970s found that prosecutors struck 41 of 44 prospective black jurors.[81] Six of the seven death penalty trials featured all-white juries.[82]
- In a 2010 study, "mock jurors" were given the same evidence from a fictional robbery case but then shown alternate security camera footage depicting either a light-skinned or dark-skinned suspect.[83] Jurors were more likely to evaluate ambiguous, race-neutral evidence against the dark-skinned suspect as incriminating and more likely to find the dark-skinned suspect guilty.[84]
- Between 2005 and 2009, prosecutors in Houston County, Alabama, struck 80% of black people from juries in death penalty cases.[85] The result was that half the juries were all white and the remainder had only a single black juror, even though the county is 27% black.[86]

Although these statistics make painfully clear that racism in jury selection is still rampant, it is very difficult for defendants to prove that

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[81] Ex. 124, Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death penalty cases*, ATLANTA JOURNAL CONSTITUTION, Mar. 19, 2018.

[82] *Id.*

[83] Ex. 125, Justin D. Levinson, Danielle Young, *Different Shards of Bias: Skin Ton, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV., 307 (2010).

[84] *Id.*

[85] Ex. 126, Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NPR Nov. 2, 2015.

[86] *Id.*

a prosecutor's purportedly race-neutral reasons are pretext for racism in all but the most egregious cases. In recent years, the Supreme Court has encountered a few of these egregious cases. In 2016, the Supreme Court held 7-1 that Georgia prosecutors violated *Batson* when they used peremptory strikes to remove all four African American potential jurors from Timothy Foster's capital jury. *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016). The trial court accepted the prosecutors' purportedly race-neutral reasons for the strikes and denied Foster's *Batson* challenge. *Id.* at 1742-43. Mr. Foster, a black man, was then convicted and sentenced to death for the sexual assault and murder of a white woman, and his postconviction litigation of the *Batson* claim was unsuccessful. *Id.* at 1742. Almost 20 years later, Foster obtained a copy of the prosecutors' jury selection file, and the evidence of racial discrimination contained in it was so stark that it led to almost unanimous consensus among the justices that the prosecutors' strikes "were motivated in substantial part by race."[87] *Id.* at 1743, 1755. It is noteworthy that it took 20 years for Foster to obtain evidence of the blatant racism of his prosecutors and that he had lost his *Batson* claims in many courts along the way.

In 2019, the Court encountered another egregious case, and seven justices held that a Mississippi prosecutor violated *Batson* when he struck 41 out of 42 potential black jurors throughout six different trials

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

of Curtis Flowers. *Flowers v. Mississippi*, 139 S. Ct. 2229, 2251 (2019).[88] The Mississippi Supreme Court reversed three times (all for prosecutorial misconduct, and one specifically for a *Batson* violation), and twice the jury could not reach a unanimous verdict. *Id.* at 2236-37. The Court described the prosecutor's pattern of racist use of peremptory strikes across his trials as follows:

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

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

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

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

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

Although prosecutors are often blamed for racial disparities in the legal system, defense attorneys are not immune to the effects of racism and implicit bias. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court considered an ineffective assistance of counsel challenge to defense counsel's introduction of a medical expert's report counsel knew presented the view that the defendant's "race disproportionately predisposed him to violent conduct" during the penalty phase, in which "the principal point of dispute" was whether the defendant "was likely to act violently in the future." *Id.* at 775. The Court characterized the report of stating "in effect, that the color of Buck's skin made him more deserving of execution." *Id.* As to the deficient-performance prong of *Strickland*, the Court concluded that the introduction of this report "fell outside the bounds of competent representation." *Id.* As to *Strickland's* prejudice prong, the Court rejected the district court's conclusion that

"'the introduction of any mention of race' during the penalty phase was '*de minimis*.'" *Id.* at 777 (quoting the district court opinion). Instead, the Court held that the expert's testimony was "potent evidence" on the penalty phase question of future dangerousness, as it

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

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

In addition, even if not hampered by implicit bias or racism, issues of race put capital defense counsel is in an impossible, double bind. Given the clear and consistent role that race plays in sentencing, a lawyer who fails to inform a client that racism will affect the client's sentence could be said to have rendered ineffective assistance. *McCleskey v. Kemp*, 481

U.S 279, 321-22 (1987). However, a lawyer who tells a client that truth demolishes the client's confidence in the justice system. *Buck*, 137 S. Ct. at 778. In short, issues of race increase the likelihood that counsel will provide constitutionally inadequate assistance.

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

The Constitution requires that capital sentencing be individualized to each defendant's "record, personal characteristics, and the circumstances of his crime." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In *Woodson*, the Court held that in capital cases, the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process." *Id.*; *accord Kansas v. Marsh,* 548 U.S. 163, 173-74 (2006); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862 (1983). Under the Eighth Amendment, "[w]hat is important at the [punishment] selection stage is an *individualized* determination of the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 897 (emphasis in the original).

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

> The unmistakable principle . . . is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555 (1979). The jury is to be "a criminal defendant's

> fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey v. Kemp,* 481 U.S. 279, 310 (1987). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *cf. Aldridge v. United States,* 283 U.S. 308, 315 (1931); *Buck v. Davis, 137 S. Ct. 759,* 779 (2017).

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

Despite this constitutional requirement, death-qualified juries routinely consider race in making sentencing determinations.[89] Nearly 80% of executions are for the murder of white victims, despite blacks being as likely to be victims of murder.[90] Killers of black people rarely get death sentences.[91] White killers of black people get death sentences even less frequently.[92] And far and away, the person *most* likely to receive a death sentence is a black man who kills a white woman.[93] While white people make up less than half of the country's murder victims, a 2003

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[89] Ex. 127, David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, HANDBOOK OF PSYCH AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research indicating that a black defendant who kills a white victim has a significantly greater likelihood of receiving a sentence of death).

[90] Ex. 107, *Ways That Race Can Affect Death Sentencing*, DEATH PENALTY INFORMATION CENTER.

[91] Ex. 128, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 CRIM. L. & CRIMINOLOGY 733 (2017).

[92] *Id.*

[93] *Id.*

study by Amnesty International found that about 80 percent of the people on death row in the United States killed a white person.[94]

The correlation between the race of the victim and the severity of punishment exists in jurisdictions across the country:[95]

- A 2012 study of Harris County, Texas, cases found that people who killed white victims were 2.5 times more likely to be sentenced to the death penalty than other killers.[96]
- In Delaware, according to a 2012 study, "black defendants who kill white victims are seven times as likely to receive the death penalty as are black defendants who kill black victims . . . Moreover, black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims."[97]
- A study of death penalty rates of black perpetrators/white victims versus white perpetrators/black victims through 1999 showed

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[94] Ex. 129, *United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases*, Amnesty International, Apr. 23, 2003.

[95] Much of this section is drawn from Ex. 114, Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASHINGTON POST, Sept. 18, 2018, Updated Apr. 10, 2019.

[96] Ex. 130, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUSTON L. REV. (2008).

[97] Ex. 131, Sheri Lynn Johnson, John H. Blume, et al., *The Delaware Death Penalty: An Empirical Study (2012)*, CORNELL LAW FACULTY PUBLICATIONS, Paper 431.

similar discrepancies. Notably, prosecutors are far less likely to seek the death penalty when the victim is black.[98]

- A study of North Carolina murder cases from 1980 through 2007 found that murderers who kill white people are three times more likely to get the death penalty than murderers who kill black people.[99]
- A 2000 study commissioned by then-Florida Governor Jeb Bush found that the state had, as of that time, never executed a white person for killing a black person.[100]
- A 2004 study of Illinois, Georgia, Maryland and Florida estimated that "one quarter to one third of death sentenced defendants with white victims would have avoided the death penalty if their victims had been black."[101]
- According to a 2002 study commissioned by then-Governor Frank O'Bannon (D), Indiana had executed only one person for killing a nonwhite victim, and although 47% of homicides in the state

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[98] Ex. 132, John H. Blume, Theodore Eisenberg, et. al., *Explaining Death Row's Population and Racial Composition*, (2004), CORNELL LAW FACULTY PUBLICATIONS, Paper 231.

[99] Ex. 133, Michael L. Radelet & Glenn L. *Pierce, Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).

[100] Ex. 134, Christopher Slobogin, *The Death Penalty in Florida,* 1 ELON L. REV. 17 (2009).

[101] Ex. 135, David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Face and Perception*, 53 DE PAUL L. REV. 1411 (2004).

involved nonwhite victims, just 16% of the state's death sentences did.[102]

- Studies in Maryland,[103] New Jersey,[104] Virginia,[105] Utah,[106] Ohio,[107] Florida[108] and the federal criminal justice system produced similar results.[109]
- A 2014 study looking at 33 years of data found that after adjusting for variables such as the number of victims and brutality of the crimes, jurors in Washington state were 4.5 times more likely to

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[102]Ex. 136, Indiana Public Defender Council, *Death Penalty Facts* http://www.in.gov/ipdc/public/pdfs/Death%20Penalty%20Factsheet.pdf (last updated 6/3/2019; last checked 12/26/2019).

[103]Ex. 137, Raymond Paternoster, Robert Rame, et. al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2004).

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

[105]Ex. 138, *Broken Justice: The Death Penalty in Virginia*, ACLU (2003).

[106]Ex. 139, Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, NTY, Feb. 24, 1995 at. B1.

[107] Ex 140, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Ohio Executions* (2016).

[108] Ex 141, Frank Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (2016).

[109]Ex. 142, Excerpt from *U.S. DOJ Survey of the Federal Death Penalty System*, 1988-2000, available at https://www.justice.gov/archives/dag/survey-federal-death-penalty-system.

impose the death penalty on black defendants accused of aggravated murder than on white ones.[110]

How a defendant's race affects the jury's assessment of his moral responsibility is more difficult to parse. Psychologist Samuel Sommers found that "[r]esearch examining the influence of a defendant's race on individual juror judgments has produced inconsistent results that are difficult to reconcile."[111] Studies have found everything from no effect, to bias for defendants of the same race, to even bias against or harsher judgment of defendants of the same race.[112] However, African American capital defendants suffer an extreme attribution error that whites commit when whites interpret and judge the behavior of minority group members.[113] This is based, in part, on years of media portrayal of criminal defendants (particularly defendants of color) as "others" via predatory language like "roving packs," "thugs," and "terrorists, " and the use of mug shots when reporting on suspects of color.[114]

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[110]Ex. 143, Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014.*

[111]Ex. 144, Erik Ausion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 2018.

[112] *Id.*

[113] Ex 145, Rebecca Hetey and Jennifer Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, Assoc. for Psych. Science (2018).

[114] *Id.*; *see also* Ex. 146, Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 105).

Racist considerations infect jury rooms – often insidiously, but sometime overtly. Despite evidentiary rules that generally prevent discovery of juror considerations, the Supreme Court held that the need to ferret out juror racism trumps even long-standing evidentiary rules. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). For centuries, jury deliberations were a sacred space protected by the "no-impeachment rule." *Id.* at 861. Intended to promote "honest, candid, and robust" conversations, jurors were given the assurance that once their verdict was rendered, that verdict could not and would not be questioned based on the comments and conclusions they expressed while deliberating. *Id.* However, when faced with reports that a juror made racist statements during jury deliberations, the Court found that "racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule." *Id.* at 871. The *Peña* Court found that racism, is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868.

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

Race continues to be a factor in death determinations. As the four dissenting *McCleskey* justices found "race casts a large shadow on the capital sentencing process." *McCleskey*, 481 U.S at 321-22. Nothing could be more arbitrary under the Eighth Amendment than a reliance upon race in determining who should live and die, be it the victim's, the defendant's, or a combination of the two. The systematic injury that

continues to occur in the issuances of death sentences has been left unaddressed for long enough. The Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1 § 16 of the Tennessee Constitution are intended for such a time as this.

Any consideration of race, whether intentional, conscious, unconscious, systematic, individual, or implicit to impose a criminal sanction "poisons public confidence" in the judicial process. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (citing *Davis v. Ayala,* 135 S. Ct. 2187 (2015)). "It thus injures not just the defendant, but 'the law as an institution . . . the community at large, and ... the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose v. Mitchell,* 443 U.S. 545, 556 (1979) (internal quotation marks omitted)).

As Justice Blackmun once wrote,

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

> the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought."

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

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

VI. Tennessee is out of step with the evolving standards of decency that have led most of the country to stop executing its citizens and which render Tennessee's death penalty unconstitutional.

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

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

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

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

in *Roper*: "Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*." *Id.* at 564.

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

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

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

Here, these factors provide sufficient evidence that there is now a national consensus against the death penalty. Executions are now rare or non-existent in most of the nation. The majority of states—32 out of 50—have either abolished the death penalty or have not carried out an execution in at least ten years.[115] An additional six states have not had

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[115] Ex. 147, *Indiana Marks 10 Years Without an Execution*, Death Penalty Information Center (DPIC), December 11, 2019, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

an execution in at least five years, for a total of 38 states with no executions in that time.[116] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor life in prison over a death sentence.[117] Perhaps most revealing about this poll is the sea change in attitudes occurring in just the last five years. Where, in 2014, only 45% of the country favored a life sentence over death, that number has increased by 15% in only five years. Importantly, the poll also demonstrates that the shift toward favoring a life sentence is apparent in every single major subgroup:

> Since 2014, when Gallup last asked Americans to choose between life imprisonment with no parole and the death penalty, *all key subgroups show increased preferences for life imprisonment.* This includes increases of 19 points among Democrats, 16 points among independents, and 10 points among Republicans."[118]

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

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[116] Ex. 148, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[117] Ex. 149, *Americans Now Support Life in Prison Over Death Penalty*, Gallup, November 25, 2019, https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx (last visited Dec. 24, 2019).

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

principles and values."[119] Tennessee has since formed its own chapter.[120] Both the national and Tennessee chapters are opposed to capital punishment for increasingly familiar reasons. Tennessee Conservatives Concerned About the Death Penalty cites the following concerns:

- Innocence – Since 1973, more than 150 people have been freed from death row across the country after evidence of innocence revealed they had been wrongfully convicted.[121]
- Arbitrariness – "Just one percent of murders in the United States have resulted in a death sentence over the last decade. But are those individuals truly the 'worst of the worst' – or simply those with inadequate legal representation?"[122]
- Lack of deterrence –The death penalty does not prevent violent crime.[123]

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

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[119] Ex. 150, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[120] Ex. 151, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

[121] Ex. 152, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019. Ex. 167, Samuel Gross, et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017).

[122] *Id.*

[123] *Id.*

"innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[124] Even more poignant, "Two prisoners were executed this year despite substantial doubts as to their guilt and [two more] came close to execution despite compelling evidence of innocence."[125] As to the unconstitutional arbitrariness of capital punishment, the report concluded:

> The 22 executions this year belied the myth that the death penalty is reserved for the "worst of the worst." At least 19 of the 22 prisoners who were executed this year had one or more of the following impairments: significant evidence of mental illness (9); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (8); or chronic serious childhood trauma, neglect, and/or abuse (13). Four were under age 21 at the time of their crime, and five presented claims that a co-defendant was the more culpable perpetrator. Every person executed this year had one of the impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[126]

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

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[124] Ex. 153, *DPIC 2019 Year End Report: Death Penalty Erodes Further As New Hampshire Abolishes and California Imposes Moratorium*, Death Penalty Information Center, December 17, 2019, https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

[125] *Id.*

[126] *Id.*

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

> Much has changed since *Penry's* conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S. at 334. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon.

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

While the standards of decency of the nation as a whole have evolved towards rejection of the death penalty, Tennessee has fallen out

of step with the rest of the country – particularly in the last eighteen months, during which the State has executed six of its citizens at a rate not seen since before 1960.[127] Post-*Furman* and *Gregg*, Tennessee was one of the last states[128] to resume executions when it executed Robert Coe on April 19, 2000 – the state's first execution in forty years.[129] The State executed another five men between 2006 and 2009.[130] And, it should be

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[127]Ex. 154, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[128] Of states that have performed executions post-*Furman*, only three states waited longer than Tennessee to resume: New Mexico (2001); Connecticut (2005); and South Dakota (2007). Ex. 155 – *Executions by State and Year*, Death Penalty Information Center https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Dec. 24, 2019). Of those three states, two have since abolished the death penalty all-together, New Mexico doing so in 2009 and Connecticut in 2012. Ex. 156, *States with no Recent Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

[129] Ex. 154, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

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

stressed that one of those men, Sedley Alley, may well have been innocent of the murder for which he was put to death – an unconscionable reality.[131] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[132] – is but one of the features of capital punishment that have led a clear majority of the country to decide that it doesn't represent our standards of decency and should be eliminated. Another, is the completely arbitrary way the death penalty is imposed. Indeed, whether based on race, poverty, or where the crime happens to take place, the imposition of the death penalty in the United States is not reserved for the worst of the worst but is, rather, completely and unconstitutionally arbitrary.

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

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

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[131] Ex. 157, *Did Tennessee Execute and Innocent Man?* Nashville Scene, May 2, 2019, https://www.nashvillescene.com/news/pith-in-the-wind/article/21067050/did-tennessee-execute-an-innocent-man (last visited Dec. 24, 2019).

[132] Ex. 158, *Tennessee*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

capital punishment is imposed arbitrarily, it is unconstitutionally cruel and unusual:

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

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

Just a few years after *Furman*, the Supreme Court approved supposed legislative corrections designed to eliminate arbitrariness in the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Yet, time and again, these purported fixes, adopted in some form or fashion by numerous states, have failed to actually result in the death penalty being any less arbitrary. In fact, its imposition in many cases is more arbitrary than ever. As a result, more and more states have ceased executions or abolished the practice all-together.[133]

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[133] Ten states never had the death penalty post-*Gregg*. An additional eleven states have eliminated their death penalty since that time: Massachusetts (1984); Rhode Island (1984); New Jersey (2007); New York (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016) (state supreme court found unconstitutional); Washington (2018) (state supreme court found unconstitutional); and New Hampshire (2019). Ex. 159, *States with and without the death penalty*, Death Penalty Information Center,

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

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

Racial disparity in the imposition of the death penalty has actually gotten significantly worse in the last ten years, both nationally and here in Tennessee. Whereas nationally, in the ten years post-*Gregg*, 46% of those sentenced to death were people of color, in the last ten years, that number reached a remarkable 60%.[134] In Tennessee, while African-Americans comprise only 17% of the state's population, 50% of the individuals on Tennessee's death row are African-American.[135] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

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https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[134] Ex. 160, *Death and Texas: Race Looms Ever Larger as Death Sentences Decline*, THE INTERCEPT, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-race-texas/ (last visited Dec. 24, 2019).

[135] Ex. 161, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

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

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

Eighty-four percent (84%) of the counties in the United States have not had an execution (of an individual sentenced to death in that county) in the past 50 years.[136] As the graph below shows, among the counties that have had an individual sentenced to death in that county executed, Harris County, Texas—Houston—outpaces the rest by an astonishing margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [137]

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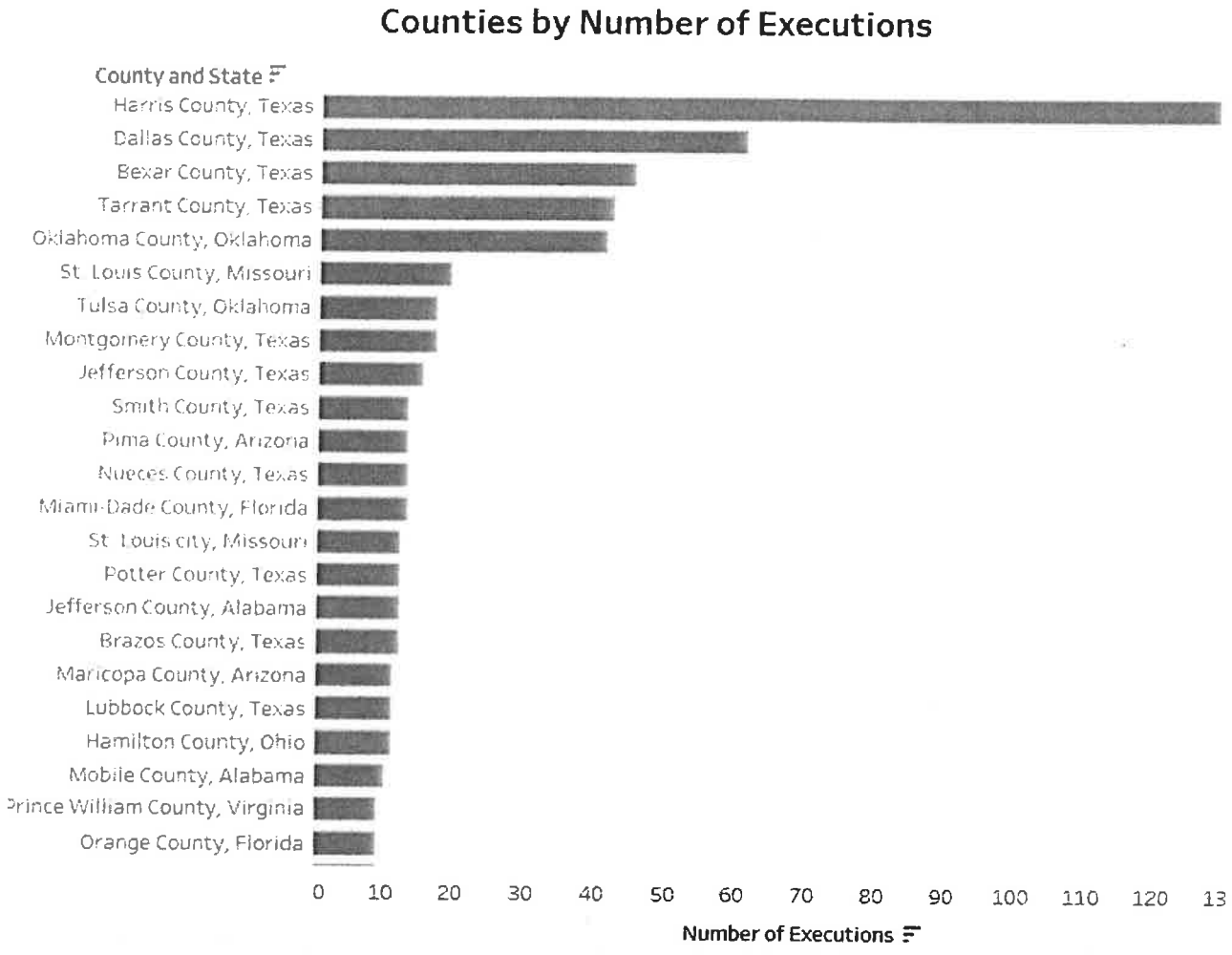
[136] Ex. 147, *Indiana Marks 10 Years Without An Execution*, Death Penalty Information Center, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[137] Ex. 162, *Executions by County*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).



When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[138]

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

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[138] Ex. 163, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

sustained death sentences.[139] While Shelby County represents less than fourteen percent (14%) of Tennessee's population, almost half of the men on death row come from Shelby County.[140] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[141]

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

Forty-plus years of attempts to correct the unconstitutional arbitrariness of the death penalty have only resulted in ever-greater arbitrariness in determining who gets sentenced to death and who does not. Evolving standards of decency over that time have led a majority of the country to recognize that the arbitrariness in the imposition of the death penalty is unconstitutionally cruel and unusual. This recognition has led to the steadily-increasing rejection of the death penalty which is so clearly outlined by the statistics detailed throughout this section.

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[139] Ex. 164, *Tennessee's Death Penalty Lottery*, TENNESSEE JOURNAL OF LAW AND POLICY, Vol. 13, Summer, 2018, at 139-140, https://tennesseelawandpolicy.files.wordpress.com/2018/07/maclean-and-miller-tennessees-death-penalty-lottery1.pdf (last visited Dec. 24, 2019).

[140] Ex. 161, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[141] *Id.*

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

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

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

of decency previously evolved is particularly instructive to the argument presented here – that Tennessee is simply behind the rest of the country in recognizing that current evolving standards of decency are not commensurate with the execution of individuals who were sentenced to death in such an arbitrary way.

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

The *Roper* Court noted that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Roper*, 543 U.S. at 564. The Court then tracked the evolution of the national consensus against executing the intellectually disabled that led to its decision in *Atkins*, and conducted a similar review of the increasing

number of states that had prohibited the death penalty for juveniles. *Roper*, 543 U.S. at 564-65. What, perhaps, stands out most in this portion of the *Roper* discussion is the emphasis the Court placed on the fact that, even prior to the Court declaring the death penalty for juveniles unconstitutionally cruel and unusual, the state of Kentucky made this determination on its own and commuted the sentence of the very juvenile it had previously fought for and won the right to execute.

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

Regarding *national consensus*, last month's Gallup poll revealed that 60% of the nation now prefer a life sentence over a death sentence.[142] As to *practice within the states*, there are now 21 states without the death penalty and, as noted at the outset of this section, a total of 38 states (very nearly 80% of the country) have not had an execution in the last five years.[143] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing

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[142] Ex. 165, *2019 Year-End Report*, Death Penalty Information Center (hereinafter "2019 DPIC report"), at 2 (report available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report (last visited Dec. 24, 2019)).

[143] Ex. 148, *States with no death penalty or with no execution in 10 years*, Death Penalty Information Center, December 11, 2019, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited Dec. 24, 2019).

numbers of states sought to further limit the use of the death penalty.[144] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[145] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[146] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[147]

Perhaps most important is the *consistency in the trend towards abolition* – the type of evidence the *Atkins* Court referred to as "telling." 536 U.S. at 315. According to the Gallup poll conducted in October 2019, in only five years, the percent of individuals who favor a life sentence over capital punishment rose 15%, from 45% in 2014 to 60% in 2019.[148] Moreover, this Gallup poll showed a wide demographic preference for life imprisonment over the death penalty, with majorities of men and women, whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[149] Equally

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[144] Ex. 165, 2019 DPIC Report, at 2.

[145] *Id.* at 3.

[146] *Id.* at 4.

[147] *Id.*

[148] *Id.* at 14; *see also* Ex. 149, Gallup Poll, https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment (last visited Dec. 27, 2019).

[149] Ex. 149, Gallup Poll at 1-2.

consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[150]

Tennessee was one of only seven states to perform an execution in 2019,[151] and joins only Texas in having any executions scheduled for 2020.[152] Although Ohio previously had executions scheduled, the Governor suspended them in the wake of a court decision comparing its execution process to waterboarding, suffocation and being chemically burned alive.[153] Otherwise, across the United States, 2019 saw the use of the death penalty remain near historic lows, as there were but 22 executions and less than 40 new death sentences imposed – the fifth straight year in a row with fewer than 30 executions and fewer than 50 new capital sentences.[154]

There are now entire regions of the country without the death penalty. With New Hampshire's abolition of the death penalty in May of this year, there is no death penalty in any New England state.[155]

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[150] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 159, *States with and without the death penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 24, 2019).

[151] Ex. 165, 2019 DPIC Report, at 6.

[152]Ex. 166, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[153] Ex. 165, DPIC Report, at 2.

[154] Ex. 165, 2019 DPIC Report, at 2.

[155] *Id.*

Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[156] Indeed, the geographic disparity for determining who is executed and who is not is more striking than ever as 91% of the executions in 2019 happened in the South and 41% in Texas alone.[157]

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

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

It is disturbing that the very aspects that have led most of the country to reject the death penalty as arbitrary and thus, cruel and unusual, are ever-present in Tennessee, even as our Attorney General

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[156] *Id.* at 3.

[157] *Id.* at 6.

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

Mr. Payne respectfully request that this Court look to the Washington Supreme Court's recent ruling that the death penalty in that state was unconstitutional. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The Court's holding was based on its conclusion, as urged here, that the "arbitrary and race based imposition of the death penalty cannot withstand the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 635 (quoting *Trop*, 356 U.S. at 101). The Washington court placed emphasis on the same considerations articulated by the Supreme Court in *Atkins* and *Roper*.

> When considering a challenge under article I, section 14, we look to contemporary standards and experience in other states. We recognize local, national, and international trends

> that disfavor capital punishment more broadly. When the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks "fundamental fairness" and thus violates article I, section 14.

Id. at 635-36 (citations omitted).

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

VII. Given Pervis Payne's Intellectual Disability, Broken Brain, and Meritorious claims of innocence, this Court should issue a certificate of commutation.

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

This statute, which is unique to Tennessee, does not "restrict, expand, or in any way affect, in the legal sense, the authority of the

Governor to exercise his constitutional power of commutation." Workman v. State, 22 S.W.3d 807, 817 (Tenn. 2000) (Birch, J. dissenting.) Rather, "[i]t serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Id.*

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

Although some have observed that the Court as a whole has not exercised its power to issue a certificate of commutation since the passage of the State Post-conviction Procedures Act, it is important to note that the legislature did not repeal Tenn. Code Ann. §40-27-106. The Court's authority remains intact and unfettered. Justice Birch entered a certificate of commutation on the record in his dissent in *Workman.*

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

As described above, Mr. Payne is intellectually disabled, he suffers neurocognitive injury, and he has a strong case of innocence. His case warrants a certificate of commutation.

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

Respectfully submitted this 30th day of December, 2019.

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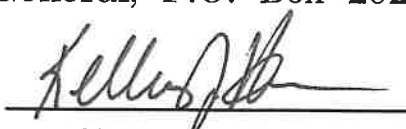
CERTIFICATE OF SERVICE

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

BY: 

Kelley J. Henry