IN THE TENNESSSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No.M2001-01865-SC-R11-PD
	)	
DONALD RAY MIDDLEBROOKS	)	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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I. Introduction

Mr. Middlebrooks suffers from a well-documented constellation of serious, debilitating psychiatric and medical diseases. Mr. Middlebrooks has a seizure disorder that is poorly controlled with medication – he falls to the ground, convulses violently, and must wear a helmet to protect his head. When he does not have his helmet, correctional officers and other inmates have to hold his head until the seizure finally subsides. He has experienced as many as six seizures in one day, even though he takes anti-seizure medication. He hears voices and sees a shadow figure. He has both neurological and neuropsychological impairments that impact his daily functioning. His neurocognitive functioning has declined over the course of the past fifteen years. He has a progressive form of dementia (Major Neurocognitive Disorder).

In addition to these co-morbid conditions, Mr. Middlebrooks also suffers chronic post-traumatic stress disorder. As discussed in more detail below, Mr. Middlebrooks' exposure to childhood sexual torture, violence, and neglect is among the worst imaginable. These illnesses do not act independently of one another. Rather they interact synergistically, each amplifying the severity of the other.

II. Mr. Middlebrooks 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

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[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 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.

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.

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defendant in the face of expert testimony that the defendant was incompetent.)

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. Middlebrooks gives notice that he is incompetent to be executed and categorically excluded from the death penalty under the United States and Tennessee constitutions. He respectfully requests that his case be remanded to the criminal court for a full and fair adjudication of his claim.

A. Mr. Middlebrooks suffers from seizure disorder which is poorly controlled by medication.

Mr. Middlebrooks' seizure disorder is characterized by multiple forms of seizures. He has absence seizures, temporal lobe seizures, grand

mal seizures with convulsions (tonic-clonic seizures), and myoclonic seizures. Mr. Middlebrooks was evaluated by neurologist, Dr. Melissa Carran, in December, 2019. Dr. Carran is an Associate Professor of Neurology and Attending Neurologist at Cooper University Health Care. Dr. Carran is board certified in Neurology and Clinical Neurology. Though Dr. Carran has not been able to complete a written report due to the press of time, she confirms Mr. Middlebrooks severe seizure disorder.

Mr. Middlebrooks seizures are documented in his prison records, prior hospitalization records, and prior mental health evaluations. Symptoms of his seizure disorder were evident as early as elementary school, though the teachers in the small town of Teague, Texas did not recognize their significance.

1. Early Childhood symptoms.

Patricia Burns Simon was an elementary school classmate of Mr. Middlebrooks. She recalls "[t]he teacher called on Donnie often, because of his daydreaming. He used to stare out the window with a glazed look on his face. This happened often in class, and I remember turning around and seeing him like this when the teacher called his name." Ex. 1, Declaration of Patricia Burns Simon. Dr. Carran will testify that children who experience seizures are often described as staring, daydreaming, or having a glazed look on their face. This is a classic symptom of absence seizure activity.

One of Mr. Middlebrooks' teachers, Margaret Bogue, noticed that he would nibble on things in the back of class. Ex. 2, Declaration of Gaye Nease regarding interview of Margaret Bogue. Dr. Carran will testify that nibbling is a sign of absence seizures.

Mr. Middlebrooks cousin, James Hill, recalls that "there were lots of times he was off in his own world, and just staring at a wall for long periods of time. I had to call his name two or three times to snap him out of it." Ex. 3, Declaration of James Hill.

Mr. Middlebrooks history is notable for experiencing blackouts and headaches with ringing in his ears which began when he was ten years old. Ex. 4, Texas DOC Records Evaluation Worksheet. People who experience "blackouts" of this nature are often describing seizure activity.

2. Adolescent and young adult symptoms

At twenty-one years of age, Mr. Middlebrooks reported that he continued to have blackouts. *Id.* He further reported a history of head injury. He had been beaten with a blackjack at age 13 and hit in the head with an umbrella at age 14 or 15. Mr. Middlebrooks was attacked in prison when he was approximately 19 years of age. The attacker stabbed him in the head with a shank. Mr. Middlebrooks' seizures increased after this attack.

In 1984, Mr. Middlebrooks was seen in the emergency room for having a seizure while in solitary. He was found lying face down on the floor. While at the emergency room it notes a tensing of body only activity noted when in clinic last approximately 15 seconds. The medical impression is a petit mal seizure activity. Ex. 5, Texas DOC Records, Emergency Record. A 1985 prison mental health team notes Mr. Middlebrooks history of epilepsy. Ex. 6, Identification Data.

In 1986, the Tarrant County Hospital reflects a diagnosis of seizure disorder. Ex. 7, Tarrant County Hospital Records.

3. Tennessee Department of Correction Records document frequent seizures.

The Tennessee Department of Corrections has treated Mr. Middlebrooks seizure disorder for decades. Ex. 8, TDOC records. He has been prescribed Dilantin and Tegretol. *Id.* The prison provides him with a special padded helmet to protect his head from further injury. A corrections officer who has witnessed Mr. Middlebrooks convulsive grand mal seizures described her observations to Dr. Carran. Mr. Middlebrooks recently experienced 5 seizures in one day, even though he is on anti-seizure medication.

4. Mental health examinations document Mr. Middlebrooks' seizure activity.

A multi-disciplinary team of mental health experts evaluated Mr. Middlebrooks in 2003-2005. Each noted that his history was remarkable for seizure disorders. Ex. 9, Report of Dr. George Woods; Ex. 10, Report of Dr. Craig Beavers, Ex. 11, Report of Dr. Lucy Brown, Ex. 12, Report of Dr. Robert Kessler.[2] Ex. 13, Neuroimages.

Dr. Carran observed physical manifestations of seizure disorder in Mr. Middlebrooks, including posturing, marks on his forehead which is damage caused by his head banging on the ground during a tonic-clonic seizures, and abnormal hand and arm movements. Dr. Carran sees abnormalities on the neuroimaging consistent with seizure disorder.

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[2] Mr. Middlebrooks was also evaluated by Dr. David Lisak, an expert in adult male survivors of sexual trauma. His report is discussed below.

In addition to Mr. Middlebrooks recent evaluation by Dr. Carran, Dr. Daniel Martell evaluated Mr. Middlebrooks within the past six weeks. Dr. Martell's visual observations of Mr. Middlebrooks and clinical interview confirm his long-standing seizure disorder that Dr. Martell believes to have originated in childhood.[3] Dr. Martell observed Mr. Middlebrooks posturing and hand movements as well.

5. Seizure Disorder is a medical condition.

"Epileptic seizures cause sudden, unexplained loss of consciousness in a child or an adult[.]" Joseph Bruni, *Episodic Impairment of Consciousness*, *in* Bradley's Neurology in Clinical Practice, Vol. 1, Ch. 2, p. 13 (Robert Daroff, et al. ed., 2016). Seizures "include symptoms, and/or signs of abnormal excessive hypersynchronous activity in the brain." Bassel W. Abou-Khalil, et al., *Epilepsies*, *in* Bradley's Neurology in Clinical Practice, Vol. 2, Ch. 101, p. 1563 (Robert Daroff, et al. ed., 2016). Seizures can cause psychosis. Jacob S. Ballon, *Psychosis, in* Merritt's Neurology, Ch. 148, p. 1309 (Elan D. Louis, et al, ed. 2016).

Seizures have multiple etiologies, but all involve loss of consciousness. Seizures can be triggered by stress, smell, sleep-deprivation, and light. Each of these trigger seizures in Mr. Middlebrooks.

Dr. Carran's evaluation of the neuroimaging as well as her clinical interview cause her to conclude that Mr. Middlebrooks seizure disorder

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[3] Mr. Middlebrooks' mother was heavy abuser of alcohol. Prenatal exposure to alcohol could be a contributing factor.

cannot be controlled with medication. If Mr. Middlebrooks was a patient in her hospital, he would be a candidate for brain surgery.

B. Mr. Middlebrooks suffers from schizophrenia. He experiences psychosis and hallucinations.

Based on his recent evaluation of Mr. Middlebrooks, Dr. Martell's report will include a diagnosis of schizophrenia which is supported by Mr. Middlebrooks' psychiatric history. Dr. Martell's review of the records and his evaluation of Mr. Middlebrooks lead him to conclude that Mr. Middlebrooks' chronic Paranoid Schizophrenia developed in his late teens for which he has consistently been prescribed anti-psychotics. Dr. Martell's opinion is that Mr. Middlebrooks currently experiences active symptoms despite his psychotropic medications. Those symptoms include daily auditory hallucinations and paranoid ideation, as well as recent visual hallucinations.

Prison records demonstrate that Mr. Middlebrooks experienced a full psychotic break during the summer of 2019 in response to the recent executions. Mr. Middlebrooks was found naked, banging his head against the wall in the shower, actively hallucinating. He was placed in a suicide cell for a week. The suicide cell activated Mr. Middlebrooks' PTSD symptoms.

The American Psychiatric Association categorizes Schizophrenia as a psychotic disorder. Ex. 14, DSM-V, American Psychiatric Association, (5th ed. 2013), at 99. Among other symptoms, persons with schizophrenia experience hallucinations and delusions. *Id.* Persons with schizophrenia are prone to depression and suicide. *Id.* at 104.

Lay observations and prior records support Dr. Martell's opinion. James Hill recalls Donnie speaking in tongues. "Donnie just suddenly started talking nonsense. It was like he was speaking in tongues." Ex. 3, Declaration of James Hill. Mr. Hill observed this behavior more than once. "I have seen Donnie do that weird talking in tongues and staring thing several times. *Id.*

Though he did not realize it, Mr. Hill also observed Mr. Middlebrooks experiencing auditory hallucinations. "Donnie came over to our house to watch a western movie, and was telling me to be [quiet] and stop whispering to him. I kept telling him that I was not whispering to him and stop trying to scare me." *Id.* at 2. "He often told me to stop whispering when I wasn't, but I thought he was just messing with me." *Id.*

In 1985, the Texas prison psychiatric records detailed Mr. Middlebrooks' auditory and visual hallucinations, delusions of another person being inside of him and directing him to do bad things, and a history of suicide attempts and self-mutilation. Ex. 6, Texas Department of Corrections Identification Data. Mr. Middlebrooks was given a diagnosis of paranoid schizophrenia.

In May, 1986, Mr. Middlebrooks was adjudicated mentally ill and court-ordered into mental health treatment at the Austin State Hospital. Ex. 15, Austin State Commitment Records.

The 1986 Tarrant County Hospital Records document a voluntary commitment after yet another suicide attempt. These records also reflect how Mr. Middlebrooks is dirty and his personal hygiene is poor. Ex. 7, Tarrant County Hospital Records. On May 27, 1986, Mr. Middlebrooks is

seen for suicidal behavior and seizure disorder. Dr. Jeff Pickens noted how Mr. Middlebrooks reported attempting to slash his own neck and wrist, how he claims no memory of the incident, and is fearful of it happening again. Ex. 15, Austin State Commitment Records.

MHMR Authority of Brazos also diagnosed Mr. Middlebrooks with Paranoid Schizophrenia.

Donald Mid

STAFF PARTICIPANTS

TREATMENT COORDINATOR

DSM III DIAGNOSES:
AXIS I: Paranoid Schizophrenia chronic w/ acute exc
AXIS II: No diagnosis in Axis II
AXIS III: Seizures
DISCHARGE CRITERIA: Seeking employment, coming to medication w/out prompt, Employed, self medicating
PATIENT'S STRENGTHS: Young, healthy, motivated
LIABILITIES: Seizures
AFTERCARE PLANS:
Education/employment: Look for full time employment stop Jr. Jra
Living arrangements: Apartment w/ roommate Mayflake #
Financial: Self supporting will be looking for jobs
Follow-up Treatment: Case mgmt, med clinic

I HAVE PARTICIPATED IN THE DEVELOPMENT OF THIS PLAN WITH MY TREATMENT COORDINATOR AND UNDERSTAND ITS CONTENT AND PURPOSE

SIGNED Donald Middlebrooks

Moreover, previous neuroimaging detected abnormal metabolic activity in Mr. Middlebrooks' corpus striatum. Ex. 11, Report of Lucy

Brown; Ex12, Report of Robert Kessler; Ex. 13, Neuroimages. Such defects have been linked to Schizophrenia. Ex. 16, B. Dean, et al., *Evidence For Impaired Glucose Metabolism In The Striatum, Obtained Postmortem, From Subjects With Schizophrenia*, Transl. Psychiatry (2016).

C. Mr. Middlebrooks suffers from a progressive form of dementia known as Major Neurocognitive Disorder and has neurological and neuropsychological deficits.

1. Mr. Middlebrooks exhibited evidence of neurocognitive deficits as a child.

Mr. Middlebrooks' school records well document his learning disabilities. He was placed under the Department of Special Education umbrella, which at that time was referred to as the Plan A Enrichment Program. It was decided among the Enrichment Team members that Mr. Middlebrooks be contained in a resource class for the "maximum time possible."Ex. 17, Wortham Public School Records. Ruth Meggs, a former teacher at Sallie Mounger elementary school in Teague, Texas confirms that Mr. Middlebrooks was placed in "a contained classroom for Learning Disabled 'LD' children." Ex. 18, Declaration of Ruth Meggs. Ms. Meggs stressed how the children within the Teague School District were not carelessly placed in resource class, but were only placed there if they really needed to be. Id. Mary Lawrence Lee, another Special Education teacher at Sallie Mounger confirms Ms. Meggs declaration. Ms. Lee reports, "For a child to be in my LD classroom, they had to have been a slow kind of kid." Ex. 19, Declaration of Mary Lawrence-Lee. Ms.

Lawrence-Lee remembers Donnie as a "very sad and troubled little boy." Id. She remembers thinking he was "different," "desperate for attention," and "needy." Id.

Records from the Teague Independent School District reflect excessive absenteeism; low grades; reading scores that were in the "very low" range; achievement test scores in the 2nd percentile for science, language, and arithmetic applications' and IQ scores ranging from 68 to 82. The test scores varied depending on the type of IQ test Mr. Middlebrooks was given and his age at the time of the test, Classmate, Patricia Burns-Simon described Mr. Middlebrooks as "socially inept." Ex. 1, Declaration of Patricia Burns Simon.

On the Stanford Achievement Test given to Mr. Middlebrooks at age 11 years and 8 months, he has a Stanine of 1 in Language, Arithmetic Computation, Arithmetic Applications, and Science. His highest Stanine on this test is a 4 in Arithmetic Concepts. In this test Mr. Middlebrooks answered that carpenters work mostly with plastic, and when you do a job right, you do it quickly. At 11-years-old and nine months, Mr. Middlebrooks was given the Otis-Lennon Mental Ability test and he answered that a driver is to car as a cowboy is to cow, instead of a cowboy is to a horse. On question number two of this same test he was asked the opposite of weak and he choose poor instead of strong. Ex. 20, Teague Independent School records. In 1977, Donald Middlebrooks was a 14-year-old 6th grader. Ex. 17 Wortham School records.

The prison mental health team in Texas diagnosed Mr. Middlebrooks with Borderline Intellectual Functioning. Ex. 6, Texas Dept. of Corrections Identification Data.

Records from the Waco State Home, where Mr. Middlebrooks was committed as a teenager, reflect that as a ninth grader, he was performing at a third to fourth grade level in all areas, with the exception of math concepts which was at a 6.5 grade level. Ex. 21, Waco State Home Records.

2. Newly administered neuropsychological evaluation reveals Major Neurocognitive Disorder.

Dr. Craig Beaver's 2004 neuropsychological evaluation identified significant neurocognitive deficits. Ex. 10, Dr. Beaver Declaration at 11.

> In particular, he shows deficits in areas of information processing speed and distractibility, with some impulsivity; he also shows a rather consistent difficulty with social perceptual skills and social judgment; and difficulty with his ability to learn and retain more thematic-based information, whether it is verbal or visual. This latter is a particularly problematic area for him. Also, Mr. Middlebrooks displays difficulties in executive functioning, particularly as it relates to information processing speed and understanding of complexity. Therefore, again, his neuropsychometric testing is consistent with significant neurological involvement.

Id. at 11.

Dr. Martell's 2019 neuropsychological evaluation found the same basic pattern of deficits as Dr. Beavers, but with evidence of *significant deterioration.* This deterioration indicates that Mr. Middlebrooks has a progressive form of dementia known as Major Neurocognitive Disorder. This finding is consistent with Mr. Middlebrooks' biological history where Mr. Middlebrooks' mother and maternal aunt each suffered from

Alzheimer's Disease and Parkinson's Disease. Ex. 3, Declaration of James Hill.

"Psychosis is also common in major cognitive disorders such as dementia." Jason S. Ballon, Psychosis, *in* Bradley's Neurology in Clinical Practice, Vol. 2, Ch. 148, p. 1309 (Robert Daroff, et al. ed., 2016)

Previous neuroimaging testing identifies defects in Mr. Middlebrooks' corpus striatum. Ex. 11, Report of Lucy Brown; Ex. 12, Report of Robert Kessler; Ex. 13, Neuroimages. Defects in the corpus striatum are linked to dementia, Parkinson's Disease, Huntington's Disease, and Schizophrenia. Ex. 11, Declaration of Lucy Brown.

D. As a child, Mr. Middlebrooks was sexually trafficked by his mother, raped by multiple perpetrators (including his mother), was sadistically tortured, abused, and neglected. As a result he suffers chronic Post-Traumatic Stress Disorder which currently impacts his daily living and contributes to acute psychiatric decompensation.

1. Torture and Trauma.

Dr. Martell will testify that what Mr. Middlebrooks experienced as a child is some of the most horrific abuse he has heard in his professional career. He will also testify that he gave Mr. Middlebrooks multiple measures to check for malingering and Mr. Middlebrooks passed them all.

Mr. Middlebrooks' mother was a severe alcoholic and pedophile. When Mr. Middlebrooks was ten years old, his mother announced that Mr. Middlebrooks and his little sister (who was three) were going to have to start "earning their keep." By that she meant that they would have to

submit to and perform sexual acts with men for money. His mother gave Mr. Middlebrooks a choice: you or your sister. Mr. Middlebrooks chose to protect his sister.

Mr. Middlebrooks vividly recalls his mother tying him to the bed and then sitting next to the bed in a chair while men would rape him. The sadism he was forced to endure did not stop there. His mother would strip him naked and tie him to the porch roof and permit men to fellate him. All in exchange for cash.

The sexual brutality was not limited to the pedophiles who preyed on him. His mother also raped him repeatedly.

His mother was a "Outlaw bitch." The Outlaws were a motorcycle gang. She would bring the gang into her home where they engaged in sexual activities.

Mr. Middlebrooks' cousin was a known pedophile who raped Donnie when he was a child. James Hill recalls:

> We were in town when our cousin, Johnnie Little, came by wanting Donnie to help him set up for my mamma's surprise birthday party. Johnnie was about 30-years-old. Donnie didn't want to go with Johnnie, but I convinced Donnie to go with him. When I got to the house I immediately heard Donnie hollering. I ran back to the bedroom and saw Johnnie had a hold of Donnie's arm. Johnnie's pants were down around his knees and so was Donnie's.

Ex. 3, Declaration of James Hill. It was not until Johnnie Little started to rape James Hill that he "realized what had happened to Donnie." *Id.*

One of the men who paid to rape Mr. Middlebrooks was a man who Mr. Middlebrooks looked up to as a surrogate father. Mr. Middlebrooks' own father died when he was three. The sense of betrayal was profound.

Another man who acted as a surrogate father to Mr. Middlebrooks was Buford Owens. Owens was a local law enforcement officer. However, when Mr. Owens discovered that Mr. Middlebrooks had broken into a local house, he tied him to the bumper of his car with bailing wire and drug him until he would confess. Court records show Buford Owens was charged with Assault in 1978. Ex.22, Owens Complaint. In a publication of local history *Freestone Past and Present*, under the section "From the Original Sheriff's Report 1976" it is noted, "Wortham Police Buford Owens back on job. As Judge Jones said don't know what to do with him when got him or what do without him when haven't." Ex. 23, Excerpt from J.R. "Sonny" Sessions, Jr., *Freestone Past and Present.*

Mr. Middlebrooks' mother introduced him to heroin. She gave him his first IV dose when he was thirteen. The drug provided needed relief from the hell that was his life. Later, Mr. Middlebrooks committed a burglary for the purpose of getting locked up and to escape his home.

As a young man in prison, Mr. Middlebrooks became a target of sexual assault.

2. Neglect

Mr. Middlebrooks did not have a consistent adult in his life to attend to his basic needs. While the outside world could not fathom what was happening to him. They did know that something was wrong.

> Donnie's 'home life was absolutely terrible. It was so bad he'd come to school so dirty that the other children didn't associate with him. He'd just slip on his shoes and walk on them. He had blond hair. He had no friends mainly because of his being so dirty.

Ex. 2, Declaration of Gaye Nease regarding interview of Margaret Bogue. As noted above, others who knew him described him as "different" "starving for affection." Patricia Burns-Simon recalled, "He had sandy hair and he was not a clean cut kid. Donnie did not come to school with neat clothes and his shoes were always worn out looking." Ms. Burns-Simon also remembered "Donnie looked like he didn't have breakfast before school." Ex. 1, Declaration of Patricia Burns Simon.

While Mr. Middlebrooks was committed to the Waco State Home, his teeth were described as in "terrible" condition and he had to have 15 teeth pulled. Ex. 21, Waco State Home Records.

3. Mental health professionals agree that Mr. Middlebrooks suffers from chronic Post-traumatic Stress Disorder.

Dr. David Lisak evaluated Mr. Middlebrooks in 2004. He concluded:

> Donald Middlebrooks suffered an extraordinary level of trauma as a child. He was sexually tortured and repeatedly raped by multiple perpetrators, and incestuously used by his mother. He was physically and psychologically abused and neglected. He escaped this childhood hell by deliberately engineering his own incarceration as a 13 year old - a 13 year old boy who was already profoundly scarred and addicted to multiple substances.

Ex. 24, Lisak Report. Dr. Martell's examination confirms Dr. Lisak's conclusion, but goes even farther.

Dr. Martell evaluated Mr. Middlebrooks using the Adverse Childhood Experiences Scale, developed in a collaborative landmark study of 17,000 people by the Centers for Disease Control and Kaiser Permanente. These findings show a graded dose-response relationship between ACEs and negative health and well-being outcomes. In other words, as the number of ACEs increases so does the risk for negative outcomes. There was a direct link between childhood trauma and adult onset of chronic disease, as well as mental disorder, suicide, being violent and a victim of violence. Having more types of trauma increases the risk of health, social and emotional problems. Mr. Middlebrooks' ACES score is 7 out of a possible 10, which puts him at significant risk for physical disease, mental disorder, and behavioral problems.

Mr. Middlebrooks' PTSD impacts his daily functioning.

E. Mr. Middlebrooks 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. Middlebrooks 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. Middlebrooks, 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.

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

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

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

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

The Diagnostic and Statistical Manual defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[4] "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."[5]

According to the American Psychological Association:

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

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[4] Ex. 25, DSM-V, American Psychiatric Association, (5th ed. 2013), § I.

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

> Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.[6]

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."[7] The National Institute of Mental Health (NIMH)[8] and the National Alliance on Mental Illness (NAMI) have similar definitions of serious mental illness as SAMHSA.[9]

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

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[6] Ex. 26, Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess (2009), at 5 (internal citation omitted).

[7] Ex. 27, 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.*

[8] Ex. 28, *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).

[9] Ex. 29, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, p.2 (last visited Dec. 22, 2019).

perception of the environment, accurate interpretation of the environment, and memory.[10]

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

In addition to his seizure disorder, Mr. Middlebrooks has been diagnosed with Schizophrenia, Major Neurocognitive Disorder, and chronic Post-Traumatic Stress Disorder. Pursuant to the criteria outlined above, there is no question that Mr. Middlebrooks is severely mentally ill. There has long been evidence of Mr. Middlebrooks' seizure disorder. Though un-diagnosed at the time, he suffered from seizures from early childhood. When assessing his chronic PTSD diagnosis, it is enlightening, if horrifying, to recognize that, instead of receiving treatment for his childhood seizures, he was simultaneously having to survive an unimaginably torturous childhood – often at the hands of his own mother. Regarding his Schizophrenia, numerous witnesses – lay and professional alike – report Mr. Middlebrooks' having auditory and visual hallucinations. Each of his mental illnesses affect his daily functioning. As demonstrated below, his mental illness also so undermined the reliability of his sentencing jury's assessment of his individualized characteristics that categorical exemption from the death penalty is required.

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[10] *See* Ex. 30, DSM-V, at § II.02 (Schizophrenia Spectrum and Other Psychotic Disorders); Ex. 31, § II.05 (Anxiety Disorders); Ex. 32, § II.08 (Dissociative Disorders).

C. Mr. Middlebrooks' mental illness renders his conviction and death sentence unconstitutionally unreliable.

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

For this reason, in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court identified two categories of defendants who it held could not reliably be sentenced to death: the intellectually disabled and juveniles. Because the Court's rationale resulting in those categorical exclusions applies with *at least* equal force to the seriously 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.[11]

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

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

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[11] *See*, Ex. 33, Scott E. Sunby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WILLAM AND MARY LAW REVIEW, 21 (2014).

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.

In Mr. Middlebrooks' case, his lawyers failed to investigate and present the evidence of his severe mental illness. Even with the scant mitigation defense they attempted to mount, Mr. Middlebrooks' mental illness prevented the jury from making any sort of reliable assessment of him.

2. Mental illness makes a defendant a poor witness.

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

> impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe "significantly fewer bits of information about the context of the story and the events that initiated it." ... [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to "tell their story in the forensic context."[12]

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.

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[12] Ex. 34, 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.

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

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

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

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

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[13] Ex. 35, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. LAW REV. 1538, 1563 & n.22 (1998) (reporting Capital Jury Project findings describing jurors' reactions to defendants who engaged in outbursts during trial).

unreliable – forcing the justice system to act, instead, as his method of suicide. As Justice Blackmun 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 (Blackmun, J., dissenting). A result more antithetical to *Woodson* and *Lockett* is hard to imagine.

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

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

The Capital Jury project has determined that, beyond all other aggravating factors, a jury's determination that a defendant might be dangerous in the future trumps all other considerations.[14] As the

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[14] Ex. 35, 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%

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.

This factor is particularly relevant to Mr. Middlebrooks. At his sentencing, the expert witness called by Mr. Middlebrooks' lawyers testified confusingly about Mr. Middlebrooks' mental illness. First, he mis-diagnosed Mr. Middlebrooks with a "severe personality disorder." *Middlebrooks,* 619 F.3d at 533. Then, in describing what the doctor referred to as the characteristics of the disorder, he reported inconsistent behavior, instability of mood, impulsive and reckless behavior and poor anger control. *Id.* at 533.

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

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"slightly more likely" to vote for death if they were concerned a defendant might pose a future danger); *see also* Ex. 36, Marla Sandys, *Capital 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).

through which such mental illness mediates behavior. In *Roper*, the Supreme Court found the lack of uniform clinical and scientific understanding to be a reason for a categorical exemption:

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

Roper, 543 U.S. at 573.

Evidence shows that juries are incapable of reliably sifting through competing psychiatric testimony. Juries frequently view defense experts as hired guns who offer up excuses, while not discounting the opinions of prosecution experts.[15] 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.

As to this point, it is important to recall that the experts assessing Mr. Middlebrooks and then testifying at his capital trial, did so a quarter-century ago. *Middlebrooks,* 619 F.3d at 533. Review of the testimony at sentencing from Mr. Middlebrooks' own expert and the State's experts is predictably emblematic of the concern regarding a lack of uniform clinical

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[15] Ex. 37, 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).

and scientific understanding of mental illness. Mr. Middlebrooks' own expert did not know how to characterize him. As a result, he described things to the jury such as "instability of mood, a marked identity disturbance; impulsive and reckless behavior, and poor anger control." *Id.* at 533. In addition, the State presented two experts, one of whom made no finding of a mental illness. *Id.* at 533. The other was left unable to say whether there even was a mental illness. *Id.* at 533. As outlined above, it would be expected that the jury would be incapable of reliably sifting through such competing psychiatric testimony. The testimony so undermined the reliability of the jury's assessment of Mr. Middlebrooks' individualized characteristics that categorical exemption from the death penalty is required.

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.[16] The *Roper* Court's determination that an unacceptable risk exists that a crime's brutality would overpower mitigation proof is an even greater concern in the context of mental illness.

The proof presented at penalty phase of Mr. Middlebrooks' trial was clearly overshadowed by the crime. For one, Mr. Middlebrooks trial

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[16] Ex. 38, 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).

lawyers failed to investigate and present the substantial mitigation that exist in his case. As demonstrated in the other enumerated factors, this is at least partly attributable to Mr. Middlebrooks' mental illness. Left with no understanding of Mr. Middlebrooks' illness, the brutality of the crime easily overpowered the scant mitigation proof that was presented. It is critically important to this factor to recognize the jury found but a single aggravating factor – that the crime was especially heinous, atrocious, and cruel. *Middlebrooks,* 619 F.3d at 533.

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. Black*, 815 S.W.2d 166, 188 (Tenn. 1991) (citing *California v. Greenwood*, 486 U.S. 35, 50 (1988); *California v. Ramos*, 463 U.S. 992, 1013–1014 (1983); *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988); *Miller v. State*, 584 S.W.2d 758, 760 (Tenn.1978)); *State v. Harris*, 844 S.W. 2d 601, 601 (Tenn. 1992) (same). Thus, even if this Court were to find that execution of the seriously mentally ill does not violate the federal constitution, it should find that it violates the state constitution.

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.[17] 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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[17] *See* Ex. 39, *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).[18]

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.[19]

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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[18] Ex. 40, *State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited December 22, 2019).

[19] *See* Ex. 39, *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.[20]

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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[20] Ex. 41, Tennessee General Assembly Legislation Webpage, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1455&GA=111; Ex. 42, *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.[21]

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.[22] 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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[21] *See* Ex. 33, 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)).

[22]Ex. 43, 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.[23] Studies show that jurors consider a defendant's serious mental illness to be an important factor in their sentencing decisions.[24]

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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[23] Ex. 35, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538 (1998); Ex. 44, 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.").

[24] *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:[25]

- American Psychiatric Association, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014);[26]
- American Psychological Association, *Report of the Task Force on Mental Disability and the Death Penalty* (2005);[27]
- National Alliance on Mental Illness, *Death Penalty.*[28]
- Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011).[29]

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[25] Ex. 45, 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).

[26] Ex. 46

[27] Ex. 47, https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf.

[28] Ex. 48, Available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Dec. 22, 2019).

[29] Ex. 49, 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.[30] 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.[31]

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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[30] Ex. 50, 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).

[31] Ex.51, 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."[32] In 2017, the ABA expressed concern in an Arkansas case involving a defendant with SIM.[33] 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."[34]

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.[35] 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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[32] Ex. 52, https://deathpenaltyinfo.org/news/american-bar-association-issues-white-paper-supporting-death-penalty-exemption-for-severe-mental-illness; *see also* Ex. 53, https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_luncheon_feature/ (last visited Dec. 22, 2019).

[33] Ex.54, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.pdf.

[34] Ex. 55, ABA Amicus Brief in Nevada Supreme Court.

[35] Ex. 56, 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."[36] 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.'"[37]

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."[38] Amnesty International published a paper opposing the execution of the mentally ill in 2006.[39]

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. 60.

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[36] Ex. 57, W.J.M. Cody, "Exclude mentally ill defendants from death penalty," THE COMMERCIAL APPEAL, Feb. 12, 2017.

[37] *Id.*

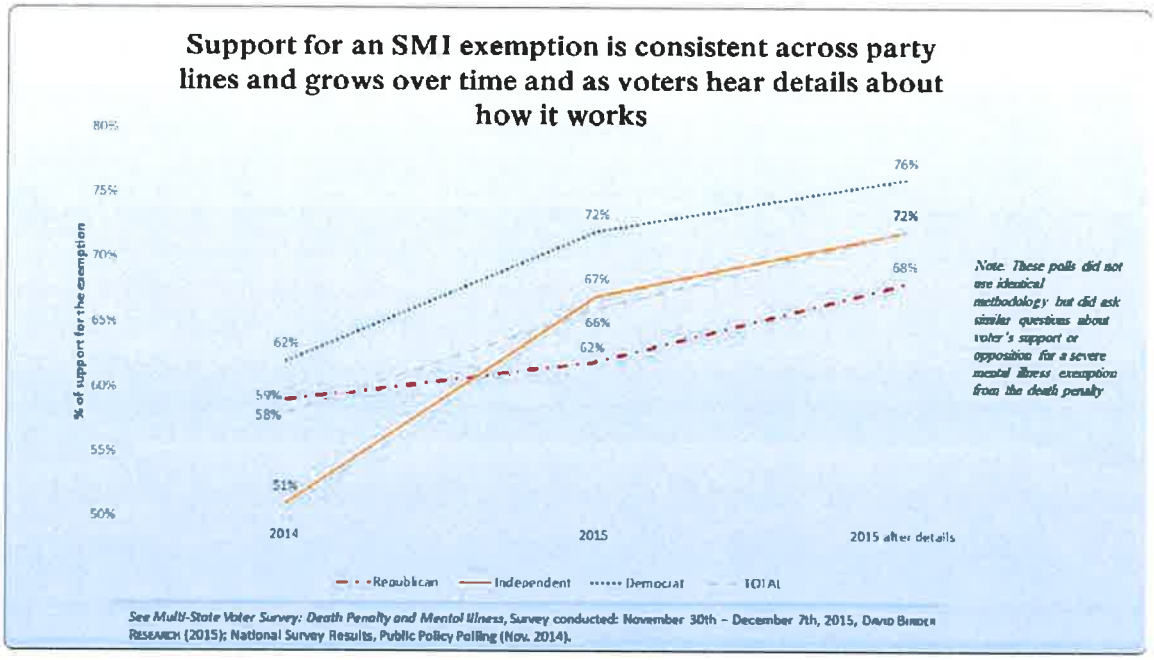
[38] Ex. 58, https://www.amnestyusa.org/double-tragedies/.

[39] Ex. 59.

- Michael Stone, *Severe Mental Illness and the Death Penalty*, JEFFERSON POLICY JOURNAL (Thomas Jefferson Institute for Public Policy) (Jan. 4, 2017), Ex. 61.
- 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. 62.
- Austin Sarat, *Stop Executing the Mentally Ill*, U.S. NEWS, June 28, 2017, Ex. 63.

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.[40]

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[40] Ex. 64, 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."[41]
- 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.[42]
- Gallup polling shows that 75% of participants oppose the death penalty for the "mentally ill."[43] 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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[41] Ex. 65, 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).

[42] Ex. 66, 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).

[43] ***See*** Ex. 67, 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."[44] 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."[45]

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."[46] Generally, the EU opposes the death penalty for all crimes.[47]

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[44] Ex. 68, *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.").

[45] Ex. 69, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[46] Ex. 70, 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).

[47] Ex. 71, 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.[48] At least one hundred of these courts serve felony offenders.[49] 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."[50] These special courts clearly reflect a consistency in the direction of change in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded

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

The last "step" of the Eighth Amendment analysis requires a court to exercise its own independent judgment in determining whether the

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[48] Ex. 72, *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).

[49] *Id.*

[50] Ex. 73, *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).

E. Conclusion

The discussion in this section makes clear it is unconstitutional to impose the death penalty upon Mr. Middlebrooks, because his serious mental illness diminished his personal culpability. 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. Middlebrooks may vindicate his claim, and remand his case to the trial court for further proceedings where Mr. Middlebrooks may establish the nature and severity of his mental illness and, thus, his exemption from execution.

IV. 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.[51] 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.[52] Moreover, just last month, Gallup released its latest poll reflecting that now, for the first time, 60% of the country favor life in prison over a death sentence.[53] 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

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[51] Ex. 74, *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).

[52] Ex. 75, *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).

[53] Ex. 76, *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).

Democrats, 16 pointes among independents, and 10 points among Republicans."[54]

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."[55] Tennessee has since formed its own chapter.[56] 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.[57]
- 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?"[58]

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

[55] Ex. 77, Conservatives Concerned About the Death Penalty, https://conservativesconcerned.org/who-we-are/ (last visited Dec. 24, 2019).

[56] Ex. 78, Tennessee Conservatives Concerned About the Death Penalty (TNCC)- Home, http://tnconservativesconcerned.org/ (last visited Dec. 24, 2019).

[57] Ex. 79, TNCC, http://tnconservativesconcerned.org/concerns/ (last visited Dec. 24, 2019.

[58] *Id.*

- Lack of deterrence –The death penalty does not prevent violent crime.[59]

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."[60] 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."[61] 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

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[59] *Id.*

[60] Ex. 80, *DPIC 2019 Year End Report: Death Penalty Erodes Further As New Hampshire Abolishes and California Imposes Moratorium*, Death Penalty Information Center, December 17, 2019, https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium (last visited Dec. 24, 2019).

[61] *Id.*

impairments listed above, an innocence claim, and/or demonstrably faulty legal process."[62]

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 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

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[62] *Id.*

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.[63] Post-*Furman* and *Gregg*, Tennessee was one of the last states[64] to resume executions when it executed Robert Coe on April 19, 2000 – the state's first execution in forty years.[65] The State

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[63]Ex. 81, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

[64] 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. 82 – *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. 83, *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).

[65] Ex. 81, *Tennessee Executions*, Tennessee Department of Correction, https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html (last visited Dec. 24, 2019).

executed another five men between 2006 and 2009.[66] And, it should be stressed that one of those men, Sedley Alley, may well have been innocent of the murder for which he was put to death – an unconscionable reality.[67] The number of exonerations of individuals on death row – three innocent men have been freed from Tennessee's death row, alone[68] – 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.

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[66] 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.*

[67] Ex. 84, *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).

[68] Ex. 85, *Tennessee*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee (last visited Dec. 24, 2019).

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 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.[69]

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%.[70] In Tennessee, while African-Americans comprise only 17% of the state's population, 50% of the

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[69] 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. 86, ***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).

[70] Ex. 87, *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).

individuals on Tennessee's death row are African-American.[71] This example of the arbitrary imposition of the death penalty is reason enough to support a life sentence over execution. Yet, there is more.

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.[72] 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

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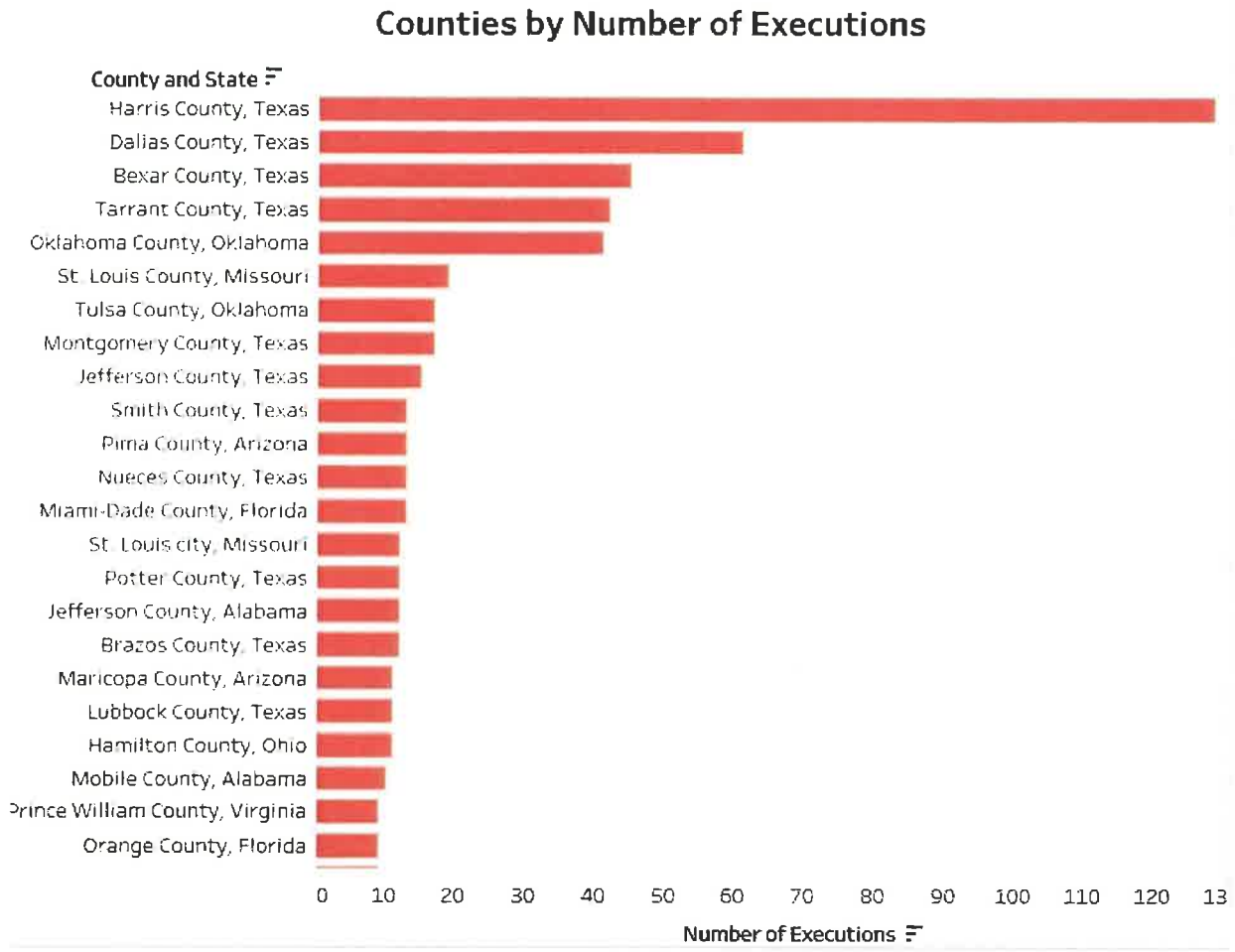
[71] Ex. 88, *Tennessee Death Row Offenders*, Tennessee Dep't of Correction, https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html (last visited Dec. 24, 2019).

[72] Ex. 74, *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).

margin, accounting for more than twice as many executions (at 129 individuals) as the next closest county (Dallas County, Texas, at 61): [73]



When it comes to racial and geographic disparities in the imposition of the death penalty, however, it does not get more emblematic than

[73]Ex. 89, *Executions by County*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited Dec. 24, 2019).

Colorado where not only are all three men sitting on death row black, but they also all went to the same high school.[74]

In Tennessee, the geographic disparity is no less stark. Since 2001, only *eight* (8) of Tennessee's ninety-five (95) counties have imposed sustained death sentences.[75] 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.[76] And, of the nine trials resulting in a death sentence since 2010, five were from Shelby County.[77]

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

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[74] Ex. 90, *The Abolitionists*, The Intercept, December 3, 2019, https://theintercept.com/2019/12/03/death-penalty-abolition/ (last visited Dec. 24, 2019).

[75] Ex. 91, *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).

[76] Ex. 88, *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).

[77] *Id.*

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.

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 was not 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.[78] 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

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[78] Ex. 92, *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)).

last five years.[79] Just this year, in addition to the abolition of the death penalty in New Hampshire and the moratorium in California, increasing numbers of states sought to further limit the use of the death penalty.[80] Oregon, already under a moratorium since 2011, significantly narrowed the class of crimes eligible for the death penalty, as did Arizona.[81] Both Wyoming and Colorado introduced legislation to abolish capital punishment in its entirety.[82] And nine different state legislatures considered bills to ban the execution of those with severe mental illness.[83]

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.[84] Moreover, this Gallup poll showed a wide demographic preference for life imprisonment over the death penalty, with majorities of men and women,

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[79] Ex. 75, *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).

[80] Ex. 92, 2019 DPIC Report, at 2.

[81] *Id.* at 3.

[82] *Id.* at 4.

[83] *Id.*

[84] *Id.* at 14; *see also* Ex. 76, 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).

whites and non-whites, and all age and educational demographics responding with this preference for punishing murder.[85] Equally consistent is the almost yearly addition – over the last ten years – of a new state that has abolished the death penalty all-together.[86]

Tennessee was one of only seven states to perform an execution in 2019,[87] and joins only Texas in having any executions scheduled for 2020.[88] 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.[89] 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.[90]

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[85] Ex. 76, Gallup Poll at 1-2.

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

[87] Ex. 92, 2019 DPIC Report, at 6.

[88]Ex. 93, *Upcoming Executions*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020 (last visited Dec. 24, 2019).

[89] Ex. 92, DPIC Report, at 2.

[90] Ex. 92, 2019 DPIC Report, at 2.

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.[91] Moreover, the only northeastern state that still has a death penalty law on its books – Pennsylvania – has a moratorium on executions.[92] 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.[93]

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.

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[91] *Id.*

[92] *Id.* at 3.

[93] *Id.* at 6.

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 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. Middlebrooks's death sentence and modify it to life. *See Ray v. State*, 67 S.W. 553, 558 (Tenn. 1902) (modifying death sentence to life); *Poe v. State*, 78 Tenn. 673, 685 (1882) (same).

Mr. Middlebrooks respectfully request that this Court look to the Washington Supreme Court's recent ruling that the death penalty in that state was unconstitutional. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The Court's holding was based on its conclusion, as urged here, that the

"arbitrary and race based imposition of the death penalty cannot withstand the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 635 (quoting *Trop*, 356 U.S. at 101). The Washington court placed emphasis on the same considerations articulated by the Supreme Court in *Atkins* and *Roper*:

> When considering a challenge under article I, section 14, we look to contemporary standards and experience in other states. We recognize local, national, and international trends that disfavor capital punishment more broadly. When the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks "fundamental fairness" and thus violates article I, section 14.

Id. at 635-36 (citations omitted).

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

V. Request for Certificate of Commutation.

Mr. Middlebrooks requests this Court 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.

Workman, 22 S.W. 3d at 817.

Mr. Middlebrooks was sentenced to death nearly twenty-five years ago. As outlined in the section of this reply on severe mental illness, mental health experts' understanding of mental illness is far from complete. What we do now know about Mr. Middlebrooks, however, is that he suffers from a well-documented constellation of serious, debilitating psychiatric and medical diseases. He has a seizure disorder that is poorly controlled with medication – he falls to the ground, convulses violently, and must wear a helmet to protect his head. When he does not have his helmet, correctional officers and other inmates have to hold his head until the seizure finally subsides. He has experienced as many as six seizures in one day, even though he takes anti-seizure medication. He hears voices and sees a shadow figure. He has both neurological and neuropsychological impairments that impact his daily functioning. His neurocognitive functioning has declined over the course of the past fifteen years. He has a progressive form of dementia (Major Neurocognitive Disorder). We also know that Mr. Middlebrooks suffers chronic post-traumatic stress disorder – the result of his exposure to unimaginable childhood sexual torture, violence, and neglect.

The jury that convicted Mr. Middlebrooks of murder and sentenced him to death wasn't told about Mr. Middlebrooks' brain damage, neurocognitive dysfunction, seizure disorder, or the extent of his mental illness resulting from a childhood of traumatic physical, sexual, and emotional abuse. This is because counsel for Mr. Middlebrooks failed to undertake an investigation of Donald Middlebrooks' psychiatric and neurological impairments.

What the jury heard, instead, was Middlebrooks' own expert incorrectly focusing on a personality disorder instead of mental illness and labeling him a chronic liar. *Middlebrooks*, 619 F.3d at 533. His own expert witness testified that he had never seen Mr. Middlebrooks express any remorse – and the State's experts testified they could make no finding of mental illness. The only aggravating circumstance found by the jury was that the murder was especially heinous, atrocious, and cruel. Yet, due to the poor presentation of Mr. Middlebrooks mental illness, they were left to determine that the brutality of his crime outweighed the scant mitigation that was presented. As explained above, it was Mr. Middlebrooks' mental illness that completely undermined the reliability of the jury's assessment of his characteristics. In such case, the United States Supreme Court has determined that categorical exemption from the death penalty is required.

Mr. Middlebrooks requests this court certify to the Honorable Bill Lee, Governor of the State of Tennessee, that there are extenuating circumstances attending this case and the punishment of death ought to be commuted.

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