**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT NASHVILLE**

**FEBRUARY SESSION, 2000**

**FILED**

**March 17, 2000**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| **STATE OF TENNESSEE,** | * | |
| | * | **No. M1999-00191-CCA-R3-DD** |
| **Appellee,** | * | |
| | * | **DAVIDSON COUNTY** |
| **vs.** | * | |
| | * | **Hon. J. Randall Wyatt, Jr., Judge** |
| **JOHN DAVID TERRY,** | * | |
| | * | **(Premeditated First Degree** |
| **Appellant.** | * | **Murder)** |

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OPINION FILED: _____

AFFIRMED

**David G. Hayes,** Judge

## OPINION

The appellant, John David Terry, appeals as of right, his punishment of death by electrocution. In 1989, the appellant was convicted by a Davidson County jury of the premeditated murder of James Matheney and was sentenced to death. At the motion for new trial, the trial court affirmed the appellant's conviction but, finding that it had erroneously charged an invalid aggravating circumstance, granted a new sentencing hearing.[1] The State appealed this decision and our supreme court affirmed the action of the trial court.[2] See State v. Terry, 813 S.W.2d 420 (Tenn. 1991). The appellant's case was remanded to the Criminal Court of Davidson County for re-sentencing. At the conclusion of the re-sentencing hearing in August 1997, the jury found the presence of two aggravating circumstances, *i.e.*, (1) that the murder was especially heinous, atrocious or cruel, Tenn. Code Ann. § 39-2-203(i)(5) (1982) (*repealed* 1989), and (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution, Tenn. Code Ann. § 39-2-203(i)(6).[3] The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death by electrocution. The trial court approved the sentencing verdict. The appellant appeals presenting for our review the following issues:

> I. Whether the heinous, atrocious, cruel aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(5), is unconstitutionally vague;

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[1]Specifically, the trial court found that it had erroneously instructed the jury upon the (i)(7) aggravator, that the murder was committed while the defendant was engaged in committing a larceny. See Tenn. Code Ann. § 39-2-203(i)(7).

[2]The supreme court's review was limited to the application of the felony murder aggravating circumstance. The appellant did not cross-appeal his conviction for first degree murder.

[3]Prior to the re-sentencing hearing, the State filed an interlocutory appeal with this court to determine whether the State was permitted to assert a new aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(6) upon remand. Under the authority of State v. Harris, 919 S.W.2d 323 (Tenn. 1996), this court permitted the State to introduce proof of any aggravating circumstance which is otherwise legally valid. See State v. John David Terry, No. 01C01-9201-CR-00304 (Tenn. Crim. App. at Nashville, June 28, 1995), as modified, (Tenn. Crim. App. at Nashville, July 26, 1996).

II. Whether the evidence is sufficient to support application of the heinous, atrocious, cruel aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(5);

III. Whether Tenn. Code Ann. § 39-2-203(i)(6), murder perpetrated to avoid prosecution, is unconstitutionally vague;

IV. Whether the evidence is sufficient to support application of aggravating circumstance Tenn. Code Ann. § 39-2-203(i)(6), that the murder was perpetrated to avoid prosecution;

V. Whether prosecutorial misconduct during closing argument affected the verdict to the prejudice of the appellant;

VI. Whether Tennessee's death penalty statutes, Tenn. Code Ann. § 39-2-203 and § 39-2-205 are constitutional; and

VII. Whether the jury imposed an arbitrary and disproportionate sentence.

After review, we find no error of law requiring reversal. Accordingly, we affirm the jury's imposition of the sentence of death in this case.

**Factual Background**

The trial court's factual findings within its memorandum opinion and as adopted by our supreme court are summarized as follows:

> The [appellant], John David Terry, was the pastor of the Emmanuel Church of Christ Oneness Pentecostal in Nashville, Tennessee. Early in 1987, the [appellant] began misappropriating funds that belonged to the church and developed an elaborate plan to adopt a totally new identity and disappear. He used the stolen funds to purchase a motorcycle and hoarded a substantial amount of cash. He also took out several insurance policies on his life, obtained identification under the assumed name of Jerry Milom [sic], and purchased the motorcycle using that identity.
>
> On June 15, 1987, the [appellant] planned a fishing trip with the church handyman, James Matheney. Matheney and the [appellant] went to the church, where the [appellant] killed Matheney by a pistol shot to the head. In an effort to hide Matheney's identity and to convince the authorities that Matheney's body was in fact the body of the [appellant], the[ appellant] severed the head and one forearm of the victim, and removed skin containing tattoos from the victim's upper arms. The [appellant] placed his own belt on the body, left his shoes nearby, and set fire to the church, hoping that authorities would believe that the charred or destroyed body was that of the [appellant] himself.

> Having set fire to the church, the [appellant], now with the assumed identity of Jerry Milom [sic], mounted his motorcycle and rode to Memphis. He carried the victim's head with him, and apparently sank it in Kentucky Lake on his way to Memphis. The head was never recovered.
>
> The [appellant's] hope that the authorities would believe that he was dead, and that Matheney was the killer, went awry when the fire department responded quickly to the church fire. Through happenstance, the first water placed through a second story window fell on a wall just above the body and, therefore, preserved a sufficient amount of the body so that it was positively identified as the victim, James Matheney, rather than the [appellant]. Upon arrival in Memphis, the [appellant] realized that his elaborate scheme had been discovered. He returned to Nashville, hired an attorney, and surrendered to authorities.
>
> With respect to the misappropriation of church funds, the record shows that in March of 1987, the [appellant,] as agent for the church, received a check for $50,000.00 made out to the church, representing the proceeds from the sale of church property. Through a series of transactions, the [appellant] took a substantial amount of this money for his own use. Five thousand dollars ($5,000) was used by the [appellant] for the purchase of the motorcycle to facilitate his "disappearance." Fifteen thousand dollars ($15,000) was taken in cash by the {appellant], and the remainder was left in the [appellant's] personal joint checking account, which he shared with his wife. While the State and the [appellant] both interpret the facts somewhat differently, the trial judge found in his memorandum opinion that the last transaction which might be interpreted as a misappropriation of church funds, was the [appellant's] transfer of two thousand dollars ($2,000) from a church account to his joint account on June 11, 1987, four days before the murder.

**Proof at the August 1997 Re-sentencing Hearing**

Metro Police Detective Sergeant Robert Moore testified that, on June 16, 1987, he was paged at 3:00 am and informed that a body had been found in the Emmanuel Church of Christ Oneness Pentecostal on Woodland Street in Nashville. When Detective Moore arrived at the scene, he observed that the church was "burnt and obviously still smoking." Another detective at the scene informed him that there was a body in the upper attic portion of the church, but the body was covered up. After responding to the fire, the officers were advised by the firefighters that a second story window was the best place to extinguish the fire and,

accordingly, they had directed the water into that window. Unfortunate for the appellant, below this window was the body of the victim, James Matheney. The water that went through the window hit the wall and sprayed the body. The fire inspector determined that had the fire burned an additional six minutes the body would had been destroyed and establishing the identity of the victim would have been impossible. A candle wrapped in cloth found outside the rear doorway of the church was determined to be the igniter of the fire. Additionally, the odor of gasoline permeated the air of the church. Gas cans were located inside the front door.

When officials were able to reach the body, they discovered that the body had been rolled in carpet and buried under a pile of lumber, only the victim's foot was exposed. After the carpet was rolled away, they observed a decapitated body clad only in white jockey shorts and a black leather belt with the initial T on the buckle. The right arm of the victim was also severed. A pair of shoes was sitting near the feet of the body. The head was very neatly cut all the way across any flesh area. "It was just as smooth as if a steak were to be fileted." The right arm was cut just below the elbow. "It also was obvious that it was cut very straight, very neat, until it got to the bone portion and it was sawing and grains going across the bone. . . ." "Other than that, the flesh had been removed from both shoulders. That was not extremely deep." Upon the discovery of the state of the corpse, law enforcement officers began to question the identity of the victim. As a beginning assumption, officials believed the body to be that of the appellant, the pastor of the church.

Through minimal investigation, officers learned that the appellant had planned a fishing trip with James Matheney, the church's handyman. Further investigation revealed that Mr. Matheney had recently been admitted to General Hospital and the officers were able to obtain x-rays of his body. Through this

comparison, the body was determined to be that of James Matheney.

After a publicly announced search, law enforcement officials located the appellant's blue Hyundai, three hundred feet from the boarding house where James Matheney lived. Inside the vehicle, officers discovered a beer bottle, a blue tackle box, and a rod and reel. Teresa Matheney Seagraves, the former wife of the victim, testified that she had given the tackle box and fishing rod to James Matheney. There were no fingerprints from the appellant found on the vehicle. Inside the boarding house where Matheney resided, other occupants discovered several pieces of identification belonging to the appellant.

On the day after the murder, the appellant's wife and his sons each discovered a one hundred dollar bill placed in each one of their wallets. The appellant's wife, Brenda Terry, informed law enforcement officers that before the offense, "the [appellant's] desk had been neatly cleaned, that [his] business seemed to have change, . . . he had switched to central heat [in the house], [he] had did some things to improve the house. . . . these envelopes were left just simply to say, pay the water bill, pay the house bill . . . ."

When the appellant was finally apprehended, he had an "Ace" bandage around his right leg and "on the pad of his hand" he had an abrasion. The appellant exhibited no emotion or remorse over his actions. The man arrested for the murder of James Matheney looked strikingly different from the man the officers had seen in pictures. The appellant in the pictures had dark hair and wore glasses. The appellant, at the time of his arrest had shaved his head and he had a dark tan. His eyebrows had been singed or cut. Soon thereafter, a search of the appellant's home revealed three toupees and a plastic bag containing $10,400.

The investigation also revealed that the appellant had gathered documents sufficient to establish an alias identity, that of Jerry Milam. The deceased, Jerry Milam, had a similar birth date to the appellant's.[4] Milam's name was selected at random from the obituary section of a local newspaper. The appellant proceeded to obtain a Tennessee birth certificate, a social security card, a certificate of baptism, and an application for a Tennessee driver's license all in the name of Jerry Milam. The driver's license and social security card were obtained in April 1987. Additionally, the appellant purchased a motorcycle, obtained a private mail service, and rented a storage unit all in the name of Jerry Milam. The unit was leased May 5, 1987, over a month before the murder. The appellant also applied for additional life insurance on April 7, 1987.

The proof established that the victim, James Matheney, and the appellant were approximately the same size. Matheney often wore the appellant's clothing and used the appellant's Sam's Wholesale Club card. Teresa Matheney Seagraves testified that she and the victim were married in 1981, had one child, and were divorced in 1986.[5] The cause of their marital problems was the victim's excessive use of alcohol. Although divorced, the couple still loved each other very much and continued to spend time with one another. Indeed, in April 1997, the victim told Ms. Seagraves of his desire to be a father to their son and a husband to her. He further informed Ms. Seagraves that David Terry was the person to call for advice and counseling because he was their pastor. Soon thereafter, the victim moved back in with his wife and son. After learning of this living arrangement, the appellant voiced his disapproval to the couple because they were not married. The appellant arranged for an apartment for the victim and paid the rent for six weeks.

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[4]Jerry Milam's brother, William Michael Milam, testified that his brother drowned in a boating accident in Savannah, Georgia, in 1951.

[5]Ms. Seagraves also testified that, prior to her husband's murder, she attended the Emmanuel Church of Christ and that the appellant was her pastor.

Additionally, the appellant hired the unemployed victim to work as a handyman at the church and promised to pay the victim ten dollars an hour. The church already had a handyman at the time the victim was hired by the appellant. Ms. Seagraves further testified that, after the appellant's arrest for the murder of her ex-husband, she visited him in jail. She explained that she asked the appellant "why he did this;" the appellant "just looked at [her] and replied, "You'll find out in Court like everybody else will." At no time did the appellant express any concern to her over the loss of her ex-husband.

Dr. Charles Harlan performed an autopsy on the body of the deceased. The autopsy examination . . . showed the presence of the beheaded torso of a white male, who was identified on the basis of x-ray identification as being that of James . . . Matheney. . . . The examination of the body . . . showed that there was also amputation of the . . . right forearm. . . . There was also an excision of skin from both the left and right shoulders and the body exhibited signs of postmortem burning. . . . The top portion of the skin down to the fat had been removed from a patch on the left shoulder and a patch on the right shoulder. Each patch is about the size of my hand."

The victim had tattoos on those portions of his body. Dr. Harlan concluded that the amputation, decapitation, and skinning of the deceased's person all occurred after death. With regard to both the decapitation and amputation, Dr. Harlan testified that

> [t]he soft tissues were removed with some sharp instrument consistent with a knife or similar type object. The bones were cut with a sharp saw and they were cut in a regular, consistent pattern, indicating that whoever used the saw on this particular type of bone was familiar with this particular procedure; namely, of cutting or sawing through bone.

Dr. Harlan opined that "the cause of death is not present in the dismembered body which was present at the location in the attic loft. The cause of death is located somewhere within the head . . . ."

As mitigation evidence, the appellant presented the prior testimony at the 1989 trial of his father, John Calvin Terry, who died in 1995. John Calvin Terry was appointed to the Board of Elders of the Emmanuel Church of Christ in 1939. In

1975, Mr. Terry became Overseer of the Assemblies of the Emmanuel Churches of Christ. Mr. Terry's testimony related that the appellant was a caring and unselfish person who was devoted to his family and the ministry.

Rita Kay Kemp and Sonja Jeanine Kyle Webb, both members of the Emmanuel Church of Christ, testified on behalf of the appellant. Both explained that the appellant had provided support and comfort to them and their families during times of family crisis and illness. The appellant's brother, Fred Russell Terry, testified that they had "a good family" influenced greatly by religion. Fred Terry stated that the most important things in his brother's life were "his church and his family." Shirley Terry, the appellant's sister-in-law, confirmed that she believed the appellant to be "always very loving, very giving, sacrificing himself and his family for his work that he was doing at that time." However, on a few occasions prior to the murder, Mrs. Terry recollected that the appellant appeared to be troubled about something. Delores Gwen Terry, the appellant's niece, testified that the appellant was "a very loving father to his children . . . very loving to his family, to his parents, his brother and sister and his nieces and nephews."

Frank Bainbridge, a professional real estate appraiser and an ordained deacon in the Catholic Church, explained that he has been involved in the prison ministry for twenty-one years. Mr. Bainbridge stated that he met the appellant ". . . at Riverbend . . . probably about early 1990. . ." during non-denominational Christian services. Mr. Bainbridge testified that "[the appellant] was an immediate leader in the services. . . . . I would ask the men to give me their ideas on the scripture we were reading. . . . John was always the leader." A number of additional witnesses, including the appellant's daughter and Peggy Allen Venegas, an ordained Emmanuel Church of Christ minister, testified as to the appellant's good character

and his value as a minister. Various employees at the Riverbend Maximum Security Institution related that the appellant's behavior as an inmate was "satisfactory."

The appellant testified that, growing up, he "had a very close-knit family." In 1967, he began helping his father in the ministry. In 1969, he began serving as Assistant Minister at the Emmanuel Church of Christ. The appellant's first marriage resulted in three children. After the couple divorced, the appellant retained custody of his sons. He remarried in 1972 to his current wife, Betty. The couple had a daughter in 1974. The appellant described his family as close and very loving. Notwithstanding, the appellant conceded that after his arrest he lost his relationship with his sons, but still remains a close relationship with his wife and daughter. With exception to this conviction, the appellant had never been arrested and has no other criminal history. Since his incarceration, the appellant "has been involved with the Data Processing Plant," where he completes data entry work for various state offices. He stated that he works "five hours a day . . . five days a week." The appellant is also involved with "as many . . . Christian worship services as [he] can," in addition to counseling other inmates.

The appellant testified that, in 1987, he was acting as Assistant to the Bishop Overseer. His goal at that time was to succeed the Bishop Overseer upon his retirement at age sixty-five. However, the Bishop Overseer declined to retire at his sixty-fifth birthday. At this point, the appellant testified that

> [he] was struggling with . . .[himself.] . . . [I]t was like a war going on inside me. There was numerous things I experienced over the past months, several members dying. . . . I was suffering with overweight problems. I was suffering with just depression, periods of uncontrollable crying, weeping. I was battling within myself and felt like that . . . everything about me was . . . falling apart, that I was a failure as a minister. I was a failure as a husband. I was just a failure as a human being. . . . I got to the place that I didn't want to live. I just wanted to die. . . . Numerous times I would put a gun to my head, I'd put a gun in my mouth. I never could pull the trigger. . . .I just wanted to run off the face of the earth. I just felt that there was no use

> for my life. that my family would be . . . that everybody that I knew would be better off without me. I just wanted to start out somewhere and never stop. I just was so out of control in my life.

The appellant related that he envisioned

> get[ting] on a motorcycle. I had read some books [Soldier of Fortune] that I had ordered . . . that told you how to get a new identity. . . . I had . . . the different scenarios was that I would stage some kind of hoax or some kind of robbery and have someone to think that's originally what Mr. Matheney. . . that he would be one that would come in and find me or find blood or find some kind of robbery attempt. . . .I knew that I was going to kill myself, disappear. . . .I had to get away.

The appellant testified that he met the victim in April 1987. He admitted that he had thoughts about killing Mr. Matheney before the date of the incident. The appellant testified:"It's the worst thing that I've ever done. I'm so sorry. I hurt and damaged so many people's lives. I've affected a family that I had no right. . . there was no reason that I had a right to do what I did. . . . And I'm sorry to this day for it."

On cross-examination, the appellant stated that in addition to his position as a pastor, he held various part-time jobs including salesman, meat cutter, and realtor. He admitted searching the obituaries in April to obtain an identity to assume. The appellant stated that shortly before this incident, he doubled the benefits on his life insurance policy because he was contemplating suicide and he wanted to provide for his wife. The appellant conceded that he has never attempted to make any restitution to the Emmanuel Church of Christ.

Dr. Robert Begtrup, a retired psychiatrist, testified that he evaluated the appellant in 1988, specifically to determine the appellant's competency to stand trial and whether he was insane at the time of the offense. As a result of his examination of the appellant, Dr. Begtrup determined that the appellant did not meet the legal definition of insanity. Notwithstanding this conclusion, Dr. Begtrup did determine that the appellant was suffering from a mental illness, *i.e.*, "major depression." To support this diagnosis, Dr. Begtrup relied upon the appellant's

reports of restless sleeping, frequent thoughts of suicide, consistent thoughts of being a failure, preoccupation with guilt, and sexual ineptitude. He reported that the demise of the appellant's healthy mental state began with the death of his mother, the appellant's confidante. Dr. Begtrup reported that the appellant had told him "that as he was dealing with the victim, he kept seeing his own face there, that his victim became himself." Despite this assertion by the appellant, Dr. Begtrup rejected any theory that the appellant was "psychotic, hallucinating."

The appellant's wife, Brenda Gail Terry, testified that her husband was a very loving, caring, and generous father and husband. Notwithstanding, she related that during the years between 1984 and 1987 she noticed that the appellant was experiencing severe mood swings. She explained that "[h]is sleeping habits were terrible. His eating habits were terrible. He couldn't sleep well at all, had gained quite a bit of weight due to a change in his eating habits . . . ." After the murder of Mr. Matheney, she related that when her husband first returned home, he was "not like himself at all. He had shaved his head . . . had this glassy look in his eye. He was very agitated, very anxious. . . ." Finally, Mrs. Terry pleaded that the appellant's life should be spared because "[h]e is an encouragement to others. . . . He is a good person. He is a loving, caring person that something tragic has happened to. . . . He would help anybody. And I believe that there are people that he has been able to help since he's been incarcerated. . . ."

The defense presented the testimony of Michael Anthony Whitsey. Mr. Whitsey met the appellant while incarcerated at the Criminal Justice Center. He stated that he had been in "trouble with the law" since he was a teenager; indeed, "[he] lived a life of crime." One evening, the appellant asked Mr. Whitsey if he could pray for me; "[a]nd when he did, we kneeled down and we prayed. And I got up

from that prayer a changed man." Shortly after his release from prison, Mr. Whitsey began operating his own business and has since started five prison ministries.

In rebuttal, the State recalled Sergeant Robert Moore to the stand. Sergeant Moore clarified the appellant's testimony that he assisted the police in locating the head and arm of the victim. Sergeant Moore stated that this information was only received fifteen months after the incident occurred, ten days prior to the commencement of trial. Additionally, the information provided was of little significance because of the vast area of the region indicated by the appellant. The defense declined the State's request that the appellant provide more detail as to the exact location of the missing body parts.

At the close of the proof, the jury was instructed on the following statutory aggravating factors:

> (1) The murder was especially heinous, atrocious, or cruel in that it involved depravity of mind.
>
> (2) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant.

The jury was also instructed that it should consider the following mitigating circumstances.

> (1) The defendant has no significant history of prior criminal activity.
>
> (2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) Prior to the commission of the murder, the defendant had been a positive and contributing member of the community, as a caring pastor, husband, and parent.
>
> (4) The defendant has accepted responsibility for his crime, and has exhibited remorse.
>
> (5) For the last ten (10) years, the defendant has exhibited a serious and consistent effort to rehabilitate himself, by functioning at a high level within the limits of his confinement.

(6) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affect[ed] his judgment.

(7) Any aspect of the defendant's character or record or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

Following submission of the instructions, the jury retired to consider their verdict. After approximately five hours of deliberations, the jury found that the State had proven the two submitted aggravating circumstances beyond a reasonable doubt and that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. In accordance with their verdict, the jury sentenced the appellant to death by electrocution for the murder of James Matheney.

## I. Imposition of Aggravator (i)(5)

The appellant initially asserts that "[t]he statutory aggravating circumstance that '[t]he murder was especially heinous, atrocious, or cruel in that it involved depravity of mind,' Tenn. Code Ann.§ 39-2-203(i)(5)(*repealed* 1989), is unconstitutionally vague." Relying upon decisions of the Sixth Circuit Court of Appeals,[6] he contends that this aggravating circumstance fails to narrow the class of persons eligible for the death penalty. Moreover, he argues, notwithstanding the constitutionality of this aggravating circumstance, that the post-mortem acts of severing the head and forearm of the corpse do not support an inference that the murder itself involved "depravity of mind."

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[6] See Coe v. Bell, 161 F.3d 320, 332-333 (6th Cir. 1998), cert. denied, – U.S. –, 120 S.Ct. 110 (1999)(reaffirming Houston v. Dutton and holding that neither the individual definitions for heinous, atrocious, and cruel nor the torture or depravity modifier cure the vagueness problem); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995), cert. denied, 516 U.S. 905, 116 S.Ct. 272 (1995) (holding that Tennessee's "especially heinous atrocious or cruel" aggravating circumstance is unconstitutionally vague).

### A. Constitutionality of Pre-1989 (i)(5) Aggravator

Our supreme court has consistently upheld the constitutional validity of the pre-1989 (i)(5) aggravating circumstance.[7] See, e.g., State v. Bondurant, 4 S.W.3d 662, — (Tenn. 1999); Strouth v. State, 999 S.W.2d 759, 765 (Tenn. 1999); State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999); State v. Blanton, 975 S.W.2d 269, 280 (Tenn. 1998), cert. denied, – U.S. –, 119 S.Ct. 1118 (1999); State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991); State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988), cert. denied, 488 U.S. 909, 109 S.Ct. 248 (1988). Specifically, our supreme court has held that the "especially heinous, atrocious, and cruel" language in Tennessee's statute does not stand alone, but rather, is limited by the phrase "in that it involved torture or depravity of mind," thus satisfying the constitutional mandate of narrowing. See Middlebrooks, 995 S.W.2d at 556. The appellant additionally contends that the vagueness of this aggravating circumstance is not cured by defining "depravity of mind" as moral corruption or a wicked or perverse act; our supreme court has likewise rejected this argument. See generally State v. Cazes, 875 S.W.2d 253 (Tenn.1994), cert. denied, 513 U.S. 1086, 115 S.Ct. 743 (1995); Black, 815 S.W.2d at 181. This court is not bound by the decisions of the federal district and circuit courts of appeal. We are bound by the decisions of the Tennessee Supreme Court and, for such reason, we decline the appellant's invitation to disregard its prior rulings. This issue is without merit.

### B. Sufficiency of the Evidence

At the time the murder was committed in the present case, Tenn Code Ann. § 39-2-203(i)(5) provided that an aggravating circumstance existed if the murder "was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."

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[7]The trial court properly instructed under the pre-1989 version of (i)(5), involving depravity of mind, which was in effect at the time of the offense. See Middlebrooks, 995 S.W.2d at 556, footnote 6. In 1989, this provision was amended, replacing the "depravity of mind" language with "serious physical abuse beyond that necessary to produce death." Id.

The appellant contends that the facts in this case fail to support an inference that his state of mind at the time of the murder was "depraved." In support of this assertion, the appellant argues that the evidence establishes that the only motive for the post-mortem dismemberment and burning of the victim's body was to conceal the victim's identity. He contends that the act of concealing the body of a murder victim is not unusual in homicide cases and therefore fails to provide the inference of a "depraved" state of mind at the time of the killing.

"'Torture' is defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." See State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985) (emphasis added). Acts of extended cruelty and violence upon a conscious person necessarily show the depravity of the mind of the murderer.[8] Id. However, in the present case, because there is no dispute that the victim was deceased at the time of the dismemberment, there can be no finding of the element of torture. See State v. Van Tran, 864 S.W.2d 465, 479 (Tenn. 1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1577 (1994). Notwithstanding, "depravity," as a murderer's state of mind, may be proved by or inferred from the defendant's conduct at or near the time of the offense. Indeed, it is the "murderer's state of mind *at the time of the killing*" which must be shown to have been depraved. Williams, 690 S.W.2d at 530 (citation omitted). Our supreme court has determined that, in some circumstances, depravity of mind may be established absent the element of "torture." Williams, 690 S.W.2d at 529.

In State v. Williams, our supreme court explained that "if acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death,

[8]Depravity is defined as "moral corruption; wicked or perverse act." See Williams, 690 S.W.2d at 529.

and must have been of such a nature, that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim." Williams, 690 S.W.2d at 529. Cf. State v. O'Guinn, 709 S.W.2d 561 (Tenn.), cert. denied, 479 U.S. 871, 107 S.Ct. 244 (1986) (a "victim need not have been alive in order to demonstrate the perpetrator's depravity of mind if the acts occurred so close to the time of the victim's death that the inference can be fairly drawn that the murderer possessed that depravity of mind at the time of the actual killing"). Thus, if "the inference cannot be fairly drawn that the murderer possessed the depravity of mind at the time the fatal blows were inflicted, then it cannot be said that the murder itself involved depravity of mind." Id. In other words, the mutilation must occur sufficiently proximate in time to the killing in order for the murder itself to have been committed with depravity of mind. In Williams, the court held that where circumstances of the disposal of the victim's body, including use of an explosive, dogs, and the burning of the house with the body in it, occurred nearly forty-eight hours after the homicide, the interval of time between death and mutilation was so great that "the inference cannot be fairly drawn that the murderer possessed the depravity of mind at the time the fatal blows were inflicted . . . it cannot be said that the murder, itself, involved depravity of mind." Id. at 531.

In the present case, the medical examiner concluded that the fatal blow causing the death of the victim occurred to the head. The severed head was never recovered. However, the appellant claimed that he shot the victim in the head. He then left the murder scene, returning one to two hours later. It was at this point that the appellant severed the victim's head and forearm from the corpse. The appellant admitted that the hacksaw and the knife used to perform this gruesome task were already at the church. It is clear from the appellant's testimony that he had hand-picked James Matheney as his victim because the victim and the appellant shared similar physical characteristics. He used his position as the victim's pastor to

influence the victim's living arrangements and to gain the victim's trust and confidence. This was necessary to complete his plan to simulate his own death. Thus, as distinguished from merely covering up the murder as in Williams, the dismemberment was a part of the murder necessary to effectuate the appellant's disappearance. Indeed, the only parts of the victim's body removed were those which readily identified the identity of James Matheney, *i.e.*, his head and his tattoos. The victim's head and forearm were then disposed of in Kentucky Lake.

It is without doubt that postmortem dismemberment of a corpse, when the perpetrator intends that the harm be done specifically to a corpse, is sufficient by itself to establish depravity of mind if the mutilation occurred proximate in time to the murder. See Williams 690 S.W.2d at 530. We construe the phrase "proximate in time to the murder" to encompass any post-mortem mutilation that can be considered incident to the murder and not considered separate, distinct or independent from it, that is, whether the mutilation was planned or merely an afterthought of the perpetrator to conceal the crime. Under these guidelines, we conclude that the evidence is overwhelming that the appellant's gruesome acts to the victim's corpse were not separate and distinct from the actual act causing death. Rather, the mutilation was part of the appellant's continuing plan to obscure the identity of the victim. Moreover, we find that the manner of the post-death mutilation in the present case is evidence of the absence of emotions ordinarily associated with murder. This void of human emotion is evidence from which a rational jury could find a "wicked or perverse act." Accordingly, considering the appellant's treatment of the victim's corpse in addition to his cold calculated planning of the entire murderous scheme, as evidenced by his selection of this particular victim on the basis of specific characteristics, demonstrates depravity of mind at the time of the murder. In determining the sufficiency of the evidence necessary to uphold a statutory aggravating circumstance, this court, after reviewing the evidence in the light most

favorable to the State, concludes that any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. See State v. Nesbit, 978 S.W.2d 872, 887 (Tenn. 1998), cert. denied, – U.S.–, 119 S.Ct. 1359 (1999) (citing Cazes, 875 S.W.2d at 253). Applying this standard, we conclude that the proof is sufficient to support a jury finding that the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind. This issue is without merit.

**II. Imposition of Aggravator (i) (6)**

Aggravating circumstance (i)(6) permits enhancement when "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution. . . ." Tenn. Code Ann. § 39-2-203(i)(6). At the sentencing hearing, the State advanced the theory that the murder was committed as part of the appellant's plan to avoid arrest or prosecution for his embezzlement of church funds. In this appeal, the appellant contends that the manner in which aggravator (i)(6) was applied in the present case was unconstitutionally overbroad. Specifically, he asserts that the (i)(6) aggravator has never been applied to a case that did not involve the murder of either victims or witnesses of another crime or a police officer attempting to apprehend a defendant. Consequently, he argues that the evidence is insufficient to support a conclusion that the murder was committed to avoid arrest or prosecution for the embezzlement of church funds.[9]

Tenn. Code Ann. § 39-2-203(i)(6) provides that imposition of the death penalty may be based upon a finding that "[t]he murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another." The appellant, in arguing the constitutionality of the (i)(6) aggravator,

[9]The appellant refers to our supreme court's previous ruling in this matter that there was an insufficient nexus between the crime of larceny and the murder to support of a finding that the murder had been committed while the defendant was engaged in committing larceny. See Terry, 813 S.W.2d at 423-424 (holding that (i)(7) aggravator not supported by sufficient proof). The appellant therefore contends that James Matheney was neither a witness to nor a victim of the larceny, nor was he a police officer.

urges this court to limit its application to victims of a crime or first hand witnesses or to arrests or prosecutions that are underway. As support for his argument, the appellant cites to our supreme court's previous opinion in this matter, see Terry, 813 S.W.2d at 423, in which he states the court quoted a David Raybin article providing:

> Aggravating circumstances six, seven, and eight deal with defendants who commit murder during the course of other crimes or while the defendants are in custody or escaping from custody.[10]

The appellant's reliance on Terry is misplaced. First, we note that the Terry court was concerned with aggravating circumstance (i)(7), murder perpetrated during the course of a felony, and not the (i)(6) factor, murder perpetrated to avoid arrest or prosecution of a felony. More importantly, the appellant misrepresents the text of the Terry opinion. Indeed, although the abovementioned "quote" is included in the Terry opinion, our supreme court did not "quote" from the article; rather, the article was quoted by the trial judge in his memorandum granting a new sentencing hearing. See Terry, 813 S.W.2d at 423. There is no indication that the court intended to include this quotation as part of their holding. Moreover, reliance of this article by a trial court for one aggravating circumstance cannot be imputed to our supreme court as its position regarding another aggravating circumstance. Indeed, our supreme court has rejected the appellant's precise argument on a previous occasion, refusing to place limitations on application of this aggravator.[11] See State v. McCormick, 778 S.W.2d 48, 53 (Tenn. 1989), cert. denied, 494 U.S. 1039, 110 S.Ct. 1503 (1990). Cf. State v. Bush, 942 S.W.2d 489, 504 (Tenn.), cert. denied, 522 U.S. 953, 118 S.Ct.

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[10] See Raybin, *New Death Penalty Statute Enacted for Tennessee*, Judicial Newsletter, University of Tennessee College of Law (May 1977).

[11] Specifically, our supreme court wrote in McCormick:

> It is insisted that this section is intended to apply only to the victims of a crime or first-hand witnesses, or to arrests or prosecutions that are underway, as evidenced by the prior cases utilizing this circumstance. We see no reason to limit the plain language of the statute in this manner. The statute is sufficiently clear by its terms to put a person of ordinary intelligence on notice of that homicide which is punishable by death. See Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972); State v. Thomas, 635 S.W.2d 114 (Tenn.1982). It is also sufficiently definite to guide the jury's discretion and to inform them what must be found in order to impose the death sentence. See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988). State v. McCormick, 778 S.W.2d at 53.

376 (1997) (citing State v. Carter, 714 S.W.2d 241, 250 (Tenn. 1986), cert. denied, 479 U.S. 1046, 107 S.Ct. 910 (1987) (court "refused to narrow the application of the circumstance to only those killings which are solely or predominately motivated by a desire to avoid arrest or prosecution")). Accordingly, we decline the appellant's invitation to place narrow limitations on the application of the (i)(6) aggravator.

The Tennessee Supreme Court has held that circumstance (i)(6) may be established by proof that at least one motive for the killing was prevention of apprehension or avoidance of prosecution or arrest.[12] See State v. Pike, 978 S.W.2d 904, 918 (Tenn. 1998), cert. denied, – U.S. –, 119 S.Ct. 2025 (1999); State v. Hall, 976 S.W.2d 121, 133 (Tenn. 1998), cert. denied, – U.S. –, 119 S.Ct. 1501 (1999); Bush, 942 S.W.2d at 504; State v. Smith, 868 S.W.2d 561, 580-81 (Tenn.1993), cert. denied, 513 U.S. 960, 115 S.Ct. 417 (1994); Carter, 714 S.W.2d at 250 (avoidance of arrest need not be sole motive for murder). At the re-sentencing hearing, in support of the (i)(6) aggravator, the State relied upon the overwhelming evidence of the appellant's embezzlement of funds from the Emmanuel Church of Christ during the period between 1984 and 1987.[13] The appellant's practice of "misappropriating" monies from the church in combination with an alleged "mid-life crisis" led to the appellant's desire to assume a new identity and begin a new life. Over several months, the appellant conducted extensive research in preparation of assuming his new identity, he purchased additional life insurance, and he obtained certain legal documents to establish a new identity. The appellant undertook extensive measures in the murder of James Matheney to make it appear that it was the appellant who was the victim and Matheney, the murderer. Based upon this evidence, the State theorized in its closing argument:

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[12]Our supreme court, in State v. Bush, conceded that aggravator (i)(6) does not apply when the only theory advanced by the State is that the victim was killed to prevent the defendant from being arrested or prosecuted for the killing. See Bush, 942 S.W.2d at 504.

[13]From March 1987 to June 1987, the appellant misappropriated approximately $33,000 from church funds.

> He's planning to leave because he's realized he stole the money, he's going to take out a big amount to plan his new life. But he has to leave behind the old David Terry so that he can't be found. So he plans the plan that you've heard about. He plans to murder James Matheney.
>
> . . .
>
> The murder was absolutely committed for no other reason other than for Mr. Terry to get away, to get away from the church and start a new life, because he'd been stealing. And he knew that he'd eventually get caught and would be prosecuted.

From this proof, the jury could have reasonably concluded that one of the motives of the murder of James Matheney was to effectuate the appellant's disappearance enabling him to avoid investigation, arrest, and prosecution resulting from his embezzlement of church funds. Thus, we conclude that any rational trier of fact could have found the existence of this aggravating circumstance beyond a reasonable doubt. See Nesbit, 978 S.W.2d at 887. This issue is without merit.

**III. Prosecutorial Misconduct**

In his next argument, the appellant contends that the State violated his right to a fair trial by arguing non-statutory aggravating circumstances to the jury in its closing argument. Specifically, the appellant asserts that the prosecutor "repeatedly urged the jury," through both oral argument and written charts, to compare the non-statutory aggravating factors of "A. Extreme premeditation; B. Innocent victim; C. Brutality of murder; D. Violated private trust; E. Burning a church; F. Concealment of crime" with the mitigating factors of "family man, good deeds as minister, good prison record, tried to help find body parts, acceptance of responsibility, remorse, depression caused it." In support of his argument, the appellant avers that "Tennessee has long adhered to the rule that evidence that does not go to proof of aggravating circumstances or rebuttal of mitigating circumstances is irrelevant and creates a 'substantial risk that the death penalty will be imposed in an arbitrary or capricious manner . . . ." Appellant's Brief at 95 (citing Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979)).

The portion of the prosecutor's argument asserting these factors was prefaced by the following:

> . . .Now, when you analyze and balance . . . these two Aggravating Factors, if you decide that one of them has been proven beyond a reasonable doubt, then you have to balance them against anything favorable to the defendant that's been introduced. They're called Mitigating Factors. And how do you balance them?
>
> Well, there are murders and there are murders. . . . Every case is different. Every case depends on its facts. So it's the fact . . . that decides how important, how serious, how bad this crime is.
>
> Well, let me show you some of the facts, some of things that I think you should consider in the balance, on how important, how weighty what he did or things that make it bad. These are not Aggravating Factors, but they are evidence that make this crime more serious.

(Emphasis added).

The law in this state is clear, although a defendant may present all relevant mitigation evidence, whether or not the category of mitigation is listed in the statutory scheme, the State may not rely upon nonstatutory aggravating circumstances to support imposition of the death penalty. See Nesbit, 978 S.W.2d at 890 (citing State v. Thompson, 768 S.W.2d 239, 251 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288 (1990); Cozzolino, 584 S.W.2d at 768). Notwithstanding, our supreme court has "recognized that a sentencing jury must be permitted to hear evidence about the *nature and circumstances of the crime* even if the proof is not necessarily related to a statutory aggravating circumstance." Nesbit, 978 S.W.2d at 890 (citing Harris, 919 S.W.2d at 331; State v. Teague, 897 S.W.2d 248, 251 (Tenn. 1995); State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S.Ct. 909 (1995); State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994)). Specifically, evidence carefully limited to allow an "individualized sentencing determination" based upon the defendant's character and the circumstances of the crime is constitutionally required. Nesbit, 978 S.W.2d at 890 (citing Nichols, 877 S.W.2d at 731) (emphasis added). Moreover, "once a capital sentencing jury finds

that a defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment to the offense and the individual defendant." Nesbit, 978 S.W.2d at 890 (citing Nichols, 877 S.W.2d at 731).

It is evident from the context of the argument that the prosecutor was not advancing non-statutory aggravating circumstances to the jury. The prosecutor was clear in his admonition to the jury that there were only two aggravators that the State had to prove. In order to support these aggravators, the prosecutor referred specifically to five unique circumstances of this offense, *i.e.*, extreme premeditation; innocent victim; brutality of murder; violated private trust; burning a church; and concealment of crime, in his rebuttal argument to the jury. Moreover, the trial court instructed the jury that the prosecution was merely arguing its theory of the case and that argument of counsel does not constitute evidence. Accordingly, we find this issue to be without merit.

**IV. Constitutional Challenges to Death Penalty**

The appellant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. The appellant concedes that these issues have been previously rejected by the Tennessee Supreme Court, however, he raises these challenges to preserve them for future appellate review. Specifically, included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution are the following:

> 1. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, specifically, the statutory aggravating circumstances set forth in Tenn. Code Ann. § 39-2-203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, fail to provide such a "meaningful

basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death.[14] This argument has been rejected by our supreme court. See State v. Vann, 976 S.W.2d 93, 117-118 (Tenn. 1998) (Appendix), cert. denied, – U.S. –, 119 S.Ct. 1467 (1999); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

2. The death sentence is imposed capriciously and arbitrarily in that

(a) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has been rejected. See Hines, 919 S.W.2d 573, 582 (Tenn. 1995), cert. denied, 519 U.S. 847, 117 S.Ct. 133 (1996).

(b) The death penalty is imposed in a discriminatory manner based upon economics, race, geography, and gender. This argument has been rejected. See Hines, 919 S.W.2d at 582; State v. Brimmer, 876 S.W.2d 75, 87 (Tenn.), cert. denied, 513 U.S. 1020, 115 S.Ct. 585 (1994); Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 23 (Tenn.), cert. denied, 510 U.S. 996, 114 S.Ct. 561 (1993).

(c) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This argument has been rejected. See State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), cert. denied, 510 U.S. 979, 114 S.Ct. 475 (1993).

(d) The death qualification process skews the make-up of the jury and results in a relatively prosecution prone guilty-prone jury. This argument has been rejected. See State v. Teel, 793 S.W.2d 236, 246 (Tenn.), cert. denied, 498 U.S. 1007, 111 S.Ct. 571 (1990); State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), cert. denied, 470 U.S. 1153, 106 S.Ct. 2261 (1986).

(e) Defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, *i.e.*, the cost of incarceration versus cost of execution, deterrence, method of execution. This argument has been rejected. See Brimmer, 876 S.W.2d at 86-87; Cazes, 875 S.W.2d at 268; Black, 815 S.W.2d at 179.

(f) The jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a non-unanimous verdict. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 22-23.

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[14]We note that factors (i)(2) and (i)(7) do not pertain to this case as they were not relied upon by the State. Thus, any individual claim with respect to these factors is without merit. See, e.g., Hall, 958 S.W.2d at 715; Brimmer, 876 S.W.2d at 87.

(g) Requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland and McKoy v. North Carolina. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Thompson, 768 S.W.2d at 250; State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), superseded by statute as recognized by, State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994).

(h) The jury is not required to make the ultimate determination that death is the appropriate penalty. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(i) The defendant is denied final closing argument in the penalty phase of the trial. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

3. Death by electrocution constitutes cruel and unusual punishment. This argument has been rejected. See Black, 815 S.W.2d at 179; see also Hines, 919 S.W.2d at 582.[15]

4. The reasonable doubt instruction violates due process. This argument has been routinely rejected. See Vann, 976 S.W.2d at 116 (Appendix); Nichols, 877 S.W.2d at 734; Bush, 942 S.W.2d at 504-05.

5. The appellate review process in death penalty cases is constitutionally inadequate in that (1) the reviewing court cannot properly evaluate the proof due to the absence of written findings concerning mitigating circumstances; (2) the information relied upon for comparative review is inadequate and incomplete; (3) the methodology is flawed because the pool of cases is unduly narrow, the determination is entirely subjective, and the review fails to properly function as a safeguard. This argument has been rejected by our supreme court on numerous occasions. See Cazes, 875 S.W.2d at 270-71; State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993); Barber, 753 S.W.2d at 664. Moreover, the supreme court has recently held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." See State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S.Ct. 1536 (1998).

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[15]The United States Supreme Court, acknowledging recent amendments to Section 922.10 of the Florida statutes permitting election between death by electrocution or death by lethal injection, dismissed as moot a grant of certiorari in a capital habeas corpus action to determine whether there is evidence to show that a particular method of execution, *i.e.*, electrocution, violates the Eighth Amendment protection against cruel and unusual punishment. Bryan v. Moore, No. 99-6723 (U.S. Jan. 24, 2000). This ruling implies that the issue now before this court is likewise moot. See Tenn. Code Ann. § 40-23-114(c) (1998 Supp.) (election by capital defendant of death by electrocution or death by lethal injection).

Based upon the above case decisions, the appellant's constitutional challenges to Tennessee's death penalty statutes are rejected.

## V. Proportionality Review

Finally, this court must consider whether the appellant's sentence of death is disproportionate to the penalty imposed in similar cases. See Tenn. Code Ann. § 39-13-206(c)(1)(D). If the imposition of a death sentence in the appealed case is "plainly lacking in circumstances with those in similar cases in which the death penalty has previously been imposed," the sentence of death will be deemed disproportionate. See Bland, 958 S.W.2d at 665. However, just because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence does not *per se* require a finding of disproportionality. Id. at 665. Thus, it is the duty of the appellate court, not to "assure that a sentence less than death was never imposed in a case with similar characteristics," but to "assure that no aberrant death sentence is affirmed." Id.

In conducting our review, we begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997), cert. denied, – U.S.–, 118 S.Ct. 2348 (1998). Second, while there is no mathematical formula or scientific formula involved, this court, in comparing similar cases, should consider (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances, including age, physical and mental conditions, and the victim's treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. See Vann, 976 S.W.2d at 107 (citing Bland, 958 S.W.2d at 667). When reviewing the characteristics of the defendant, we consider (1) the defendant's prior record or

prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of the helplessness of the victim; and (8) the defendant's capacity for rehabilitation. Id.

Applying these factors, we note that the victim, James Matheney, the father of a two year old son, was singled out by the appellant as his victim. His selection was part of the appellant's elaborate plan to fabricate his own death and establish a new life and identity as Jerry Milam. The appellant used his position as the victim's pastor to gain the victim's trust and eventually to carry out his ultimate plan. The cause of death remains unknown except for the appellant's assertion that he shot the victim once in the head. Shortly after the homicide, the appellant, utilizing his training as a butcher, removed the head and forearm from the corpse. He also removed tattoos from the victim's person. The appellant then disrobed the corpse, placed his own belt with personalized buckle on the body, rolled the body in carpeting and, later, burned the church containing the body of the deceased. The appellant disposed of the victim's head and forearm in Kentucky Lake. These body parts were never recovered. All of these actions, again, were committed not to conceal the murder of James Matheney, but to disguise the victim's body to be that of the appellant in order to facilitate his assumption of a new identity.

At the time of the offense, the appellant was pastor of the Emmanuel Church of Christ in Nashville. He was middle-aged and married with four children. During the three years preceding the murder, the appellant had been misappropriating church funds and proceeds from the sale of church property for his own use. Despite this evidence of unlawful behavior, the appellant had no prior criminal convictions and was portrayed as a very loving, generous, and caring man to both his family and

his congregation. The appellant presented evidence that, at the time of the offense, he was suffering from mental/psychiatric disorders. Despite the appellant's assertions of remorse and accepted responsibility for his crime, the record indicates otherwise. Specifically, the proof indicated that his behavior towards the victim's wife after his arrest was less than remorseful. Moreover, his cooperation with authorities occurred six months after his arrest and was minimally helpful. The appellant argues that the unique circumstances of this case, including the fact that no former pastors are on Tennessee's death row, remove him from those class of murderers for whom a sentence of death is appropriate. We find to the contrary; the nature of the crime, his abuse of his position as a pastor to orchestrate his plan upon a trusting and innocent victim, and his callous disregard for human life places him into that class of criminals for whom a sentence of death is appropriate. See Blanton, 975 S.W.2d at 285.

While no two capital cases and no two defendants are alike, we have reviewed the circumstances of the present case with similar first degree murder cases and conclude that the penalty imposed in the case *sub judice* is not disproportionate to the penalty imposed in similar cases. See, e.g.,

> (1) State v. Burns, 979 S.W.2d 276 (Tenn. 1998), cert. denied, – U.S. –, 119 S.Ct. 2402 (1999) (death penalty upheld based on aggravating circumstances (i)(3) and (i)(6) where defendant shot victim several times during a robbery. Defendant presented mitigation proof that his father was a minister and that he had been active in the church. Proof also presented that defendant participated in religious services while in custody.).
>
> (2) State v. Pike, 978 S.W.2d at 904 (imposition of death penalty upheld based on aggravating circumstances (i)(5) and (i)(6) where defendant hand-selected victim prior to murder, lured victim to remote area, bludgeoned victim to death, mutilated body, and kept part of victim's skull as souvenir. Defendant had no prior criminal history and offered proof that she was under emotional or mental disturbance at time of the crime).
>
> (3) State v. Hall, 958 S.W.2d at 679 (death penalty upheld based on aggravating circumstances (i)(5) and (i)(7) where defendant doused girlfriend with gasoline, locked her in her vehicle and set her on fire.

Defendant had no prior criminal history and offered mitigating proof of personality disorder).

(4) State v. Bush, 942 S.W.2d at 489 (death penalty affirmed based on aggravating circumstances (i)(5) and (i)(6) where defendant savagely beat and stabbed seventy-nine year old acquaintance to death. Defendant later boasted about the murder. Defendant offered evidence of mental disease and lack of prior criminal record).

(5) State v. Smith, 868 S.W.2d at 561 (death penalty upheld based on aggravating circumstances (i)(5), (i)(6), (i)(7) and (i)(12) where defendant found guilty of triple murder of estranged wife and her two children; defendant shot wife twice, slashed her throat, and stabbed her with knife and ice pick; older son shot three times, stabbed with ice pick and knife; and younger son had been shot and stabbed in the chest. Defendant offered psychological evidence of personality disorders).

(6) State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309 (1986) (death sentence upheld based on aggravating circumstances (i)(5) and (i)(7) where defendant presented himself as a South American mercenary to victim and the two men arranged a large purchase of marijuana, defendant later shot and killed victim, victim's throat was slashed evincing depravity of mind. Defendant had no prior record of violent criminal activity).

(7) State v. Melson, 638 S.W.2d 342 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770 (1983) (death penalty upheld based on aggravating circumstances (i)(5) and (i)(6) where defendant used hammer to repeatedly beat victim in head, victim had attempted to defend herself during ordeal, only motive was victim's discovery of defendant's theft, defendant had no significant prior history of criminal activity).

Cf. (1) State v. Bondurant, 4 S.W.3d 662 (Tenn. 1999) (court upheld aggravating circumstances (i)(2) and (i)(5) where defendant beat victim to death with rocking chair; beating continued thirty minutes after death; defendant dismembered victim's body and then burned the corpse. Evidence presented that defendant was exemplary son, good family man, and good employment history. Conviction was reversed and remanded on unrelated grounds.).

Sentences where life without parole imposed.

(1) State v. Harris, 989 S.W.2d 307 (Tenn. 1999) (sentence of life without parole upheld based upon aggravating circumstance (i)(6) where defendant and compatriots ambushed victim in order to steal his vehicle, fatally shot the victim, and dismembered corpse. Defendant presented evidence that she suffered from psychological disorders, was an alcoholic, and had a history of being in abusive relationships. Victim's father asked jury not to impose death penalty).

Upon comparing the facts of these cases with those now before this court, we conclude that the appellant's sentence is neither excessive nor disproportionate. This case involves a carefully plotted, cold blooded crime of a brutal and depraved nature, planned over a period of months, committed over a period of hours, with dismemberment of the corpse thereafter all merely to avoid potential incrimination in an unrelated offense. A sentence of death has been imposed many times in this state for less shocking murders. There is no evidence that passion, prejudice or any other arbitrary factor other than the appellant's own selfish desires influenced the commission of this murder; thus, rendering the circumstances of this case equally as horrifying or worse than those in previous cases. The penalty imposed by the jury is clearly not disproportionate to the penalty imposed for similar crimes.

**Conclusion**

In accordance with the mandate of Tenn. Code Ann. § 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Likewise, we have considered the appellant's sentencing issues

raised on appeal and have determined that none have merit. Accordingly, the appellant's sentence of death by electrocution is affirmed.[16]

DAVID G. HAYES, Judge

CONCUR:

DAVID H. WELLES, Judge

NORMA MCGEE OGLE, Judge

[16]No execution date is set. Tenn. Code Ann. § 39-13-206(a)(1) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the death sentence is upheld by the higher court on review, the supreme court will set the execution date.