

November 26, 2019

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: Response to Proposed Changes to Rule 12, Section 1, Section 2,
And First-Degree Murder Report
NO. ADM2019-01537

Dear Jim:

The Tennessee Bar Association did not submit an official Comment in response to the proposed changes to SCT Rule 12; however, the TBA would like to pass on the following information, drafted by the TBA Criminal Justice Section Executive Council, that may be helpful to the Court.

The Criminal Justice Section Executive Council for the Tennessee Bar Association has reviewed the proposed amendments to Tenn. Sup. Ct. R. 12 and would suggest one additional change. Rule 12 previously provided, consistent with Tenn. Code Ann. § 39-13-206, that upon affirmance by the Court of Criminal Appeals ("CCA"), the appellate court clerk would transmit the record to the Tennessee Supreme Court ("TSC"). However, pursuant to a recent amendment to the statute, any capital direct appeals for offenses committed on or after July 1, 2019, go directly to the Tennessee Supreme Court. Based on this change in the statute, the rule should be further amended to reflect how the record gets from the trial court to the appellate court.

For offenses committed on or after July 1, 2019, in accord with Tenn. Code Ann. § 39-13-206(a)(1), upon ~~affirmance by the Court of Criminal Appeals~~ of the conviction and sentence of death becoming final in the trial court, ~~the trial court clerk shall expeditiously file the record with the Appellate Court Clerk within the time limit provisions of Tennessee Rules of Appellate Procedure 24 and 25 the Appellate Court Clerk shall forthwith transmit the record to the Supreme Court for immediate docketing.~~ The Appellate Court

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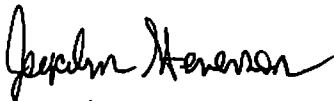


Clerk shall promptly notify the parties of the docketing, the date of filing of the record in this Court, and of the times for filing and service of briefs under T.R.A.P. 29(a). The case shall proceed in accordance with the Tennessee Rules of Appellate Procedure except as otherwise required by this Rule. ~~No party shall incorporate or adopt by reference any brief previously filed by that party in the Court of Criminal Appeals, either in whole or in part, and any brief filed in this Court shall be complete, presenting all issues, arguments and facts, without any need for reference to any brief previously filed in the Court of Criminal Appeals. A copy of the opinion of the Court of Criminal Appeals shall be appended to the appellant's brief.~~

TBA's proposed amendment is consistent with the recent amendment to Tenn. Code Ann. § 39-13-206(a)(1) and provides for the transmittal of the record from the trial court to the appellate court.

Please let us know if you have any questions at all.

Sincerely,

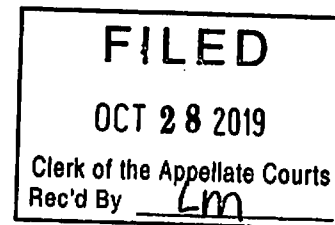


Joycelyn Stevenson
Executive Director



Berkley Schwarz
Director of Public Policy &
Government Affairs

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



IN RE: RULE 12, SECTION 1, SECTION 2, AND FIRST-DEGREE MURDER
REPORT,

RULES OF THE TENNESSEE SUPREME COURT

No. ADM2019 - 01537

COMMENT OF THE OFFICE OF THE POST-CONVICTION DEFENDER

INTRODUCTION

The Tennessee Office of the Post-Conviction Defender serves as the presumptive legal counsel in post-conviction and other state collateral proceedings for all indigent Tennessee inmates under a sentence of death. Our mission is to provide timely and high-quality legal representation, making sure that each client's case complies with federal and state constitutional mandates, as well as national capital litigation standards.

COMMENT

The Tennessee Supreme Court Rule 12 database is an important collection of detailed information regarding first-degree murder convictions in Tennessee. Although the primary purpose of the database is to assist in conducting appellate comparative proportionality review in capital cases pursuant to Tenn. Code Ann. 39-13-206 (c)(1)(D), it also provides a valuable basis for analyzing the administration of the death penalty in Tennessee and the disposition of the state's

first-degree murder cases generally. Recent changes to the mechanism used to gather this information, however, have the effect of exempting significant data from the Rule 12 collection.

Specifically, a new version¹ of the Rule 12 report form instructs the trial courts **not** to note whether the State has sought the death penalty or life without a possibility of parole (LWOP) in cases that were ultimately resolved through a negotiated guilty plea. Such information has historically been deemed important to maintain along with other data related to first-degree murder cases, which is still collected in the Rule 12 database. We respectfully ask that this Court change the form and allow the collection of the death and LWOP notice data in all first-degree murder cases to resume. Maintaining this information will provide a fuller and more accurate picture of how the death penalty is administered in the State of Tennessee, assist in proportionality review of capital cases, and facilitate the State's efforts to maintain accurate and easily accessible data regarding its criminal justice system.

The omission of this significant information is the result of a new heading inserted after question 3 in Section A of the Rule 12 report form. The heading reads as follows: **"If the defendant pleaded guilty with no sentencing hearing, skip to Section B."** There are nine questions in Section A under this heading which the judges are now instructed not to answer if the case has been resolved by a guilty

¹ Although this change took place prior to the currently proposed amendments to the Rule 12 report form, we respectfully ask that the Court address this issue, since it is already in the process of amending the form with other proposed changes.

plea. One of them is question 7, which has six subsections, a—g. The relevant subsections are as follows:

- (a) Did the State file a notice of intent to seek the death penalty?
- (b) Did the State file a notice of intent to seek life imprisonment without parole?
- (c) Did the State withdraw its notice of intent to seek the death penalty, either formally or informally?
- (d) Did the State withdraw its notice to seek life imprisonment without parole either formally or informally?

Appendix B, Proposed Revised Tenn. Sup. Ct. R. 12 First-Degree Murder Report.

There is no other place on the form that asks for this information. As such, the effect of the new heading directing the judges to skip questions 4 through 12 in guilty plea cases is that the courts are no longer tracking the number of capital or LWOP cases that are resolved through a negotiated guilty plea.²

Historically, the State of Tennessee has struggled with maintaining uniform statistical information regarding its criminal cases. In 2004, the Comptroller of the Treasury conducted a study of first-degree murder cases in Tennessee, the purpose of which was to examine case processes, compare costs of capital and non-capital cases, and recommend changes to streamline the capital case process. Comptroller of the Treasury Report, *Tennessee's Death Penalty: Costs and Consequences*, July 2004. In its report, the Comptroller found that Tennessee does not have a comprehensive, integrated criminal justice information system. The report

² Although the information about all cases in which death notices were filed could be reconstructed from the Monthly Capital Case Reports compiled by the Administrative Office of the Courts, it would be much more efficient to simply add this information to the searchable and publicly accessible Rule 12 database. The undersigned counsel is not aware of any other mechanism that tracks LWOP notices.

specifically noted the lack of an accurate record of death and LWOP notices filed in cases, as well as the courts' failure to properly collect data pursuant to Tennessee Supreme Court Rule 12. *Id.* at 44—47. The Comptroller stated that accurate maintenance of the death and LWOP notices would enable interested parties to “monitor and track cases and to plan for future resource expenditures.” *Id.* at 46. The Comptroller’s Report also recommended expansion of the Rule 12 reports to gather additional information from defense counsel and the prosecutors. *Id.* at 47.

Similarly, in 2017, this Court’s Indigent Representation Task Force issued a report in which it provided historical background on our state’s ongoing challenges in collecting and maintaining case-related data. Tennessee Supreme Court Indigent Representation Task Force Report, *Liberty & Justice for All: Providing Right to Counsel Services in Tennessee*, April 2017, 10—13. The Task Force noted the necessity of “empirical, evidence-based data” in properly evaluating and managing the state’s system of providing indigent legal representation and issued several recommendations aimed at facilitating statewide case data collection. Given these challenges, the state’s current efforts to remedy the lack of complete and accurate criminal justice system data, and the fact that most cases in our criminal justice system are resolved through guilty pleas,³ it would be counter-intuitive to stop collecting the death and LWOP notice information in guilty plea cases pursuant to Rule 12.

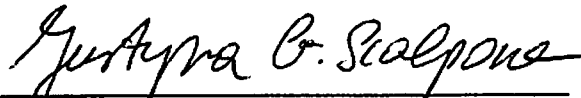
³ *Id.* at 6; See also *Class v. U.S.*, 138 S.Ct. 798 (2018) citing United States Commission, Overview of Federal Criminal Cases Fiscal Year 2016, p. 4 (May 2017); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006—Statistical Tables*, p. 1 (Rev. Nov. 22, 2010).

Apart from the larger policy considerations, accurately recording death notices could also assist with the comparative proportionality review in capital cases pursuant to Tenn. Code Ann. 39-13-206 (c)(1)(D). Although in *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997), and more recently in *State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013), this Court has held that capital cases disposed of through guilty pleas should not be in the pool of cases considered in the comparative proportionality review, two of the Justices in *Pruitt* wrote a strong dissenting opinion on this matter. Specifically, the dissent found that in determining whether a sentence of death is proportionate in a particular homicide, it is relevant to look at whether similar homicides across the state warranted pursuit of the death penalty. The Justices noted that, “if a particular homicide is one that would clearly not result in the pursuit of the death penalty in most districts, then imposition of the death penalty in that case would not be proportionate to the crime.” *Id.* at 230. They did not exclude guilty pleas in this analysis and stated that it is the facts of the offense that matter in the comparative analysis, not the “procedure that produced the conviction.” *Id.* at 231. Although the dissent in *Pruitt* is not currently the controlling law, given the 3-2 split in that decision, it is not outside the realm of possibility that the Court’s view on this issue may change in the future. In that event, it would be beneficial for the state to continue to collect death-notice information in all first-degree murder convictions.

Given the above concerns, we respectfully ask that this Court alter the Rule 12 report form by extracting and renumbering questions 7(a) through (d) from the

portion of Section A which applies only to non-guilty plea cases. This small change will allow the state to resume collecting all death and LWOP notice information in first-degree murder convictions. It will also be in line with the state's efforts to create and maintain ways in which criminal case information can be efficiently stored, analyzed, and made available to the public.

Respectfully submitted,

A handwritten signature in black ink that reads "Justyna G. Scalpone". The signature is written in a cursive style with a horizontal line underneath the name.

JUSTYNA G. SCALPONE, BPR #30992
Post-Conviction Defender

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