IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. M1999-00516-SC-R11-PD
	)	
HENRY HODGES	)	CAPITAL CASE

RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE; NOTICE THAT DEFENDANT IS INCOMPETENT TO BE EXECUTED AND REQUEST FOR A HEARING; AND REQUEST FOR CERTIFICATE OF COMMUTATION

FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DISTRICT OF TENNESSEE

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Supervisory Asst. Federal Public Defender

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SYLLABUS

Mr. Hodges currently suffers from a psychotic disorder which causes him to lose touch with reality and smear feces over the walls and windows of his cell. A recent neurological evaluation of Mr. Hodges concludes that Mr. Hodges brain scans show evidence of cortical atrophy which is associated with various types of dementia. He is incompetent to be executed.

This Court should not set an execution date for Henry Hodges because his lawyers were railroaded into a trial completely unprepared. Financially bankrupt, the lead attorney had to work on Mr. Hodges case on nights and weekends. After the jury was selected, the lawyers simply threw up their hands and told Henry he should plead guilty to gain sympathy with the jury and keep out the most damaging crime fact evidence. The lawyers were completely wrong on the law and the damaging facts came in and were made even more powerful by the lack of any defense. The lawyers forgot that by pleading Mr. Hodges guilty to the indictment they made him immediately death eligible. Because they had not done the work, they failed to present critical mitigation proof. Instead they hired an expert who had gone on TV and diagnosed Henry with anti-social personality disorder before he even met Mr. Hodges. The ill-conceived theory was that Mr. Hodges was anti-social because he had been abducted and raped as a twelve-year old. Any marginally competent attorney knows that such an incredibly frightening experience does not cause anti-social personality disorder. It does cause post-traumatic stress disorder. Because they did not know what they were doing, the lawyers

failed to appreciate that Mr. Hodges erratic and manic behavior was a red flag that he was out of touch with reality. So instead, they put Henry on the witness stand to describe his own abduction and rape. Essentially leaving Henry to fend for himself. His testimony was an unmitigated disaster.

Even with his attorneys' woefully inadequate representation, one of the jurors believed Mr. Hodges should not be sentenced to death. That juror's vote should have resulted in a life sentence, but the juror was unable to continue to deliberate because of severe arthritis pain. The juror gave in and voted for death – not because he believed Mr. Hodges was "the worst of the worst," but because the juror needed to go home.

Post-conviction counsel were denied critical funding to investigate and develop proof of counsel's deficient performance and the prejudice that resulted. Because the post-conviction lawyers were unable to investigate, the proof that was discovered in federal court was excluded because of procedural technicalities. No court has ever adjudicated the merits of Mr. Hodges' full claim of ineffective assistance of counsel.

Because of his longstanding and debilitating serious mental illness. This Court should create an exemption from the death penalty for the seriously mentally ill, because the same unreliability that infects death determinations for the intellectually disabled and for juveniles compromises the integrity of death sentences for someone who is mentally ill, like Mr. Hodges.

Finally, this Court should declare that the death penalty violates contemporary, evolving standards of decency and therefore is unconstitutional under the Eighth Amendment of the United States Constitution and Article 1, section 16 of the Tennessee Constitution.

Mr. Hodges respectfully requests that this Court deny the State's motion. Mr. Hodges invokes his right to a hearing on his competency to be executed claim and requests that the hearing provide the full measure of due process as is required by a case of this magnitude, including sufficient time to prepare and present the proof of his current incompetence.

I. Mr. Hodges is incompetent to be executed. *Madison v. Alabama*, 139 S.Ct. 718 (2019). This case should be remanded for a full and fair evidentiary hearing under Tenn. S. Ct. R. 12 (4)(A); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Coe v. State*, 17 S.W. 3d 191 (Tenn. 2000); and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

The Eighth Amendment to the United States Constitution precludes the execution of a prisoner "who has 'lost his sanity' after sentencing." *Madison*, 139 S. Ct. at 722 (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)). Put another way, *Ford* holds that the insane are categorically excluded from the death penalty under the Eighth Amendment to the United States Constitution. *Madison*, 139 S.Ct. at 723. Because the insane are constitutionally excluded from the death penalty, the State of Tennessee is prohibited from executing an insane person. *Id.*; *see also Van Tran*, 6 S.W.3d at 265 ("[T]his Court has an affirmative constitutional duty to ensure that no incompetent prisoner is executed."); *Martiniano ex rel. Reid v. Bell*, 454 F.3d 616, 618 (6th Cir. 2006) (Cole, J., concurring) ("It is undisputed that the state cannot execute [the defendant] if he is incompetent.").

The rationale for the decision in *Ford*, and its progeny, is rooted in the common law and evolving standards of decency. "Surveying the common law and state statutes, the Court found a uniform practice against taking the life of [an insane] prisoner." *Madison*, 139 S.Ct. at 722. The *Madison* Court observes that the bar against the execution of the insane is "time-honored" because to do so "simply offends humanity." *Id.* at 722-23 (quoting *Ford*, 477 U.S. at 407, 409). Further, the Supreme Court recognizes the "natural abhorrence" of "civilized societies" to the

execution of this category of defendants. *Madison*, 139 S.Ct. at 723. Moreover, there is no retributive purpose to executing the insane. *Id.*

Additional considerations support excluding the insane from execution. There are religious underpinnings to the prohibition against executing the insane. Commentators observed that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it[.]" *Ford*, 477 U.S. at 407 (quoting Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685)) (internal quotation marks omitted). Further, the goal of deterrence is not served by the execution of the insane. *Ford*, 477 U.S. at 407. "It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus solo furore punitur*." *Id.* at 407–08.

In the years since *Ford*, the states have struggled with defining the scope of the category of those individuals who are "insane" and therefore ineligible for execution. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court rejected the Fifth Circuit Court of Appeals' test, which asked whether the prisoner was aware that he was to be executed and why he was to be executed. *Id.* at 956. In *Panetti*, the Fifth Circuit Court of Appeals concluded that a prisoner could not present evidence that his mental illness "obstruct[ed] a rational understanding of the State's reason for his execution." *Id.* The Supreme Court held this standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 956-57.

In essence, the Supreme Court acknowledged in *Panetti* that a defendant may be able to parrot the words that would indicate that he is aware that he will be executed for a crime, but that does not end the

inquiry.[1] The Eighth Amendment requires more. It requires that the defendant rationally understand what is about to happen *and why*. If a defendant's delusions prevent a rational understanding of his execution and the reason for it, then the constitution places a substantive prohibition on his execution, the Court held. "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. Although the Court did not adopt a rule governing all competency determinations, it did conclude "[i]t is ... error to derive from *Ford* ... a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." *Id.*

In remanding the case, the Court stressed that the lower courts must conduct a searching and detailed evaluation of the evidence:

> The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent.

---

[1] *See Kirkpatrick v. Bell*, 64 Fed. Appx 495 (6th Cir. 2003) (district court abused its discretion in denying stay of execution and finding defendant competent to waive his appeals based solely on the testimony of the defendant in the face of expert testimony that the defendant was incompetent.)

Panetti, 551 U.S. at 962. The Court directed the lower courts to look to *Roper v. Simmons*, 543 U.S. 551, 560-564 (2005) and *Atkins v. Virginia*, 536 U.S. 304, 311-314 (2002) as guides. Roper and Atkins rely extensively on the opinions and data presented by mental health and medical professionals.

Last term, in *Madison*, the Court re-affirmed the competency to be executed exclusion and clarified the scope of the category. The defendant in *Madison* suffers from a medical condition (dementia) and, as a result, has no memory of the offense for which is to be executed. Thus "[t]he first question presented is whether *Panetti* prohibits executing Madison merely because he cannot remember committing his crime. The second question raised is whether *Panetti* permits executing Madison merely because he suffers from dementia, rather than psychotic delusions." *Madison*, 139 S. Ct. at 726.

The Court observes that the test for competency was clarified and adopted by the majority in *Panetti*, and that test "is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's rationale for [his] execution.'" *Madison*, 139 S. Ct. at 723 (quoting *Panetti*, 551 U.S. at 958–59). The Court concluded that memory loss due to dementia, by itself, does not meet this test. However, "a person suffering from dementia may be unable to rationally understand the reason for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S.Ct. at 726-27. The Court emphasized that the critical question is whether the defendant has a "rational understanding." *Id.* at 727.

But memory loss can play a role in the "rational understanding" analysis.

> If that loss combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the State is exacting death as punishment, then the *Panetti* standard will be satisfied. That may be so when a person has difficulty preserving any memories, so that even newly gained knowledge (about, say, the crime and punishment) will be quickly forgotten. Or it may be so when cognitive deficits prevent the acquisition of such knowledge at all, so that memory gaps go forever uncompensated. As *Panetti* indicated, neurologists, psychologists, and other experts can contribute to a court's understanding of issues of that kind. But *the sole inquiry for the court remains whether the prisoner can rationally understand the reasons for his death sentence.*

Madison, 139 S. Ct. at 727–28 (emphasis added) (internal citations omitted). The etiology of the defendant's lack of rational understanding is irrelevant to the analysis: "*Panetti* framed its test … in a way utterly indifferent to a prisoner's specific mental illness. The *Panetti* standard concerns … not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment." *Madison*, 139 S. Ct. at 728. The Court held:

> [A] judge must therefore look beyond any given diagnosis to a downstream consequence. As *Ford* and *Panetti* recognized, a delusional disorder can be of such severity—can "so impair the prisoner's concept of reality"—that someone in its thrall will be unable "to come to grips with" the punishment's meaning. *Panetti*, 551 U.S. at 958; *Ford*, 477 U.S. at 409. But delusions come in many shapes and sizes, and not all will

> interfere with the understanding that the Eighth Amendment requires. See *Panetti*, 551 U.S. at 962 (remanding the case to consider expert evidence on whether the prisoner's delusions did so). And much the same is true of dementia. That mental condition can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the State wants to execute him. *See supra*, at ——— – ———. But dementia also has milder forms, which allow a person to preserve that understanding. Hence the need—for dementia as for delusions as for any other mental disorder—to attend to the particular circumstances of a case and make the precise judgment *Panetti* requires.

Madison, 139 S. Ct. at 729.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court created the procedure under which state and federal claims of competency to be executed are to be raised and litigated. This procedure was affirmed in *Coe*, adopted in Tenn. S. Ct. R. 12, and modified by *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010). Under *Van Tran*, a defendant who is incompetent to be executed must raise the issue with this Court in response to a motion to set execution date. This Court, in turn, will remand the case to the criminal court for the prisoner to submit proof necessary to meet the required threshold showing. Once that showing is met, the criminal court will conduct a hearing.

Mr. Hodges gives notice that he is incompetent to be executed and categorically excluded from the death penalty under the United States and Tennessee constitutions.

A. Mr. Hodges suffers from psychotic illness and cortical atrophy

It is beyond dispute that Henry Hodges is seriously mentally ill. Though diagnostic descriptors by the multitude of mental health professions who have evaluated and treated him vary, one has to but meet Mr. Hodges to know that his mind tortures him daily.

1. Mental health experts have determined that Mr. Hodges has a psychotic disorder and cortical atrophy.

As an adolescent, Mr. Hodges was hospitalized multiple times and treated with powerful anti-psychotic medications. These multiple hospitalizations "speak of a child with severe mental illness." Ex. 01, Declaration of Dr. George Woods. Dr. Woods concluded that Mr. Hodges suffers from Bipolar Disorder and traumatic stress. He supports his diagnosis through documentary evidence and clinical interview.

> Consistent with Bipolar and traumatic stress, Mr. Hodges suffered significant symptoms of agitated depression, including social ideations, psychomotor agitation, social deterioration, and impulsivity. His level of severe substance abuse is found in greater thant 50% of patients suffering from Bipolar Disorders, and this form of self medication [is] the most common co-occuring disorder with Bipolar Disorder. The only mental disorder with equally high co-occuring substance use disorder is traumatic stress.

Id. at 4.

Mr. Hodges suffers from "delusional precepts... powerful forces that overwhelm him." *Id.* at 8. Mr. Hodges dissociates (i.e. disconnects from reality). *Id.* Bipolar disorder and traumatic stress disorder produce psychosis is some persons.

In November, 2019, Mr. Hodges was evaluated by neuropsychiatrist, Dr. James Merikangus. Dr. Merikangus reviewed Mr. Hodges records, including prison records, as well as scans of Mr. Hodges brain. Dr. Merikangus observed cortical atrophy in the images. Cortical atrophy is associated with multiple forms of dementia, including Alzheimer's Disease, Parkinson's Disease, and Lewy Body Dementia. Sarah C. Janiki, et al., *Lewy Body Dementias, in* Merritt's Neurology, Ch. 52, p. 454 (Elan D. Louis, et al, ed. 2016); Benjamin D. Hill, et al., *Neuropsychology, in* Bradley's Neurology in Clinical Practice, Vol. 1, Ch. 43 (Robert Daroff, et al. ed., 2016). Dr. Merikangus concludes that the record supports a finding that Mr. Hodges suffers from psychotic symptoms.

2. Prison records document Mr. Hodges mental illness and irrational behavior.

The Tennessee Department of Correction has medicated Mr. Hodges with antipsychotics since at least 2004. TDOC has treated his serious mental illness with: Thorazine, Olanzapine, and, shamefully, Benadryl.[2] Despite the antipsychotics, Mr. Hodges has visual and auditory hallucinations as shown by his 2011 Grievance to TDOC about the 2 inch man living in his toilet:

[2] Benadryl is prescribed to treat his post-traumatic stress disorder.

TENNESSEE DEPARTMENT OF CORRECTION

INMATE GRIEVANCE

henry hodges | 109147 | rm 51 2
NAME | NUMBER | INSTITUTION & UNIT

DESCRIPTION OF PROBLEM: friday june 10 at about 9:30 pm i got up to use the bathroom and found a little red man about 2 inches tall he was naked and didnt have

REQUESTED SOLUTION: take the toilet out of my cell

henry hodges
Signature of Grievant

june 15 2017
Date

TENNESSEE DEPARTMENT OF CORRECTION

INMATE GRIEVANCE (continuation sheet)

DESCRIPTION OF PROBLEM: any hair in my toilet it scared the hell out of me i thought it was some kind of dead animal until it talked to me it said its name was irgal and he was going to take my soul and eat it i wondered if i was on a weird ass episode of twilight zone or candid camera from hell for the rest of the night and every night since then irgal has popped up in my toilet he sits on the rim and [redacted] threatens to steal my soul while i am sleeping and before he eats my soul he will dip it in steak sauce to add some flavor i have not gotten a lot of sleep since he showed up i think officer sneed may be behind it he doesnt like me maybe he hired irgal to kill me or used voodoo i dont know i have to keep my eye on him

Periodically, Mr. Hodges serious mental illness causes him to smear feces, cut himself, destroy his own cell, and/ or attempt suicide. A random sampling of TDOC records – or even a visit to Riverbend on about any day – yields reflections of prison staff about Mr. Hodges' serious mental illness:

- April 2014: a TDOC senior psychological examiner reported that Mr. Hodges' "insight are (sic) not good at this time and thought process not appropriate at this time." Later that week, Mr. Hodges was placed in restraints and on suicide watch after he smeared feces every day since stopping his Thorazine. Ex. 02, 4/14/14 TDOC records. That period of extreme distress lasted for over two weeks, with Mr. Hodges smearing and flooding his cell each time he was released from restraints.

- July 2016: a TDOC nurse reported she was unable to see Mr. Hodges through his cell window because of the feces, but Mr. Hodges asked her for a clean Band-Aid to cover his healing self-inflicted wrist wounds. Mr. Hodges asked for toilet paper to use as a pillow: denied per suicide precautions. "There was a puddle of urine in front of door, but security had placed rolled up blankets in front of door to keep urine out of hallway. Inmate had written on walls with what security staff said was caulk from the window. He had written 'slut,' a frown face and other things less visible from the door. There was a small dried up area of blood in front of toilet. It did not appear recent. Despite all his requests being denied, inmate just got in bed and laid down after conversation. He did seem agitated with fast loud speech though. Altered thought processes. Ex. 03, 7/8/16 TDOC records.

- A year later, in July 2016, Mr. Hodges again cut his wrists. The report reflects he "was bleeding profusely. When nurse arrived, patient was ranting and out of control." Nursing notes show that upon arrival at the infirmary he said, "I need to wash the blood off me. Can I take a shower. I need something. I feel nervous, I can't sleep." Henry "complained of people messing with him." He "reported breaking sprinkler heads, smearing feces on the walls, smearing blood on himself and walls from cutting himself, and lighting a fire." He said he did not need mental health or medical services because, "I don't trust them;" he was "naked and evidence of a fire was in the top right corner of his cell." Ex. 04, 7/3/16 TDOC Records; Later that month, Mr. Hodges asked the staff for Benadryl, "to help patient settle down." Ex. 05, 7/12/16 TDOC records.

- In December 2016, Mr. Hodges, again, smeared feces for several days. The staff documented the smearing, documented that he punched his door at 18:50 on December 8, but noted: "no mental health concerns per inmate report, current distress present, follow up in 1-2 weeks." Ex. 06, 12/10/16 TDOC records.

Mr. Hodges' distress is persistent, pervasive, and pernicious. His self-harming actions are often in response to stimuli others cannot see:

Saturday 9-10-11

dear gaye

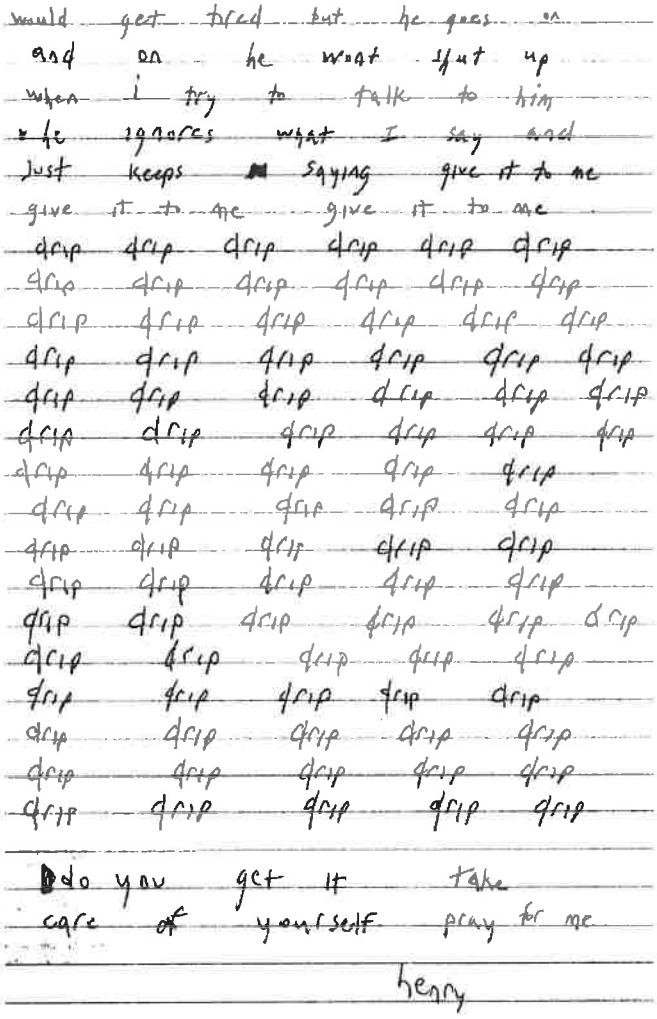
how are you doing. ok i hope i am [redacted] not ok

Wednesday irgal was really bothering me and I began beating and kicking on my door and barking and howling to try to drown out irgals ranting and raving

i got wrote up for creating a disturbance and they give 5 days hole time suspended after 60 days

he is at it again today i think he is [redacted] trying to drive me crazy and weaken my soul to make it easier to steal

he keeps saying give it to me over and over it like [redacted] a dripping faucet drip give it to me drip give it to me drip give it to me drip you would think he



Given Mr. Hodges psychotic, delusional, and irrational symptoms as well as the presence of cortical atrophy, he is incompetent to be executed.

B. Mr. Hodges is entitled to a full and fair hearing. He submits that the procedures created under *Van Tran* do not comport with procedural due process or the Eighth and Fourteenth Amendment and should be modified.

In *Panetti,* the Supreme Court made clear that states must provide due process in the adjudication of competency to be executed claims.

Counsel for Mr. Hodges requests all due process procedural protections be afforded to him during such a proceeding, including provisions that he and all relevant witnesses be given adequate time and opportunity to prepare and be heard. A recent examination of the very tight time frames envisioned by the *Van Tran* court suggests that the trial court must be given more leeway. *Van Tran*, 6 S.W.3d at 267-72. That is, as counsel reads it, the entire process from the moment of remand to the deadline for the trial court's final order is to take no more than thirty-five (35 days), and the experts will be given a total of ten (10) days from the date of their appointment to see and assess Mr. Hodges, and to draft and file their final report. *Id.* at 269. Respectfully, those tight time frames seem unrealistic, and risk preventing experts from being able to complete helpful, intelligent, complete and scientifically valid reports. This time frame similarly compromises the ability of the lawyers and the trial judge to engage in reasoned analysis and discourse. Counsel is not suggesting any particular time-frame, other than that the trial court be given authority to deviate from the *Van Tran* schedule.

II. This Court should not set an execution date for Henry Hodges, because his court appointed counsel looked out for themselves instead of their mentally ill client.

Henry Hodges' counsel advised him to plead guilty, because they "forgot" that his plea would render him death eligible. After Mr. Hodges followed his counsels' advice, pled, and was sentenced to death, counsel admitted that they "never sat down and did an analysis of what are the benefits of going to trial, what are the deficits and where did that lead

us." Ex. 07, Don Dawson Post-Conviction Testimony Excerpts, "The attorneys conducted no legal research into proper considerations in deciding whether to plead guilty, and did not weigh the possible benefits of putting on a case at the guilt phase of trial." *Hodges v. Colson*, 727 F.3d 517, 546 (White, J., dissenting) (citing Ex. 07, Don Dawson Post-Conviction Testimony Excerpts; *see also id.* at 1839). Their efforts were "a Helter Skelter intense effort to prepare a case in two months" culminating, the weekend before trial in a last ditch plea. Ex. 08, Brock Mahler. As the attorneys described their predicament, "we were looking for an out" – for themselves, because representing Mr. Hodges was bankrupting them. Ex. 07, Don Dawson.

Trial counsel admit that their own financial considerations influenced their advice to Mr. Hodges. The Court of Criminal Appeals found that counsels' "meager compensation was considered in the defense strategy." *Hodges v. State*, 2000 WL 1562865 at *6 (Tenn. Crim. App., Oct. 20, 2000). Counsel Terry testified that the, then, $20 per hour attorney fee was "not going to get you effective assistance in this kind of case." Ex. 09 Michael Terry Post-Conviction Testimony, *Id.* at *7.

Mr. Hodges' counsel were unprepared to advise him of the consequences of a plea, because they were unprepared, period. Lead counsel, Don Dawson initially told the court he could not accept appointment in Mr. Hodges' case, because he was committed to a federal trial in Memphis. The court appointed Mr. Dawson anyway, and Mr. Dawson was unable to work on Mr. Hodges' case until two months before trial. By that point, his federal trial had crushed his solo law practice and Mr. Dawson had joined a firm – one that required him to work extra on

paying cases to "make up for the losses [appointed work like Mr. Hodges'] I had brought in." Ex. 07, Don Dawson Post-Conviction Testimony. Mr. Dawson could only work on Mr. Hodges's case "during the weekend and evenings primarily. It was the case that was left for the off-hours time." *Id.* Co-counsel were no better off. Second chair counsel, Michael Terry, was in the midst of another capital murder trial and could not work on Mr. Hodges' case until shortly before trial. Ex. 09 Michael Terry Post-Conviction Testimony. Third chair counsel, Brock Mahler, had no criminal trial experience of any kind, but was assigned responsibility for the development of the sentencing phase of the trial. Ex. 08, Brock Mehler Post-Conviction Testimony. Counsel did not begin working on the case until the trial court threatened to "remove us from the case if we didn't act more responsible" in October 1991. Ex. 09, Brock Mehler Post-Conviction Testimony.

Mr. Hodge's counsel did not advise him that his plea would make him death eligible. They did not even discuss with him that they were about to plead him guilty to all the charges: "I remember a moment of terror when we indicated we were pleading guilty and I think the court responded to all charges or something of that nature. And you know, my first recollection was, I forgot about the robbery." Ex. 07, *Id.,* p.99, Don Dawson. They had talked to Mr. Hodges about pleading to the murder, but not about pleading to the robbery. *Id.* And the plea gained nothing: As the CCA found, "[Mr. Hodges] ultimately gained nothing by pleading guilty"– especially after counsel questioned the jury during voir dire about issues relating to Mr. Hodges's innocence. *Hodges*, 2000 Tenn. Crim. App. LEXIS at *63. Counsel admits that they would not have

advised Mr. Hodges to plead guilty had they realized the facts of the crime were clearly admissible in the penalty phase under Tennessee law even after a plea.

Counsel advised Mr. Hodges to plead, because they did not know what else to do. They did not have any other plans, because they had not done the work necessary to develop a strategy. They failed to collect records, because they did not start attempting record collection until six weeks pretrial. Ex. 10, Ann Charvat Post-Conviction Testimony. They hired a mitigation investigator less than two months before trial who, "had a whole list of things that needed to be investigated that she never got to because [they] ran out of time." Ex. 9 Brock Mahler; Ex. 10, Ann Charvat. The mitigation investigator called her efforts "very rushed and hurried" and said she did not have enough information to compose a social history. Ex. 10, Ann Charvat Post-Conviction Testimony.

Without a social history, and with the clock ticking down, counsel hired Dr. Barry Nurcombe, who had already diagnosed Mr. Hodges for the local television media. Dr. Nurcombe's opinions were easily available – Mr. Mehler just had to view Mr. Hodges's television interviews and statements (he had given several) and the follow-up television interview of Dr. Barry Nurcombe. Ex. 07, Don Dawson. Ex. 07, Dawson. Based on Dr. Nurcombe's television interview, Mr. Mehler identified him as a potential expert, and Dr. Nurcombe agreed to work on the case. Ex. 07, Don Dawson. Thus, what became "the nucleus of [Mr. Hodges's] defense" in mitigation was Mr. Hodges's report that he was raped during the summer between sixth and seventh grades. Ex. 07, Don Dawson; Ex. 07, Don Dawson Ex. 08, Brock Mahler Id., p.24. The entire mitigation theory

thus relied on Mr. Hodges's own testimony – with nothing at all to corroborate his statements except for an expert psychologist, Dr. Nurcombe, who first diagnosed Mr. Hodges on the local news – much like a Court TV pundant.

III. This Court should not set an execution date, because one of Mr. Hodges' jurors only voted for death, because he was forced to do so to escape the courthouse.

Even with counsel's cursory work, one juror believed Mr. Hodges was entitled to a life sentence. Under Tennessee law, that juror's vote should have resulted in Mr. Hodges receiving a life sentence. Tenn. Code Ann.§ 39-13-204. However, unlike the other jurors, Juror Thompson suffered extreme pain throughout the sentencing hearing and through deliberations from severe arthritis. Because of his pain, Mr. Thompson, who voted for a life sentence during the jury's deliberations, ultimately voted to sentence Mr. Hodges to death so that he could go home.

Counsel questioned Juror Thompson during voir dire about his health, including his severe arthritis, the excruciating pain he endured when sitting, and his physical ability to sit as a juror. Ex. 11 Testimony of Leroy Thompson. He told the trial court about his severe arthritis: "I'm sick, myself . . . I have arthritis bad . . . It's affecting me now, yes, sir," that he was taking pain killers and couldn't sit for long periods of time, and told the court that "I've been in great pain for four days." *Id.* He admitted that serving as a juror would "aggravate" his arthritis, but the trial court would not dismiss Mr. Thompson. *Id.* Instead, the trial court said that Mr. Thompson could stand during proceedings and told him to take his Tylenol. *Id.*, p.1554. Mr. Thompson agreed and told the court

that he could pay attention if he stood up some. Id. Mr. Thompson, however, was in substantial pain due to his severe arthritis during deliberations and voted for death simply to end the deliberations because of his pain. Ex. 12, Declaration of Leroy Thompson.

Despite the fact that juror Thompson "did not want to vote for the death penalty," he did,

> because it was so bad on me and I wanted this to hurry up and get over because of my condition. I had to go along with them to get away from there. If I had not been feeling bad, I would have been able to stand and not vote for the death penalty. I needed to get home and I went along for that reason.

Id.

No court has analyzed Mr. Hodges' entitlement to relief on the merits of this claim, because the federal court wrongly found that Mr. Thompson did not serve on the jury. Ex. 13 Excerpt from District Court Pleading. Mr. Thompson did serve on the jury, as is manifest by his signature on the verdict form and by his sworn declaration. Ex. 14, verdict form; Ex. 12 Thompson Declaration. This Court should deny the state's motion and remand Mr. Hodges' case to the trial court for fact finding and adjudication of this claim.

IV. Execution of Henry Hodges violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Tennessee Constitution, because he is seriously 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 just 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."[3] "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."[4]

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[3] Ex. 17, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.

[4] Ex. 18, 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).

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 Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[5]

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."[6] The National Institute of Mental Health (NIMH)[7] and the National

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[5] Ex. 19, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

[6] Ex. 20, 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.*

[7] Ex. 21, *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).

Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[8]

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, perception of the environment, accurate interpretation of the environment, and memory.[9]

B. An execution date should not be set, because Mr. Hodges is mentally ill.

As described above, Mr. Hodges suffers from Bipolar Disorder, Post-traumatic stress disorder, and cortical atrophy. His illness manifest itself by manic behavior, delusional thinking, psychosis, dissociation, self-harm, and feces smearing. Mr. Hodges cannot think rationally or critically.

C. Mr. Hodges' 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*

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

[9] *See* Ex. 23, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 24, § II.O5 (Anxiety Disorders); Ex. 25, § II.08 (Dissociative Disorders).

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 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.[10]

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

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[10] *See*, Ex. 26, 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).

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 *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.

Here, Mr. Hodges' severe mental illness impaired his ability to work with his counsel and caused him to behave in ways that appeared bizarre and scary. Mr. Hodges was suffering from Bipolar Disorder at the time of his arrest, guilty plea, and capital sentencing trial. Some of Mr. Hodges behavior from the time of trial include:

> During the period surrounding his trial in Nashville, Mr. Hodges was impulsive, suicidal, and unable to take the direction his attorney attempted to provide.

> He made legal decisions based upon seeing Trina Brown, smashed his head with his handcuffs and refused treatment, attempted to represent himself, and threatened to kill himself. He talked regularly to the media about his case and compulsively called law enforcement officials against his attorneys' direction.

Ex. 01, Declaration of Dr. George Woods. Moreover, also at the time of the guilty plea and sentencing hearing, Mr. Hodges demonstrated impulsivity, suicidal tendencies, mood lability consistent with mania, and affective dysregulation found in those with Bipolar disorder and traumatic stress:

> Bipolar Disorder and traumatic stress are also consistent with Mr. Hodges'[s] behavior prior to, during, and after his arrest, incarceration, and trial. Newspaper reports documented Mr. Hodges'[s] numerous calls to Nashville criminal justice officials. Multiple calls, including 5 calls in one day, are consistent with the impulsivity found in Bipolar Disorder.

Id.

The June 11, 1991 Tennessean documented the bizarre behavior of Mr. Hodges prior to his trial. Ex. 01 George Woods Collective Exhibit. He perched on top of the Criminal Justice Center for several hours. He also climbed atop a basketball goal and threatened to hang himself on the pipes. The newspaper reported that shortly after these events, he chatted with police officers. *Id.* Dr. George Woods explained that these behaviors are consistent with the mood lability seen in mania and the

affective dysregulation found in traumatic stress. *Id.* Mr. Hodges explained, "Then it would be like I was watching myself from a movie camera . . . I could see what was happening but it was like I couldn't do anything. It just happened to fast." *Id.* By the time Mr. Hodges' trial started, he had discussed much of his history with newspaper and television reporters, against his attorneys' explicit direction. The newspaper reported his attempts to represent himself, which included handwritten letters admitting his involvement.

His attorneys, Mr. Dawson and Mr. Terry, discussed their inability to work with Mr. Hodges. Mr. Hodges tied his defensive "decisions" to factors like whether he could spend two hours with Trina Brown, the woman who admitted she ordered Mr. Hodges to commit the murder for which he is now condemned. Ex. 15, Notice of Filing Trina Brown Exhibit. Mr. Hodges'[s] impulsive behavior, impaired judgment, and mood lability are all symptoms consistent with his untreated Bipolar Disorder and traumatic stress. Ex. 01, George Woods. As Dr. Nurcombe noted in his testimony, Mr. Hodges was clearly disturbed during his trial. It was against this backdrop of mood lability, impaired judgment, irritability, psychomotor agitation, and suicidality that Mr. Hodges' profound mood disorder and traumatic stress precluded him from rationally assisting his attorneys in the preparation of his defense. Ex. 01, George Woods.

2. Mental illness made Mr. Hodges 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."[11]

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 my making inappropriate gestures or noises, the jurors may interpret such behavior as proof of a lack of remorse or as proof of dangerousness.[12] 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

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[11] Ex. 27, 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.

[12] Ex. 28, 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).

inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion." *Id.* at 143-44.

Mr. Hodges testified horribly at his sentencing proceeding. His account of being raped by a stranger at age twelve reflected his disordered thinking and the severe impairment of extreme, untreated trauma. Mr. Hodges testified that he was molested at age twelve, during the summer before seventh grade, by an older male who drove up beside him and offered him a ride. Ex. 15, R.40, Notice of Filing. Mr. Hodges testified to the details of the rape, which included fondling, oral sex and anal intercourse, Ex. 16, Testimony of Henry Hodges. The rapist threatened Mr. Hodges that if he told about the rape, everyone would think he was gay and would say it was his fault. Ex. 15 Testimony of Henry Hodges. Mr. Hodges, just twelve years old at the time, believed the rapist and didn't tell anyone. Id. Mr. Hodges admitted that the rape caused him to feel ashamed and fearful, especially at school: he was afraid his peers "would see everything I'd done. Everything that had happened." Ex. 15, Testimony of Henry Hodges. He was more afraid that his family would find out: "[A]fter that, I couldn't stay at home. I was afraid that they were going to find out." Id. So Mr. Hodges reported that he started skipping school, running away, and getting high "because you left this world." Id.

The State viciously cross- examined Mr. Hodges about his failure to tell anyone about the rape, including the sixteen mental health professionals (which the State listed) that Mr. Hodges saw as an adolescent. Ex. 15, Testimony of Henry Hodges. Mr. Hodges responded that he told Dr. LaBelle in Georgia the year before while in prison. Ex.

15, Testimony of Henry Hodges. Unfortunately, no one had gotten the Georgia records or talked to Dr. LaBelle to verify Mr. Hodges's testimony. Ex. 07, Testimony of Don Dawson. After this scant and tenuous presentation of mitigating evidence, it was no surprise that only one juror wanted to vote for a life sentence.

3. Mental illness distorted Mr. Hodges' 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 Hodgesmun stated,

> 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 (Hodgesmun, J., dissenting). A result more antithetical to *Woodson* and *Lockett* is hard to imagine.

As discussed, above, Mr. Hodges' decision making was extremely impaired by his mood disorder and psychosis. As Dr. Woods observed, Mr. Hodges "made legal decisions based upon seeing Trina Brown, smashed his head with his handcuffs and refused treatment, attempted to represent himself, and threatened to kill himself. He regularly talked to the media about his case and compulsively called law enforcement officials against his attorneys' direction." Ex. ##, GWW dec. 219-2.

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.[13] As the

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[13] Ex. 28, 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. 29, Marla Sandys, *Capital*

Supreme Court noted in *Skipper v. South Carolina*, 476 U.S. 1 (1986), a jury's belief that 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.

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jurors, mental illness, and the unreliability principle: Can capital jurors 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).

Evidence shows that juries are incapable of reliably sifting through competing psychiatric testimony. Juries frequently view defense experts as hired guns who offer up excuses, while not discounting the opinions of prosecution experts.[14] 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.

Here, Mr. Hodges' trial counsel presented proof from Dr. Barry Nurcome, who testified that the diagnosis of Mr. Hodges was "basically just a rap sheet." Ex. 01, George Woods (quoting Dr. Nurcombe). According to Dr. Nurcombe Mr. Hodges was not insane, not psychotic, and had no mental illness – "he has a severe personality disorder" and was acting under an extreme mental or emotional disturbance. In addition, Dr. Nurcombe believed that Mr. Hodges had something akin to post-traumatic stress disorder (although he did not use that terminology in his direct examination). Dr. Nurcombe testified that the murder was "a partial re-enactment of the original molestation". Dr. Barry Nurcombe, diagnosed Mr. Hodges for the local television media based solely on Mr. Hodges' interviews and thereafter stuck to that which he had prejudged before he met, much less evaluated, Mr. Hodges.

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[14] Ex. 30, 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).

The State seized on Dr. Nurcombe's diagnosis on cross-examination and closing argument, reminding the jury that anti-social personality disorder was not a mental illness, that one of the hallmarks of anti-social personality disorder is lying and manipulation, and impugning Dr. Nurcombe himself for his television diagnoses and his limited experience with adult forensic work.

The State also insisted that Mr. Hodges's report that he was raped at age twelve was not reliable based on Dr. Nurcombe's diagnosis of anti-social personality disorder and because Mr. Hodges had never told any family, friends, or mental health professionals about the rape. That is, the defense's own proof, that Mr. Hodges had a personality disorder, undermined their only proof in mitigation –that Mr. Hodges had been raped as a child and committed this murder out of that trauma.

Had counsel presented a more reliable and accurate portrayal of Mr. Hodges' mental illness, there is a reasonable likelihood that more than one juror would have voted against death. Mr. Hodges' symptoms are diagnostic of a serious mental illness, mixed phase bipolar disorder.

Bipolar disorder is a genetically linked mental illness; since before the publication of the DSM-3 in 1987, it has been well accepted in the psychiatric field that Bipolar disorder can be inherited. Ex. 01, George Woods. Mr. Hodges' disorder manifested when he was a teenager, causing many of the symptoms that Dr. Nurcombe attributed solely to a personality disorder. The presence of a serious, Axis-I mental disease by definition makes Mr. Hodges ineligible for a diagnosis of a personality disorder; symptoms that meet the definition of a serious mental illness cannot then quality a person for a personality disorder. Bipolar disorder

causes Mr. Hodges to experience extreme mood lability and to experience delusion precepts. Ex.01, George Woods.

Further, chronic, untreated post-trauma stress disorder exacerbated Mr. Hodges' symptoms. While Dr. Nurcombe found that Mr. Hodges' symptoms were consistent with his history of rape at age 12. Ex. 01, George Woods. He failed to explain that those symptoms met the diagnostic criterion for post-traumatic stress syndrome – a diagnosis that was readily available and well accepted at the time of Mr. Hodges' arrest and trial. Ex. 01, Dr. Woods Declaration. Had trial counsel given the jury a coherent picture of Mr. Hodges' mental anguish and distress, explaining its biological, genetic origin and how the rape Mr. Hodges experienced as a child exacerbated his symptoms, further impairing his functioning, the jury would have found the mitigation to outweigh the aggravated nature of the crime. Had the jury heard this coherent, accurate description and diagnosis of Mr. Hodges' serious mental illness Mr. Hodges would not have been sentenced to death.

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.[15] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower

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[15] Ex. 31 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).

mitigation proof is an even greater concern in the context of mental illness.

As outlined, above, the proof presented at trial of Mr. Hodges' mental illness was woefully inadequate to describe his tortured reality. It was also inadequate to mitigate the proof the jury heard about the crime itself. Had the jury heard the true nature of Mr. Hodges' impairments, heard that rape victims more often than not do not disclose their abuse, particularly if they fear familial rejection or social ostracization because the attack was same-gender.

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 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. Hodges*, 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.

D. 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.[16] 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 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

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[16] *See* Ex. 32, *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).

moratoriums on executions. (California, Colorado, Ohio, Oregon, Pennsylvania, and Washington).[17]

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.[18]

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.

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[17] Ex. 33, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

[18] *See* Ex. 32, *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).

SB1124 was referred to Senate Judiciary Committee on February 11, 2019.[19]

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 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)

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[19] Ex.34, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 35, *Recent Legislative Activity*, Death Penalty Information Center https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 22, 2019).

(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.[20]

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.[21] Numerous other jurisdictions have eliminated it altogether. In 2018, the Washington Supreme Court held that that the death penalty violates the state constitution, as it is contrary to the evolving standards

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[20] *See* Ex. 26, 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)).

[21] Ex. 36, 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-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ (last visited Dec. 23, 2019).

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.[22] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[23]

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

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[22] Ex. 28, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 37, 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.").

[23] *Id.*

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:[24]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[25]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[26]
- National Alliance on Mental Illness, *Death Penalty*.[27]
- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[28]

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[24] Ex. 38, 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).

[25] Ex. 39

[26] Ex. 40, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[27] Ex. 41, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

[28] Ex. 42, https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Dec. 22, 2019).

The American Bar Association also publically opposes executing or sentencing to death the defendants with serious mental illness.[29] 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.[30]

Citing national polls in 2014 and 2015, then ABA President-elect Hilarie Bass said the American public "support[s] a severe mental illness

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[29] Ex. 43, 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).

[30] Ex.44, https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Dec. 22, 2019).

exemption from the death penalty by a 2 to 1 majority."[31] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM.[32] 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."[33]

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.[34] Former Tennessee Attorney General, W.J. Michael Cody expressed his support for an exemption for the seriously mentally ill: "[A]s society's understanding of mental illness improves every day," it is "surprising that people with severe mental illnesses, like

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[31] Ex. 45, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness; *see also* Ex. 46, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[32] Ex.47, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

[33] Ex. 48, ABA Amicus Brief in Nevada Supreme Court.

[34] Ex. 49, 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

schizophrenia, can still be subject to the death penalty in Tennessee."[35] 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.'"[36]

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."[37] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[38]

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 WASHINGTON POST, April 3, 2017 ("[O]ur research suggests that the death penalty actually targets those who have mental illnesses."), Ex. 53.

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[35] Ex. 50, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[36] *Id.*

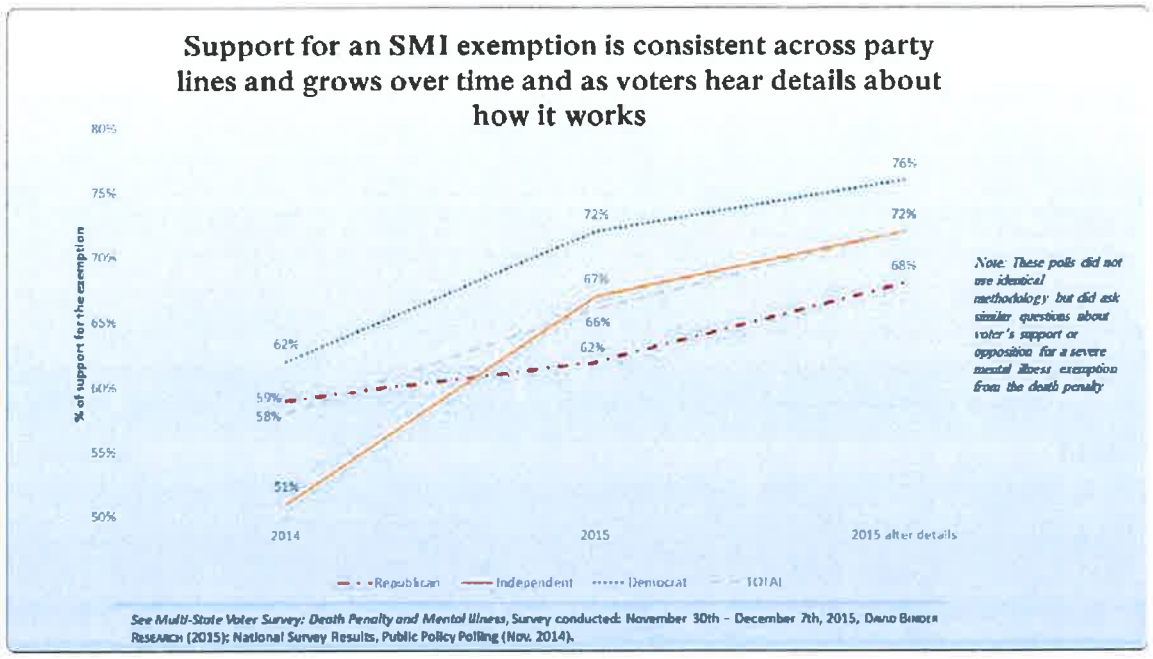
[37] Ex. 51, https://www.amnestyusa.org/double-tragedies/.

[38] Ex. 52.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 54.
- 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. 55.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 56.

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.[39]

[39] Ex. 57, 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."[40]
- 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.[41]
- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[42] 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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[40] Ex. 58, 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).

[41] Ex. 59, 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).

[42] *See* Ex. 60, 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."[43] 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."[44]

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."[45] Generally, the EU opposes the death penalty for all crimes.[46]

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[43] Ex. 61 *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.").

[44] Ex. 62 *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[45] Ex. 63 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).

[46] Ex. 64, 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).

f. Evidence of National Consensus: Mental Health Courts

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.[47] At least one hundred of these courts serve felony offenders.[48] 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."[49] 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

E. 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

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[47] Ex. 65, *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).

[48] *Id.*

[49] Ex. 66, *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).

death penalty is a disproportionate response to the moral culpability of 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).

F. It is unconstitutional to impose the death penalty upon Mr. Hodges, because his serious mental illness diminished his personal culpability.

Mr. Hodges' bipolar disorder, psychotic thinking, and paranoid ideations, diminish his personal culpability for the murder. Unlike the

cold, heartless, conniving killer the state presented him to be, Mr. Hodges is disorganized, confused, and highly governed by his erratic brain chemistry. Where his erratic behavior was presented at trial as proof of his insouciance and indifference, it was actually a manifestation of his illness and was completely beyond his control. Mr. Hodges' psychotic thinking diminishes his moral responsibility. Because the jury never heard proof about his serious mental illness, the death verdict against Mr. Hodges lacks the reliability required to be constitutionally adequate.

G. 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. Hodges may vindicate his claim, and remand his case to the trial court for further proceedings where Hodges may establish the nature and severity of his mental illness and, thus, his exemption from execution.

V. 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.[50] An additional six states have not had an execution in at least five years, for a total of 38 states with no executions in that time.[51] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor life in

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[50] Ex. 67, *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).

[51] Ex. 68, *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).

prison over a death sentence.[52] Perhaps most revealing about this poll is the sea change in attitudes occurring in just the last five years. Where, in 2014, only 45% of the country favored a life sentence over death, that number has increased by 15% in only five years. Importantly, the poll also demonstrates that the shift toward favoring a life sentence is apparent in every single major subgroup:

> Since 2014, when Gallup last asked Americans to choose between life imprisonment with no parole and the death penalty, *all key subgroups show increased preferences for life imprisonment*. This includes increases of 19 points among Democrats, 16 pointes among independents, and 10 points among Republicans."[53]

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 principles and values."[54] Tennessee has since formed its own chapter.[55]

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[52] Ex. 69, *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).

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

[54] Ex. 70, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[55] Ex. 71, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

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.[56]
- 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?"[57]
- Lack of deterrence –The death penalty does not prevent violent crime.[58]

Indeed, these same concerns are recognized in the recent year-end report by the Death Penalty Information Center, which noted that, "innocence remained a crucial concern in 2019, as two people were exonerated from death row more than 40 years after their convictions."[59]

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[56] Ex. 72, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019. Ex. 87, Samuel Gross, et. al., Race and Wrongful Convictions in the United States, National Registry of Exonerations (2017).

[57] *Id.*

[58] *Id.*

[59] Ex. 73, *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-

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."[60] 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."[61]

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

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penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

[60] *Id.*

[61] *Id.*

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.[62] Post-*Furman* and *Gregg*, Tennessee was one of the last states[63] to resume executions when it executed Robert Coe on April 19, 2000 – the state's first execution in forty years.[64] The State executed another five men between 2006 and 2009.[65] And, it should be stressed that one of those men, Sedley Alley, may well have been innocent

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[62]Ex. 74, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[63] 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. 75 – *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. 76, *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).

[64] Ex. 74, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[65] 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.*

of the murder for which he was put to death – an unconscionable reality.[66] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[67] – 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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[66] Ex. 77, *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).

[67] Ex. 78, *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.[68]

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[68] 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. 79, ***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*.

1. 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%.[69] 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.[70] 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).

[69] Ex. 80, *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).

[70] Ex. 81, *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).

2. 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.[71] 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): [72]

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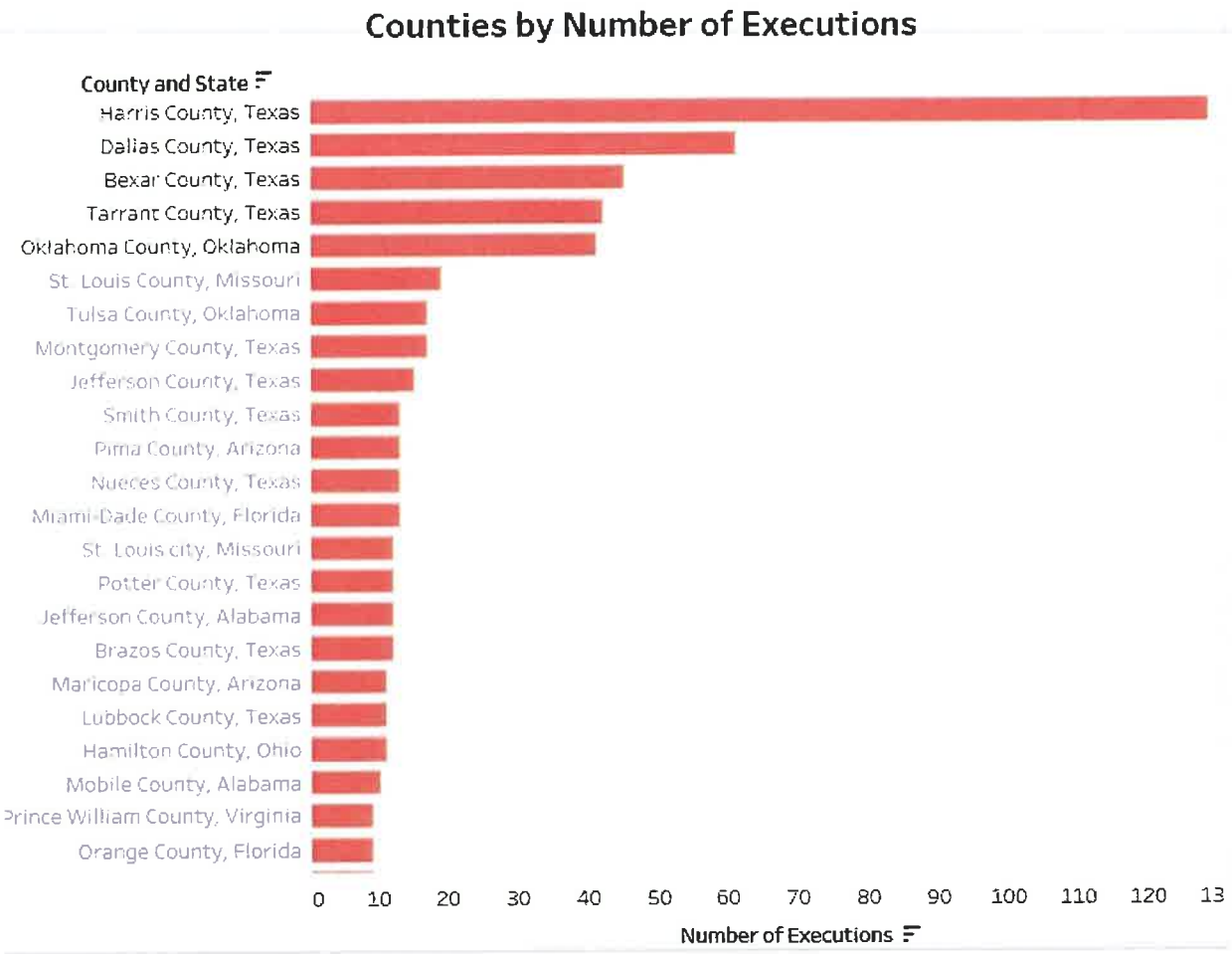
[71] Ex. 67, *Indiana Marks 10 Years Without An Execution*, Death Penalty Information Center, https://deathpenaltyinfo.org/news/indiana-marks-10-years-without-an-execution (last visited Dec. 24, 2019).

[72] Ex. 82, *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 Hodges, but they also all went to the same high school.[73]

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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[73] Ex. 83, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

sustained death sentences.[74] 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.[75] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[76]

B. 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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[74] Ex. 84, *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).

[75] Ex. 81, *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).

[76] *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).

C. 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.[77] 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.[78] 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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[77] Ex. 85, *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)).

[78] Ex. 68, *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.[79] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[80] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[81] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[82]

Perhaps most important is the *consistency in the trend towards abolition* – the type of evidence the *Atkins* Court referred to as "telling." 536 U.S. at 315. According to the Gallup poll conducted in October 2019, in only five years, the percent of individuals who favor of a life sentence over capital punishment rose 15%, from 45% in 2014 to 60% in 2019.[83] 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.[84] Equally

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[79] Ex. 85, 2019 DPIC Report, at 2.

[80] *Id.* at 3.

[81] *Id.* at 4.

[82] *Id.*

[83] *Id.* at 14; *see also* Ex. 69, 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).

[84] Ex. 69, 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.[85]

Tennessee was one of only seven states to perform an execution in 2019,[86] and joins only Texas in having any executions scheduled for 2020.[87] 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.[88] 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.[89]

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.[90]

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[85] New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018); and New Hampshire (2019). Ex. 79, *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).

[86] Ex. 85, 2019 DPIC Report, at 6.

[87] Ex. 86, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[88] Ex. 85, DPIC Report, at 2.

[89] Ex. 85, 2019 DPIC Report, at 2.

[90] *Id.*

Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[91] 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.[92]

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.

D. 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

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[91] *Id.* at 3.

[92] *Id.* at 6.

unusual, are ever-present in Tennessee, even as our Attorney General seeks to schedule executions in unprecedented numbers. This Court, however, has the authority – recognizing the realities of capital punishment that are leading the United States consistently towards total abolition – to deny the State's request for an execution date and, instead, commute a death sentence to one of life in prison. As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI § 1 of the Tennessee Constitution, *In Re Burson*, 909 S.W.2d 768, 772-73 (Tenn. 1995), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§ 16-3-503-04, to deny the Attorney General's motion to set an expedited execution date and instead vacate Mr. Hodges' 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. Hodges 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).

VI. This Court should issue a certificate of commutation because Mr. Hodges is severely mentally ill, his trial was a sham, and procedural technicalities and denial of funding, time, and resources, have prevented him from receiving a full and fair adjudication of his ineffective assistance of counsel plea.

Mr. Hodges asks 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.

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.

As described above, Mr. Hodges was repeatedly deprived of competent counsel, funding, time, and resources to present his case. His mental illness exacerbated these overwhelming obstacles. His case warrants a certificate of commutation.

For all the reasons outlined in this response, Mr. Hodges 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. Mr. Payne also invokes his right to a full and fair hearing regarding his competency to be executed under the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution.

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